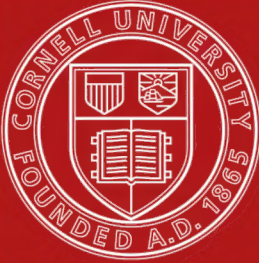


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ILLUSTRATIVE CASES

ON

EQUITY JURISPRUDENCE

SELECTED BY
HARRY B. HUTCHINS
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ILLUSTRATIVE CASES

ON

EQUITY JURISPRUDENCE

HUTCH. & BUNK. EQ.

(1)*

**SOUTHERN CALIFORNIA RY. CO. v.
RUTHERFORD et al.**

(62 Fed. 796.)

Circuit Court, S. D. California. June 30, 1894.

Suit by the Southern California Railway Company, a corporation of the state of California, against C. C. Rutherford and others for injunction.

W. J. Hunsaker, for complainant.

ROSS, District Judge. Time does not admit of an extended statement of the facts of the case or of the reasons for awarding the injunction applied for. The bill shows, among other things, that the complainant railway company is one link in a through line of road extending from National City, San Diego county, Cal., to the city of Chicago, in the state of Illinois, engaged in the transportation, among other things, of interstate commerce and the mails of the United States; its connecting roads being the Atlantic & Pacific and the Atchison, Topeka & Santa Fé Railroad Companies. That there is a valid existing contract between the complainant company and its connecting companies and the Pullman Palace Car Company by which all regular passenger trains running over the said through line of road, including that of the complainant, carrying the mail and passengers, shall carry Pullman cars. That the defendants are in the employ of the complainant company, and were employed by it to, among other things, handle and operate its trains so engaged in carrying the United States mail and passengers and freight between National City, Cal., and Chicago, Ill., and to and from intermediate points, and from the time of their employment up to the time of the commission of the acts complained of by the complainant were duly accustomed to handle and operate such trains, including Pullman cars. That subsequently the defendants, although remaining in the employment of the complainant company, refused, and still refuse, to handle or operate any train of cars of the complainant company to which a Pullman car is attached; and because of the discharge by the receivers in possession and control of the Atchison, Topeka & Santa Fé Railroad Company of certain employés of theirs for refusing to handle or operate any train of that road to which a Pullman car is attached, the defendants to the present bill, while remaining in the employment of the complainant company, refused, and still refuse, to handle or operate any of the trains of the complainant company engaged in carrying the mail of the United States and in the aforesaid interstate commerce, which their regular and accustomed duties as such employés required, and still require, them to operate and handle. Undoubtedly, in the absence of a valid existing contract obligating the defendants to remain in the employment of the complainant company, they

would ordinarily have the legal right to quit the employment and cease work at any time. But the bill alleges that the defendants continue in the employment of the complainant company, and yet refuse to perform their regular and accustomed duties as such employés; and it further shows that such refusal subjects and will continue to subject the complainant to a multiplicity of suits and to great and irreparable damage, in that there is an existing valid contract requiring complainant to attach a Pullman car or cars on all of its through trains for the carriage of passengers and the mail, and also retards and interrupts the complainant in the transmission of the United States mail and the interstate commerce aforesaid.

It is manifest that for this state of affairs the law—neither civil or criminal—affords an adequate remedy. But the proud boast of equity is, “*Ubi jus, ibi remedium.*” It is the maxim which forms the root of all equitable decisions. Why should not men who remain in the employment of another perform the duties they contract and engage to perform? It is certainly just and right that they should do so, or else quit the employment. And where the direct result of such refusal works irreparable damage to the employer, and at the same time interferes with the transmission of the mail and with commerce between the states, equity, I think, will compel them to perform the duties pertaining to the employment so long as they continue in it. If I unlawfully obstruct by a dam a stream of flowing water, equity, at the suit of the party injured, will compel me by injunction, mandatory in character, to remove the dam, and, prohibitory in character, from further interfering with the flow of the stream; and if I unlawfully erect a wall shutting out the light from another, equity will compel me to tear it down, and to refrain from further interference with the other's rights. It is true that such cases are not precisely like the present one, yet the principle upon which the court proceeds in such cases is not substantially different. And if it be said that there is no exact precedent for the awarding of an injunction in the present case, I respond, in the language of the court in the case of Toledo, etc., Ry. Co. v. Pennsylvania Co., 54 Fed. 751: “Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was therefore, in its time, without precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constant and varying demands for equitable relief.”

Moreover, the rights of the public in a case of this sort should be considered. “Railroads,” said the supreme court in the

case of *Joy v. St. Louis*, 138 U. S. 50, 11 Sup. Ct. 243, "are common carriers, and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the

progress of trade and traffic, by new methods of intercourse and transportation."

For the reasons thus hastily and briefly stated, I shall award an injunction requiring the defendants to perform all of their regular and accustomed duties so long as they remain in the employment of the complainant company, which injunction, it may be as well to state, will be strictly and rigidly enforced.

REES v. CITY OF WATERTOWN.

(19 Wall. 107.)

Supreme Court of the United States. 1873.

Mr. Justice HUNT delivered the opinion of the court.

This case is free from the objections usually made to a recovery upon municipal bonds. It is beyond doubt that the bonds were issued by the authority of an act of the legislature of the State of Wisconsin, and in the manner prescribed by the statute. It is not denied that the railroad, in aid of the construction of which they were issued, has been built, and was put in operation.

Upon a class of the defences interposed in the answer and in the argument it is not necessary to spend much time. The theories upon which they proceed are vicious. They are based upon the idea that a refusal to pay an honest debt is justifiable because it would distress the debtor to pay it. A voluntary refusal to pay an honest debt is a high offence in a commercial community and is just cause of war between nations. So far as the defence rests upon these principles we find no difficulty in overruling it.

There is, however, a grave question of the power of the court to grant the relief asked for.

We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important. The question is not entirely new in this court.

In the case of *Supervisors v. Rogers*,* an order was made by this court appointing the marshal a commissioner, with power to levy a tax upon the taxable property of the county, to pay the principal and interest of certain bonds issued by the county, the payment of which had been refused. That case was like the present, except that it occurred in the State of Iowa, and the proceeding was taken by the express authority of a statute of that State. The court say: "The next question is as to the appointment of the marshal as a commissioner to levy the tax in satisfaction of the judgment. This depends upon a provision of the code of the State of Iowa. This proceeding is found in a chapter regulating proceedings in the writ of mandamus, and the power is given to the court to appoint a person to discharge the duty enjoined by the peremptory writ which the defendant had refused to perform, and for which refusal he was liable to an at-

tachment, and is express and unqualified. The duty of levying the tax upon the taxable property of the county to pay the principal and interest of these bonds was specially enjoined upon the board of supervisors by the act of the legislature that authorized their issue, and the appointment of the marshal as a commissioner in pursuance of the above section is to provide for the performance of this duty where the board has disobeyed or evaded the law of the State and the peremptory mandate of the court."

The State of Wisconsin, of which the city of Watertown is a municipal corporation, has passed no such act. The case of *Supervisors v. Rogers* is, therefore, of no authority in the case before us. The appropriate remedy of the plaintiff was and is a writ of mandamus.† This may be repeated as often as the occasion requires. It is a judicial writ, a part of a recognized course of legal proceedings. In the present case it has been thus far unavailing, and the prospect of its future success is, perhaps, not flattering. However this may be, we are aware of no authority in this court to appoint its own officer to execute the duty thus neglected by the city in a case like the present.

In *Welch v. St. Genevieve*,* at a Circuit Court for the district of Missouri, a tax was ordered to be levied by the marshal under similar circumstances. We are not able to recognize the authority of the case. No counsel appeared for the city (Mr. Reynolds as *amicus curiæ* only); no authorities are cited which sustain the position taken by the court; the power of the court to make the order is disposed of in a single paragraph, and the execution of the order suspended for three months to give the corporation an opportunity to select officers and itself to levy and collect the tax, with the reservation of a longer suspension if it should appear advisable. The judge, in delivering the opinion of the court, states that the case is without precedent, and cites in support of its decision no other cases than that of *Riggs v. Johnson County*,** and *Lansing v. Treasurer*.‡ The first case cited does not touch the present point. The question in that case was whether a mandamus having been issued by a United States court in the regular course of proceedings, its operation could be stayed by an injunction from the State court, and it was held that it could not be. It is probable that the case of *Supervisors v. Rogers*§ was the one intended to be cited. This case has already been considered.

The case of *Lansing v. Treasurer* (also cited), arose within the State of Iowa. It fell within the case of *Supervisors v. Rogers*,

†*Riggs v. Johnson County*, 6 Wallace, 193.

*10 Am. Law Reg. (N. S.) 512, Fed. Cas. No. 17,372.

**6 Wallace, 166.

‡9 Am. Law Reg. (N. S.) 415, Fed. Cas. No. 16,583.

§7 Wallace, 175.

*7 Wallace, 175.

and was rightly decided because authorized by the express statute of the State of Iowa. It offered no precedent for the decision of a case arising in a State where such a statute does not exist.

These are the only authorities upon the power of this court to direct the levy of a tax under the circumstances existing in this case to which our attention has been called.

The plaintiff insists that the court may accomplish the same result under a different name, that it has jurisdiction of the persons and of the property, and may subject the property of the citizens to the payment of the plaintiff's debt without the intervention of State taxing officers, and without regard to tax laws. His theory is that the court should make a decree subjecting the individual property of the citizens of Watertown to the payment of the plaintiff's judgment; direct the marshal to make a list thereof from the assessment rolls or from such other sources of information as he may obtain; report the same to the court, where any objections should be heard; that the amount of the debt should be apportioned upon the several pieces of property owned by individual citizens; that the marshal should be directed to collect such apportioned amount from such persons, or in default thereof to sell the property.

As a part of this theory, the plaintiff argues that the court has authority to direct the amount of the judgment to be wholly made from the property belonging to any inhabitant of the city, leaving the citizens to settle the equities between themselves.

This theory has many difficulties to encounter. In seeking to obtain for the plaintiff his just rights we must be careful not to invade the rights of others. If an inhabitant of the city of Watertown should own a block of buildings of the value of \$20,000, upon no principle of law could the whole of the plaintiff's debt be collected from that property. Upon the assumption that individual property is liable for the payment of the corporate debts of the municipality, it is only so liable for its proportionate amount. The inhabitants are not joint and several debtors with the corporation, nor does their property stand in that relation to the corporation or to the creditor. This is not the theory of law, even in regard to taxation. The block of buildings we have supposed is liable to taxation only upon its value in proportion to the value of the entire property, to be ascertained by assessment, and when the proportion is ascertained and paid, it is no longer or further liable. It is discharged. The residue of the tax is to be obtained from other sources. There may be repeated taxes and assessments to make up delinquencies, but the principle and the general rule of law are as we have stated.

In relation to the corporation before us, this objection to the liability of individual property for the payment of a corporate debt

is presented in a specific form. It is of a statutory character.

The remedies for the collection of a debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to the creditor. Thus a statute prohibiting the exercise of its taxing power by the city to raise money for the payment of these bonds would be void.* But it is otherwise of statutes which are in existence at the time the debt is contracted. Of these the creditor must take notice, and if all the remedies are preserved to him which were in existence when his debt was contracted he has no cause of complaint.†

By section nine of the defendant's charter it is enacted as follows: "Nor shall any real or personal property of any inhabitant of said city, or any individual or corporation, be levied upon or sold by virtue of any execution issued to satisfy or collect any debt, obligation, or contract of said city."

If the power of taxation is conceded not to be applicable, and the power of the court is invoked to collect the money as upon an execution to satisfy a contract or obligation of the city, this section is directly applicable and forbids the proceeding. The process or order asked for is in the nature of an execution; the property proposed to be sold is that of an inhabitant of the city; the purpose to which it is to be applied is the satisfaction of a debt of the city. The proposed remedy is in direct violation of a statute in existence when the debt was incurred, and made known to the creditor with the same solemnity as the statute which gave power to contract the debt. All laws in existence when the contract is made are necessarily referred to in it and form a part of the measure of the obligation of the one party, and of the right acquired by the other.‡

But independently of this statute, upon the general principles of law and of equity jurisprudence, we are of opinion that we cannot grant the relief asked for. The plaintiff invokes the aid of the principle that all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. The great advantage possessed by the court of chancery is not so much in its enlarged jurisdiction as in the extent and adaptability of its remedial powers. Generally its jurisdiction is as well defined and limited as is that of a court of law. It cannot exercise jurisdiction when there is an adequate and complete remedy at law. It cannot assume control over that large class of obligations called imperfect obligations, resting upon

*Van Hoffman v. City of Quincy, 4 Wallace, 535.

†Cooley, Constitutional Limitations, 235, 237.

‡Cooley, Constitutional Limitations, 235.

conscience and moral duty only, unconnected with legal obligations. Judge Story says,† "There are cases of fraud, of accident, and of trust which neither courts of law nor of equity presume to relieve or to mitigate," of which he cites many instances. Lord Talbot says:‡ "There are cases, indeed, in which a court of equity gives remedy where the law gives none, but where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for this court to take it up where the law leaves it, and extend it further than the law allows."

Generally its jurisdiction depends upon legal obligations, and its decrees can only enforce remedies to the extent and in the mode by law established. With the subjects of fraud, trust, or accident, when properly before it, it can deal more completely than can a court of law. These subjects, however, may arise in courts of law, and there be well disposed of.*

A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels. Thus, assume that the plaintiff is entitled to the payment of his judgment, and that the defendant neglects its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens. This summary proceeding would involve a violation of the rights of the latter. He has never been heard in court. He has had no opportunity to establish a defence to the debt itself, or if the judgment is valid, to show that his property is not liable to its payment. It is well settled that legislative exemptions from taxation are valid, that such exemptions may be perpetual in their duration, and that they are in some cases beyond legislative interference. The proceeding supposed would violate that fundamental principle contained in chapter twenty-ninth of Magna Charta, and embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law—that is, he must be served with notice of the proceeding, and have a day in court to make his defence.**

"Due process of law (it is said) undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights."‡ In the New England States it is held that a judgment obtained against a town may be levied upon and made out of the property of any inhabitant of the town. The suit in those States is brought in form against the inhabitants

of the town, naming it; the individual inhabitants, it is said, may and do appear and defend the suit, and hence it is held that the individual inhabitants have their day in court, are each bound by the judgment, and that it may be collected from the property of any one of them.* This is local law peculiar to New England. It is not the law of this country generally, or of England.‖ It has never been held to be the law in New York, in New Jersey, in Pennsylvania, nor, as stated by Mr. Cooley, in any of the Western States.¶ So far as it rests upon the rule that these municipalities have no common fund, and that no other mode exists by which demands against them can be enforced, he says that it cannot be considered as applicable to those States where provision is made for compulsory taxation to satisfy judgments against a town or city.‡

The general principle of law to which we have adverted is not disturbed by these references. It is applicable to the case before us. Whether, in fact, the individual has a defence to the debt, or by way of exemption, or is without defence, is not important. To assume that he has none, and therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest.

Again, in the case of *Emeric v. Gilman*, before cited, it is said: "The inhabitants of a county are constantly changing; those who contributed to the debt may be non-residents upon the recovery of the judgment or the levy of the execution. Those who opposed the creation of the liability may be subjected to its payment, while those, by whose fault the burden has been imposed, may be entirely relieved of responsibility. . . . To enforce this right against the inhabitants of a county would lead to such a multiplicity of suits as to render the right valueless." We do not perceive, if the doctrine contended for is correct, why the money might not be entirely made from property owned by the creditor himself, if he should happen to own property within the limits of the corporation, of sufficient value for that purpose.

The difficulty and the embarrassment arising from an apportionment or contribution among those bound to make the payment we do not regard as a serious objection. Contribution and apportionment are recognized heads of equity jurisdiction, and if it be assumed that process could issue directly against the citizens to collect the debt of the city, a court of equity could make the apportionment more conveniently than could a court of law.†

*See the cases collected in Cooley's Constitutional Limitations, 240-245.

‡Russell v. Men of Devon, 2 Term R. 667.

¶See *Emeric v. Gilman*, 10 California, 408, where all the cases are collected.

§Cooley's Constitutional Limitations, 246.

†1 Story's Equity Jurisprudence, § 470 and onwards.

†1 Equity Jurisprudence, § 61.

‡Heard v. Stanford, Cases Tempore Talbot, 174.

*1 Story's Equity Jurisprudence, § 60.

**Westervelt v. Gregg, 12 New York, 209.

‡Ib.

We apprehend, also, that there is some confusion in the plaintiff's proposition, upon which the present jurisdiction is claimed. It is conceded, and the authorities are too abundant to admit a question, that there is no chancery jurisdiction where there is an adequate remedy at law. The writ of mandamus is, no doubt, the regular remedy in a case like the present, and ordinarily it is adequate and its results are satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that, by means of the aid afforded by the legislature and by the devices and contrivances set forth in the bill, the writs have been fruitless; that, in fact, they afford him no remedy. The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. To illustrate: the writ of *habere facias possessionem* is the established remedy to obtain the fruits of a judgment for the plaintiff in ejectment. It is a full, adequate, and complete remedy. Not many years since there existed in Central New York combinations of

settlers and tenants disguised as Indians, and calling themselves such, who resisted the execution of this process in their counties, and so effectually that for some years no landlord could gain possession of his land. There was a perfect remedy at law, but through fraud, violence, or crime its execution was prevented. It will hardly be argued that this state of things gave authority to invoke the extraordinary aid of a court of chancery. The enforcement of the legal remedies was temporarily suspended by means of illegal violence, but the remedies remained as before. It was the case of a miniature revolution. The courts of law lost no power, the court of chancery gained none. The present case stands upon the same principle. The legal remedy is adequate and complete, and time and the law must perfect its execution.

Entertaining the opinion that the plaintiff has been unreasonably obstructed in the pursuit of his legal remedies, we should be quite willing to give him the aid requested if the law permitted it. We cannot, however, find authority for so doing, and we acquiesce in the conclusion of the court below that the bill must be dismissed.

JUDGMENT AFFIRMED.

DIBRELL v. CARLISLE et al.

(48 Miss. 691.)

Supreme Court of Mississippi. 1873.

Appeal from chancery court, Chickasaw county; Bradford, Chancellor.

The complainant in the court below, Charles C. Dibrell, filed his bill to the April term, 1868, alleging that on the 4th December, 1866, William F. Walker, then largely indebted in a sum exceeding \$60,000 to his wife, Eliza R. Walker, on account of her separate estate, executed and delivered a deed of conveyance to one Thomas J. Denton, a citizen of said county, and his successors in office, as trustee for said Eliza, and the heirs of her body, by which he granted, bargained, and sold to said trustee certain real and personal property particularly described in the bill, and states its value at \$29,942, and that it was intended to be, and was received by the parties as, a payment to that extent on the indebtedness of Walker to his wife. The deed is filed as an exhibit to the bill.

It is further stated in the bill that Denton, the trustee, accepted the trust, entered immediately upon the discharge of his duties, residing within a few miles of the property transferred to him, ready at all times to do and perform all acts contemplated in the deed, until the 4th March, 1868; that on the 6th of March, 1868, under the provisions of said deed, the complainant was duly and legally appointed as successor to said Denton by the probate judge of said county; that on the 20th March, 1867, the said William F. Walker, confederating with Henry G. Humphries and E. K. Carlisle, commission merchants and citizens of Mobile, Ala., to divest the said Eliza of her equitable interest in said lands, induced her to execute jointly, with her husband, a mortgage on said lands, to secure the payment of an asserted debt of \$7,337.64, which the said William F. had contracted with said Humphries & Carlisle, maturing on the 19th December, 1867; that said deed of mortgage authorized Carlisle & Humphries, in default of payment of said debt, upon giving 30 days' notice, to sell said lands at auction and divest the title from the trustee and the said Eliza, and forever bar her equity of redemption. The mortgage is filed as an exhibit to the bill.

It is further charged that said Humphries & Carlisle were fully apprised of the true condition of the title to the land when they affected the negotiation; that they were expressly notified of the deed of trust first mentioned, and knew that the property they were seeking to incumber was trust property, settled upon the said Eliza and the heirs of her body; that she was ignorant of the legal effect to be given to the deed of mortgage by the draftsman; that but a small portion of the debt claimed was for her

family supplies and necessities, wearing apparel of herself or children, or their education, or household furniture, or carriages and horses, buildings on her land and premises, or repairs thereof, or materials, work, and labor for the benefit and improvement of her separate estate.

The bill "protests against another clause of the said deed of mortgage, as being not only manifestly against his rights, but in direct violation of the deed from said Walker to complainant's predecessor"; alleges that the land in the deed is estimated at \$20,750; that indebtedness in the mortgage is \$7,337.64, far less than the value of the land; charges that, since the execution of the mortgage, said William F. has paid \$1,800 or \$2,000 to Carlisle & Humphries, which should have been credited on said indebtedness, and that the mortgage provides that the surplus from the land sale shall be paid to Walker and wife, and not to the trustee, the complainant.

The bill further states that said Humphries & Carlisle, by their agent and attorney, J. N. Carlisle, Esq., have advertised the lands for sale under the mortgage, and also about 6,000 bushels of corn, on the second Monday in March, 1868. A copy of the advertisement is filed as an exhibit.

H. G. Humphries, E. K. Carlisle, J. N. Carlisle, and William F. Walker are made defendants, and injunction, etc., prayed for to restrain the sale. There is also a prayer for discovery, by Humphries & Carlisle, of the amount due them, and that on final hearing the injunction be made perpetual, that the mortgage be canceled.

On the 6th March, 1868, the chancellor indorsed on the bill his fiat for injunction, upon the complainant entering into bond with sureties in the sum of \$2,000. The bond was given, and writs of injunction and subpoena issued.

Exhibit No. 1, referred to in the bill, is as follows:

"The State of Mississippi, Chickasaw County. This indenture, made and entered into this 4th day of December, 1866, between William F. Walker, of the first part, Eliza R. Walker, his wife, of the second part, each of the county and state aforesaid, and Thomas J. Denton, of the same county and state, of the third part, witnesseth: That the said party of the second part, having been the owner in her own right at the time of her marriage, in the year of our Lord one thousand eight hundred and fifty-three, with the said party of the first part, of a large personal estate, which was received by, controlled, possessed, used, and enjoyed by him, as hereinafter set forth, that is to say, thirty-three negro slaves, which went into his possession on the first day of January, 1854, and were worked and controlled in raising cotton, etc., and whose hire was worth as stated," etc. The deed then proceeds to give the names and value of the hire of each

negro for eleven years, the aggregate hire valued at \$34,250, and continues: "And the said party of the second part having received large sums of money from the separate estate of the said Eliza, as follows: The sum of fifteen thousand dollars on the first day of January, 1854; seven thousand dollars on the 1st July, 1855, and six thousand dollars on the 1st July, 1866, amounting to twenty-eight thousand dollars; and the said William F. having assumed the entire management and control of the separate estate of the said Eliza, and with the funds realized from the proceeds raised by her negro slaves as aforesaid, and with the cash received by him as above set forth, he purchased real and personal property as hereinafter described and valued, that is to say," etc. The deed here describes the tract of land in controversy, and a number of mules, horses, wagons, carriage and harness, farming utensils, carpenters' and blacksmiths' tools, household and kitchen furniture, jewelry, plate, stock hogs, etc., valued at \$8,192, and proceeds: "And the said William F. being anxious to secure, so far as he has the ability to do so, the payment of this debt he owes to his wife, amounting to the sum of sixty-two thousand two hundred and fifty dollars, taking the hire of the negro property as the basis of his liability for their use and employment. Now, in consideration of the premises, and for and in consideration of the sum of ten dollars, paid by the said party of the third part, the receipt of which is hereby acknowledged, the said party of the first part hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell, unto the said party of the third part, all the real and personal property above described, to wit" (giving description of land and personal property before referred to): "In trust, nevertheless, for the use, benefit and behoof of the said party of the second part and the heirs of her body forever, who are to retain the possession, management, direction, and control of the property conveyed. The said trustee or his successor, to be designated by the judge of the probate court of the county and state aforesaid, in term time or in vacation, to take such possession or direction as may then be necessary for faithfully carrying out this trust according to its true intent and meaning, such as bringing and defending suits, executing bonds, signing papers, or appointing an attorney in fact to do and perform whatever may be necessary and proper to be done in protecting and defending the said estate to the party of the second part and the heirs of her body." The deed then states that the property conveyed, valued at \$29,942, "is intended to be to that extent in part payment of the sum of \$62,250, the amount admitted to be due," etc., and concludes with warranty of title, etc.

Exhibit No. 2 of the bill is in the words and figures following:

"The State of Mississippi, Chickasaw County. This deed of mortgage, made the this 20th day of March, 1867, between W. F. Walker, with E. R. Walker, his wife, both of the county of Chickasaw and state of Mississippi, of the first part, and E. K. Carlisle, with H. G. Humphries, commission merchants, of Mobile and state of Alabama, of the other, witnesseth: That whereas the said W. F. Walker, with E. R. Walker, his wife, are indebted to the said E. K. Carlisle and H. G. Humphries in the sum of seventy-three hundred and thirty-seven dollars and sixty-four cents, said sum of money being advanced to said W. F. Walker and E. R. Walker on their crop of cotton, to be raised in and during the year, Anno Domini, 1867, on the plantation under the superintendence of W. F. Walker, Jno. D. Poyner, and Thos. McCarthy. Said sum of money is further secured by their certain promissory notes, bearing date the nineteenth day of January, A. D. 1867, for the said sum of seventy-three hundred and thirty-seven dollars and sixty-four cents, subscribed with their hands and delivered to the said E. K. Carlisle and H. G. Humphries, whereby the said W. F. Walker and E. R. Walker promised to pay the said Carlisle & Humphries, or order, seventy-three hundred and thirty-seven dollars and sixty-four cents, on or before the nineteenth day of December, 1867, for value received. And whereas, the said W. F. Walker and E. R. Walker, his wife, are willing to give this deed for satisfaction of what may be due and unpaid to the said Carlisle & Humphries on the nineteenth day of December, 1867, next: Therefore the said W. F. Walker and E. R. Walker bargain, sell, alien, and convey to the said Carlisle & Humphries all those tracts or parcels of land situated and lying in the county of Chickasaw and state of Mississippi, known and described as the west half of section twelve, in township thirteen, range five east, and the west half of section thirteen, township thirteen, range five east, containing six hundred and seventy acres, more or less; also convey all the cotton crop that is raised on said lands or plantation under the direction or superintendence of W. F. Walker, John D. Poyner, and Thomas McCarthy, which said cotton is to be shipped to said Carlisle & Humphries aforesaid as soon as is practicable after ginning and baling the same; to have and to hold the same with all the rights and appurtenances to the said Carlisle & Humphries, their heirs, executors, and administrators. But this conveyance is upon condition, if the said W. F. Walker and E. R. Walker shall, on or before the nineteenth day of December, 1867, well and fully pay the said sum of money, then this deed is to cease and to be void; but if after that day said sum, with any part thereof, be unpaid, then it shall be lawful for the said Carlisle & Humphries, or their legal representative, after giving thirty days' notice by advertisement in some newspaper in Chickasaw coun-

ty of the cause, day, and place of sale, to proceed to sell at public auction at Okolona the mortgaged property, or a sufficiency thereof, for cash to the highest and best bidder, and out of the proceeds, after defraying the cost of advertisement and sale, they may retain the full amount of mortgage money due, and if there be a surplus they are presently to pay it to W. F. Walker and E. R. Walker, or their legal representatives, and to make to the vendee or vendees a deed of conveyance, transmitting the quit of purchase of all right, title, or interest of the parties and their heirs, or of all claiming under them, and thereupon all the right and title of the W. F. Walker, with E. R. Walker, his wife, to redeem, shall be as effectually barred and foreclosed as if upon a decree in equity; and the said W. F. Walker, with E. R. Walker, his wife, hereto put their names and seals, the day and date aforesaid.

"[Signed] W. F. Walker. [Seal.]
"E. R. Walker. [Seal.]"

Carlisle & Humphries filed their answer, averring that they knew nothing of the existence of the debt alleged to be due Eliza R. Walker by W. F. Walker, her husband, except what they learn from the said exhibit No. 1 in the bill, and that they believe the debt fictitious; that there was no valid consideration in law or equity passing from said Eliza to said W. F. Walker for the conveyance; that said conveyance is fraudulent and made with the intent to defraud the creditors of said W. F.; that the appointment of T. J. Denton as trustee was merely nominal, and for the better serving to cloak and conceal the said property and more effectually defrauding the creditors of the said W. F.; that said Denton, under a provision in the deed of trust, appointed the said W. F. his attorney in fact, clothing him with full power to act in all things pertaining to said trusteeship, as if he, the said W. F., had been trustee; that the said W. F. executed the said mortgage in the bill mentioned as such attorney in fact; that the complainant, C. C. Dibrell, ignoring the action of his predecessor, Denton, filed his bill with the intent to deprive respondents of their rights and powers vested in them as mortgagees; that said T. J. Denton, being aware of the execution of said attorneyship to W. F. Walker, refused to join in said bill of complaint, but, actuated by the dictates of honor and honesty, declined entering into such fraudulent interference with respondents' rights; denies all confederating by Carlisle & Humphries to defeat Mrs. Walker's interest in said lands; denies inducing her to join her husband in executing the mortgage; alleges that the mortgage was made by W. F. Walker, as attorney in fact for the trustee and by Mrs. Walker, freely and voluntarily, without any persuasion, and by her so acknowledged in a private examination by an officer authorized to take such acknowledgment; denies all knowledge of the trust un-

der which Mrs. Walker held the lands, and supposed W. F. Walker fully empowered to convey or incumber them.

Respondents assert that the \$7,337.64 was money actually advanced to the said W. F. Walker and his wife during the year 1867, for the necessary supplies of the plantation of said Walker and wife, and believe that it was used for them and their children; denies that the property mortgaged is and was worth \$20,750, but insists that its value at the date of the mortgage and now does not exceed respondents' debt; denies that the execution of the mortgage was against the rights of the trustee, Dibrell; alleges that W. F. Walker was notoriously acting as the agent of his wife, and with the knowledge and consent of Denton, trustee; that, if the allegations in complainant's bill be true, said Walker, under false and fraudulent pretenses, obtained respondents' money; that said Walker and wife have never paid but \$873.20, and this amount was duly credited on the debt. Respondents say that they are led to believe that Dibrell, complainant, through the solicitation and procurement of W. F. Walker, accepted the appointment of trustee, and, without a knowledge of what his predecessor had done, has filed this bill and made the representations and allegations therein from false representations of W. F. Walker; that Dibrell's action is in direct contravention of the action of his predecessor, Denton; that W. F. Walker's interest is not with respondents as defendants in this suit, but identified with the complainant; and that he cunningly devised his joinder with respondents as defendant for fraudulent purposes.

Respondents insist that the advances made by them were solely on the credit of Mrs. Walker and her children, the beneficiaries of the pretended deed of trust, and for their benefit and use, and not on the credit of W. F. Walker; that he was insolvent and unable to obtain credit at the time; that the writ of injunction was illegally issued because of the want of good sureties on the bond; that said bond has no date and bears no evidence of having been duly executed as the law directs; that the fiat only requires a bond for \$2,000, whilst the amount of indebtedness enjoined is \$6,464.36, and the bond is not in double the sum so enjoined.

The mortgage referred to in the bill as Exhibit No. 2 is made an exhibit in the answer also. Another exhibit to the answer consists of an account of the debts due by W. F. and Eliza Walker to Carlisle & Humphries, showing balance of \$7,337.64. Exhibit C is as follows:

"The State of Mississippi, Chickasaw County. To whom these presents may come, greeting: Know ye that I, Thos. J. Denton, reposing entire confidence in the probity and integrity of W. F. Walker, a citizen of the county of Chickasaw and state of Mississippi, do by these presents constitute him my true

and lawful attorney in fact for me as trustee, appointed under a deed executed by the said Walker in favor of Eliza R. Walker and the heirs of her body as cestui que trust, on the 4th day of December, 1866, conveying real and personal property valued at \$29,942, and in my name to sign all papers, bonds, affidavits, contracts, and to make, do, and perform all and every act necessary or proper to be made, done, or performed for the protection of said trust estate, or for carrying out the true intent and meaning of said trust deed, and to every act in the premises which I could do if personally present, and I hereby ratify and confirm whatever he may lawfully do in the premises. Given under my hand and seal this the 4th day of December, 1866.
 "[Signed] T. J. Denton. [Seal]"

This power of attorney was acknowledged and recorded in Chickasaw county.

J. A. Orr and Harris & Withers, for appellant. Gholson & Hooper, James T. Harrison, and George L. Potter, for appellees.

PEYTON, J. This was an injunction bill brought by the appellant in the chancery court of Chickasaw county to restrain the appellees, E. K. Carlisle and H. G. Humphries, from executing a power of sale contained in a mortgage given to them by William F. Walker and Eliza R. Walker, his wife.

The material facts of the case are these: William F. Walker, being indebted to his wife, Eliza R., in a large amount of money, on the 4th day of December, 1866, conveyed to one Thomas J. Denton certain real and personal estate situated in the said county of Chickasaw, in this state, in trust for the use of the said Eliza R. Walker and the heirs of her body forever, which deed of conveyance was duly acknowledged and recorded.

That on the 20th day of March, A. D. 1867, the said William F. Walker and Eliza R., his wife, made and executed their deed of mortgage of six hundred and seventy acres of the land, covered by the said deed of trust, to said Carlisle & Humphries, to secure the payment of a promissory note for \$7,337.64, made by said Walker and wife, dated the 19th day of January, 1867, and payable to said Carlisle & Humphries on the 19th day of December, 1867. The said mortgage deed, which was duly acknowledged and recorded, gives to the mortgagees a power of sale of the mortgaged property in default of payment of the note at maturity.

The note not having been paid, the mortgagees were proceeding to sell the property, when they were enjoined from so doing by the appellee, who was appointed trustee, under a power in the deed creating the trust estate, to succeed the original trustee, who had resigned the trust.

The appellees, Carlisle & Humphries, in their answer, admit the conveyance in trust as set forth in the bill of complaint, but deny that there was any valid consideration there-

for, and insist that it was made to hinder, delay, and defraud creditors. They admit the execution of the mortgage stated in the bill, and insist that they had a right to sell the mortgaged property to pay the amount due on the debt therein specified. They aver that the amount specified in the said note and mortgage was actually advanced by them to the said W. F. and E. R. Walker for the necessary supplies of the plantation of the said Walker and wife, and that they believe that the said money was used by the said Walker and wife for the use and benefit of the said E. R. Walker and her children, and that the advances were made solely on the credit of Mrs. E. R. Walker, and not on that of her husband, who was insolvent and unable to obtain credit at the time the advances were made.

The appellees, Carlisle & Humphries, moved the court below to dissolve the injunction on bill, answer, exhibits, and proofs. The motion was sustained and the injunction dissolved. And from this decree the cause is brought to this court by appeal on the part of the appellee.

This record presents three important questions for our consideration:

(1) What interest does Mrs. Walker take under the conveyance to a trustee for the use of herself and the heirs of her body forever?

(2) Where the wife has joined with her husband in a mortgage of her separate estate to pay the debt of her husband, can the corpus of that estate, under the existing laws, be subjected in a court of equity to the payment of such debt?

(3) Is the separate estate of Mrs. Walker liable in equity to the payment of the debt specified in the mortgage or any part thereof?

The first question involves the construction of the limitations in the deed creating the trust estate. It is a common maxim that equity follows the law: *Equitas sequitur legem*. Where a rule of the common or statute law is direct and governs the case with all its circumstances or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it. A court of equity cannot disregard the canons of descent. In general, in courts of equity, the same construction and effect are given to perfect trust estates as are given by courts of law to legal estates. The incidents, properties, and consequences of the estates are the same. The same restrictions are applied as to creating estates and bounding perpetuities and giving absolute dominion over property. The same modes of construing the language and limitations of the trusts are adopted. 1 Story, Eq. (Redf. Ed.) pp. 53-55, § 64.

The words "heirs of the body," in the conveyance of a legal estate, are words of limitation of the estate to the donee, and not words of purchase for the heirs of the body.

Warren v. Haley, Smedes & M. Ch. 647. These words create an estate in fee tail, which, by our statute, is converted into an estate in fee simple. Rev. Code, p. 307, art. 3. And, if it be true that the same modes of construing the language and limitations of trust estates are adopted as apply to legal estates, we cannot resist the conclusion that Mrs. Walker takes, under the terms of the deed, the entire trust estate absolutely.

With regard to the second question it may be remarked that it is a familiar rule of equity jurisprudence that general debts or general personal engagements of a married woman, contracted during coverture, are not chargeable upon her separate estate; and, unless a feme covert who contracts a debt or enters into an engagement designs that such engagement or debt shall constitute a charge upon her separate estate, a court of equity will not entertain jurisdiction to enforce payment thereof out of such separate estate.

When real property is conveyed absolutely to the separate use of a married woman, she can dispose of the trust estate only in the mode and manner prescribed by the instrument creating the trust estate, and, if none be prescribed and limited therein, then in accordance with the provisions of the statute.

Prior to the adoption of our present Code, in 1857, it has been repeatedly decided by this court that the wife may bind the corpus of her separate estate, by deed in trust or mortgage, as a security for the debts of her husband. *James v. Fisk*, 9 Smedes & M. 144; *Sessions v. Bacon*, 23 Miss. 272; *Armstrong v. Stovall*, 26 Miss. 280; *Russ v. Wingate*, 30 Miss. 445; *Stone v. Montgomery*, 35 Miss. 83-105; *Prewett v. Land*, 36 Miss. 495.

Since the adoption of the Code, a married woman has no power to encumber the corpus of her separate estate by deed of trust, mortgage, or otherwise, for the debt of her husband, but only the income thereof. The statute expressly provides that no conveyance or incumbrance for the separate debts of the husband shall be binding on the wife beyond the amount of her income. Rev. Code, p. 336, art. 23. This is a wise provision intended to secure to the wife the enjoyment of her separate estate against any possible contingency of loss through the fraud, force, or undue influence of her husband.

The solution of the third question depends upon the facts of the case as they may be developed and established by the evidence. With a view to the more beneficial enjoyment and productiveness of the separate estate of a married woman, the law has provided that all contracts made by the husband and wife, or by either of them, for supplies for the plantation of the wife, or for the employment of an agent to superintend the planting operations, may be enforced, and satisfaction had out of her separate estate. And all contracts made by the wife, or by the husband with her consent, for family

supplies or necessities, wearing apparel of herself and children, or for their education, or for household furniture, or for carriage and horses, or for buildings on her land or premises, and the materials therefor, or for work and labor done for the use, benefit, or improvement of her separate estate, shall be binding on her, and satisfaction may be had out of her separate property. Rev. Code, p. 336, art. 25. And it has been decided that a married woman is liable on a promissory note given by her for a horse purchased by her for the supply and use of her plantation. *Robertson v. Ward*, 12 Smedes & M. 490. This adjudication was made under the act of 1846, which made the income only of her separate estate liable to the payment of the debt. And, under the act of 1857, this court has decided that the wife is liable out of the corpus of her separate estate to the payment of a note given by herself and husband for money advanced for the purpose of purchasing supplies for her plantation, and which was actually applied to that purpose. *Bowman v. Thomas E. Helm*. These cases are regarded as coming within the equity of the respective statutes under which the debts were contracted.

It results, therefore, from this view of the law, that Mrs. Walker is liable to payment out of her separate estate for the amount of supplies furnished by Carlisle & Humphries for her plantation, and for the amount of the money advanced by them to Walker, or Walker and wife, for the purchase of supplies for her plantation, or the improvement of her separate estate, and which were actually applied to that use and purpose. And for that portion of the debt secured by the mortgage, which was not applied to these purposes, she is liable to payment out of the income only of her separate estate. The record contains no evidence as to what portion of the debt secured by the mortgage was for supplies actually furnished by Carlisle & Humphries for the plantation of Mrs. Walker, or which was applied to the purchase of such supplies. Nor is there any proof as to what amount of the money advanced by Carlisle & Humphries was applied by Walker to his own use.

The most appropriate remedy of Carlisle & Humphries will be found in a court of equity, in which an account can be taken of what portion of the note secured by the mortgage was for supplies for Mrs. Walker's plantation, and what part of the money was advanced by them for the purchase of such supplies, and which was actually so applied, and what part of the same was used by Walker for his own purposes. When these facts are ascertained, the court will make a decree in accordance with the principles above laid down, subjecting the separate estate of Mrs. Walker to sale to pay for the supplies for her plantation, and decreeing that the trustee of the estate and Mrs. Walker pay to Carlisle & Humphries

the amount of the debt, secured by the mortgage, found due them by William F. Walker, out of the income of her separate estate.

It is insisted by some of the counsel of the appellees that the mortgage was void because the trustee did not join in the mortgage deed. This was not necessary. In a case free from fraud or undue influence, a married woman can bind her separate property without the trustees, unless their assent be made necessary by the instrument which gave that property. And in the case at bar the charge made upon the separate estate by the wife is totally unrestrained by the deed creating the trust estate, and is valid and binding, and a court of equity is bound to enforce it, so far as to subject the separate estate to the payment for supplies for carrying on the wife's plantation, and so far as she was surety for her husband, and had mortgaged her property to pay his debt, to subject the rents, issues, and profits of her separate estate to the payment of that debt.

With respect to the duty of trustees in relation to real property, it is still held, in conformity to the old law of uses, that pernanity of the profits, execution of estates, and defense of the land, are the three great properties of the trust. Therefore a court of chancery will compel trustees (1) to permit the cestui que trust to receive the rents and profits of the land; (2) to execute such conveyances as the cestui que trust shall direct; (3) to defend the title of the land in any court of law or equity. *Tiff. & B. Trusts*, 815.

A cestui que trust may lawfully dispose of his trust estate, notwithstanding his title is contested by the trustee, for the latter can never disseize the former of the trust estate; but, so long as it continues, the possession of the trustee is treated, at least in a court of equity, as the possession of the cestui que trust. *Baker v. Whiting*, 3 Sumn. 475, Fed. Cas. No. 787.

It is insisted that the power of sale contained in a mortgage deprives the mortgagor of his equity of redemption, and therefore cannot rightfully be exercised. The principle seems to be now well established, though

after great doubt and discussion, that a clause may legally be inserted in the mortgage deed empowering the mortgagee, upon breach of condition, to make sale of the mortgaged premises, to pay his debt from the proceeds, and account with the mortgagor for the balance. The power of sale is to apply solely to the remedy, and not to impair any right of the mortgagor. The power of sale does not bar the mortgagee's right to foreclose by judicial proceedings. The remedy is cumulative merely, and in no respects affects the jurisdiction or proceedings of a court of chancery. 1 Hil. Mortg. 128, 129. And such sale, made after the law day or breach of condition, and in pursuance of the terms of the mortgage, vests in the purchaser all the title conveyed by the mortgage, free from the right of redemption.

There is nothing in the record tending in any way to impeach the validity of the mortgage. There is no evidence of any undue influence or improper conduct or control on the part of the husband to obtain the wife's assent and signature to the mortgage deed. And the debt in question was not incurred for the husband alone, or for unworthy purposes. It was for money advanced and articles supplied, partly for the family, partly for the use of Mrs. Walker, and partly for the benefit of the trust estate. We can, therefore, perceive no good reason why the mortgage should not be enforced against the separate estate or its income, according to the nature, extent, and character of the liability, when ascertained by proof.

It is objected that the mortgagees had no right to sell the corn advertised, under the power of sale contained in the mortgage deed, for the reason that there was no corn mortgaged. This objection is well taken, for it is very clear that the mortgagees can sell under the power only the property covered by the mortgage.

For the reasons set forth in this opinion, we think the court below erred in dissolving the injunction.

The decree must therefore be reversed and cause remanded.

SPEIDEL et al. v. HENRICI.

(7 Sup. Ct. 610, 120 U. S. 377.)

Supreme Court of the United States. March 7, 1887.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Wm. Reinecke, Geo. Hoadly, E. M. Johnson, and Edwd. Colston, for appellants. George Shiras, Jr., for appellees.

GRAY, J. This bill was filed against the trustees of the Harmony Society, an unincorporated association of persons living together as a community, by a former member of the society, claiming a share in property in the hands of the trustees. The bill is sought to be maintained on the ground that the trust was not a charity, in the legal sense, and the members of the society were equitable tenants in common of the property held in trust. The learned counsel for the appellants differ in their views of the trust; the one insisting that it was unlawful, because founded in fraud and against public policy, and should therefore be dissolved; and the other contending that it was a lawful and continuing trust. We have not found it necessary to consider which of these is the sound view, because we are of opinion that the plaintiff did not show himself to be entitled to invoke the interposition of a court of equity.

As a general rule, doubtless, length of time is no bar to a trust clearly established, and express trusts are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of his cestui que trust. *Prevost v. Gratz*, 6 Wheat. 481, 497; *Lewis v. Hawkins*, 23 Wall. 119, 126; *Railroad Co. v. Durant*, 95 U. S. 576. But this rule is, in accordance with the reason on which it is founded, and as has been clearly pointed out by Chancellor Kent and Mr. Justice Story, subject to this qualification: that time begins to run against a trust as soon as it is openly disavowed by the trustee insisting upon an adverse right and interest which is clearly and unequivocally made known to the cestui que trust; as when, for instance, such transactions take place between the trustee and the cestui que trust as would, in case of tenants in common, amount to an ouster of one of them by the other. *Kane v. Bloodgood*, 7 Johns. Ch. 90, 124; *Robinson v. Hook*, 4 Mason, 139, 152, Fed. Cas. No. 11,956; *Baker v. Whiting*, 3 Sum. 475, 486; *Oliver v. Piatt*, 3 How. 333, 411. This qualification has been often recognized in the opinions of this court, and distinctly affirmed by its latest judgment upon the subject. *Willison v. Watkins*, 3 Pet. 43, 52; *Boone v. Chiles*, 10 Pet. 177, 223; *Seymour v. Freer*, 8 Wall. 202, 218; *Bacon v. Rives*, 106 U. S. 99, 107, 1 Sup. Ct. 3; *Philippi v. Philippe*, 115 U. S. 151, 5 Sup. Ct. 1181. In the case of an implied or con-

structive trust, unless there has been a fraudulent concealment of the cause of action, lapse of time is as complete a bar in equity as at law. *Hovenden v. Annesley*, 2 Schoales & L. 607, 634; *Beckford v. Wade*, 17 Ves. 87. In such a case, Chief Justice Marshall repeated and approved the statement of Sir Thomas Plumer, M. R., in a most important case in which his decision was affirmed by the house of lords, that, "both on principle and authority, the laches and non-claim of the rightful owner of an equitable estate, for a period of 20 years, (supposing it the case of one who must within that period have made his claim in a court of law, had it been a legal estate,) under no disability, and where there has been no fraud, will constitute a bar to equitable relief, by analogy to the statute of limitations, if, during all that period, the possession has been under a claim unequivocally adverse, and without anything having been done or said, directly or indirectly, to recognize the title of such rightful owner by the adverse possessor." *Elmendorf v. Taylor*, 10 Wheat. 152, 174; *Cholmondeley v. Clinton*, 2 Jac. & W. 1, 175, and 4 Bligh, 1. Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and shows no excuse for his laches in asserting them. "A court of equity," said Lord Camden, "has always refused its aid to stale demands, where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court." *Smith v. Clay*, 2 Amb. 645, 3 Brown, Ch. 640, note. This doctrine has been repeatedly recognized and acted on here. *Piatt v. Vattier*, 9 Pet. 405; *McKnight v. Taylor*, 1 How. 161; *Bowman v. Wathen*, 1 How. 189; *Wagner v. Baird*, 7 How. 234; *Badger v. Badger*, 2 Wall. 87; *Hume v. Beale*, 17 Wall. 336; *Marsh v. Whitmore*, 21 Wall. 178; *Sullivan v. Railroad*, 94 U. S. 806; *Godden v. Kimmell*, 99 U. S. 201. In *Hume v. Beale*, the court, in dismissing, because of unexplained delay in suing, a bill by cestuis que trust against a trustee under a deed, observed that it was not important to determine whether he was the trustee of a mere dry legal estate, or whether his duties and responsibilities extended further. 17 Wall. 348. See, also, *Bright v. Legerton*, 29 Beav. 60, and 2 De Gex, F. & J. 606. When the bill shows upon its face that the plaintiff, by reason of lapse of time and of his own laches, is not entitled to relief, the objection may be taken by demurrer. *Maxwell v. Kennedy*, 8 How. 210; *National Bank v. Carpenter*, 101 U. S. 567; *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. 350.

The allegations of this bill, so far as they are material to the defense of laches, are in substance as follows: The Harmony Society is a voluntary association, formed in 1805 by the plaintiff's parents and other heads of families, who had emigrated from Germany under the leadership of one Rapp, and become subject to his control in both spiritual and temporal affairs. In that year, Rapp, for the purpose of acquiring absolute dominion over their means and mode of living, falsely and fraudulently represented to them that they could not be saved from eternal damnation except by renouncing the plan of a separate home for each family, yielding up all their possessions, as had been done by the early Christians, and laying them at the feet of Rapp as their apostle, to be put into a common fund of the society, and thenceforth living as a community under his control, receiving in return only the necessities of life; and they, induced by and relying on his false and fraudulent representations, immediately yielded up all their possessions to the common fund of the society, and placed the fund in his keeping as their trustee, and thenceforth lived as a community or common household, submitted themselves and their families to do for the community such work as he directed, allowed the avails thereof to form part of the common fund, and relinquished to him and his successors in the leadership of the community the management of the trust fund and the control of their own persons and those of their wives and children, and received only the necessities of life in return. Rapp received and accepted the trust fund, and all the accretions to it by the work of the inhabitants of the community or otherwise, not as his own, but in trust for the members of those families and the contributors to the fund, and for their common benefit; and always, up to his death in 1847, recognized and acknowledged said trust, and disclaimed any greater interest in the fund than that of any other contributor, and any other right to its management and control than by virtue of his leadership of the community. In 1807 Rapp obliged his followers to abjure matrimony, and thenceforth did not permit them to marry in the community, and compelled any one about to marry to leave it. The plaintiff was born in the community in 1807, and was reared in and as a part of it, under Rapp's teachings and control, and faithfully worked for it from the age of 12 to the age of 24 years, and allowed the avails of his work to become part of the common fund, and received in return nothing but the necessities of life, which were of far less value than the avails of his work; and in 1831, being about to marry, had to leave and did leave the community. The trust fund so received and accepted by Rapp, with its profits, interest, and accretions, now amounts to \$8,000,000, and yields an annual income of \$200,000, and is held by the defendants on the same trust on which Rapp held it in

his life-time; and neither Rapp nor the defendants ever rendered any account to the plaintiff or to the beneficiaries of the fund, although the plaintiff, before bringing this suit in May, 1882, demanded of the defendants an account and a settlement of his share. The trust on which Rapp, and the defendants as his successors, held the common fund of the Harmony Society, is described in one place in the bill as "for the members of said families and the contributors of said fund, and for their common benefit;" that is to say, as is clearly explained by what goes before, in trust for their common benefit as a community, living together in the community, working for the community, subject to the regulations of the community, and supported by the community. This was the "said trust," which, as the bill afterwards alleges, Rapp, up to his death, and his successors, until the bringing of this suit, "always recognized and acknowledged." The constant avowal of the trustees that they held the trust fund upon such a trust is wholly inconsistent with and adverse to the claim of the plaintiff that they held the fund in trust for the benefit of the same persons as individuals, though withdrawn from the community, living by themselves, and taking no part in its work. The plaintiff, upon his own showing, withdrew from the community in 1831, and never returned to it, and, for more than 50 years, took no step to demand an account of the trustees, or to follow up the rights which he claimed in this bill. If he ever had any rights, he could not assert them after such a delay,—not on the ground of an express and lawful trust, because the express trust stated in the bill, and constantly avowed by the trustees during this long period, was wholly inconsistent with any trust which would sustain his claim; not on the ground that the express trust stated in the bill was unlawful and void, and therefore the trustees held the trust fund for the benefit of all the contributors in proportion to the amounts of their contributions, because that would be an implied or resulting trust, and barred by lapse of time. In any aspect of the case, therefore, if it was not strictly within the statute of limitations, yet the plaintiff showed so little vigilance and so great laches, that the circuit court rightly held that he was not entitled to relief in equity.

It is proper to add that this decision does not rest in any degree upon the judgments of the supreme court of Pennsylvania and of this court, in the cases cited at the bar, in favor of the trustees of the Harmony Society in suits brought against them by other members, because each of those cases differed in its facts, and especially in showing that the society had written articles of association, which are not disclosed by this bill. *Scriber v. Rapp*, 5 Watts, 351; *Baker v. Nachtrieb*, 19 How. 126.

Decree affirmed.

HAWKER v. MOORE et al.

(20 S. E. 848, 40 W. Va. 49.)

Supreme Court of Appeals of West Virginia.
Dec. 8, 1894.

Appeal from circuit court, Harrison county.

Bill by Owen Hawker against Wilson Moore and others. From a decree for plaintiff, defendant Moore appeals. Affirmed.

J. Philip Clifford, for appellant. John Bas-
sel, for appellee.

HOLT, J. In this case the circuit court of Harrison county, by decree entered on the 27th day of January, 1893, set aside as fraudulent the deed made by appellant, Wilson Moore, on the 1st day of September, 1880, to Elam F. Piggatt, for the 25 acres of land mentioned, and decreed the sale thereof to pay plaintiff's judgment, from which defendant Moore obtained this appeal.

The facts are as follows: On the 15th day of October, 1880, the Merchants' National Bank of West Virginia, at Clarksburg, was the holder of a promissory note given to the bank by James Hawker, the principal therein, and the defendant Wilson Moore, and plaintiff, Owen Hawker, as his sureties, and the bank on that day obtained a judgment thereon against the three parties named. James Hawker, the principal, was insolvent, and plaintiff, Owen Hawker, was compelled to satisfy and pay the judgment. Therefore plaintiff was entitled to contribution from his cosurety, defendant Moore, of one-half the amount of the judgment thus paid, and to that extent to be substituted to the judgment lien of the bank against his real estate. Where one has been compelled to pay the debt of another, equity, as far as it can be done without just ground of complaint on the part of others, substitutes him to all the rights and remedies of the creditor against such debtor. This doctrine of subrogation has been applied freely in this state, and to its full extent, upon the general principles of equity, without the aid of any statute; and, having taken this correct view in the beginning, there has so far never been any need of any statute to correct any misstep in improper restraint of its application upon the supposition that a debt once paid must thereafter be treated as nonexistent under all circumstances, and to all intents and for all purposes. The doctrine, as it has been expounded and applied in our courts, has nothing of form, nothing of technicality, about it; and he who, in administering it, would stick in the letter, forgets the end of its creation, and perverts the spirit which gave it birth. It is the creature of equity, and real essential justice is its object. *Enders v. Brune* (1826) 4 Rand. (Va.) 438, 447; *McNiel v. Miller* (1887) 29 W. Va. 480, 2 S. E. 335; *Robinson v. Sherman* (1845) 2 Grat. 178; 2 Bart. Suit in Eq. 1051. The doctrine is em-

inently calculated to do exact justice between persons who are bound for the performance of the same duty or obligation, and is one, therefore, which is much encouraged and protected. "Equality is equity" is on this branch its maxim. It springs naturally out of the two equities of contribution and exoneration, and is in fact one of the means by which those equities are enforced. Bisp. Pr. Eq. (4th Ed.) § 335; *Dering v. Earl of Winchelsea*, 1 Cox, 318; *Pendlebury v. Walker*, 4 Younge & C. Exch. 441; *Steel v. Dixon*, 17 Ch. Div. 825; Brett, Lead. Cas. in Mod. Eq. (2d Ed.) 285, notes. See *Ferguson v. Gibson*, L. R. 14 Eq. 379; *Forbes v. Jackson*, 19 Ch. Div. 615, under the mercantile law amendment, Act 19 & 20 Vict. c. 97, § 5; 2 Beach, Mod. Eq. Jur. § 809. Here the plaintiff has paid off the judgment, and asks the court to give him the benefit of the creditor's lien. Who can object to this? Who is injured by it? Not the bank, for they have received their debt from the plaintiff, and justice binds them to give the plaintiff their vantage ground. Not the principal debtor, for he is insolvent, and has no interest in the matter. Not the cosurety, for it is by his fault that plaintiff had to bear, in the first instance, the whole burden. If he had paid his half, and equality is equity, there would have been no occasion to ask the court to compel him to pay; and it does not lie with him to say that plaintiff shall not occupy a vantage ground that enables him, by process of law, to enforce the performance of this duty. The other creditors cannot complain, for the debt has in truth not been paid, because not paid by the one ultimately bound, but by others, who became his unwilling creditors in due course of law. But if there should be any one who, by any rule of strict law, or in equity and good conscience, stands on higher ground, or for any reason has a better right, he will not be displaced, or his right disturbed; for that is the essence of the doctrine. See *Pott v. Nathans* (1841) 1 Watts & S. 155; *Eddy v. Trav-
er* (1837) 6 Paige, 521; *Gross v. Davis*, 87 Tenn. 226, 11 S. W. 92, and 10 Am. St. R. 635, notes; *Sheld. Subr.* (2d Ed.) § 137; *Id.*, p. 209, § 140; 24 Am. & Eng. Enc. Law, p. 189; *Thomas v. Stewart* (1888) 117 Ind. 50, 18 N. E. 505; *Crumlish's Adm'r v. Improvement Co.*, 38 W. Va. 390, 18 S. E. 456, and 23 L. R. A. 120, note 7; *Dugger v. Wright* (1888) 51 Ark. 232, 11 S. W. 213.

It would answer no useful purpose to take up the testimony and show that it justifies the decree complained of. The fair conclusion to be drawn is that the deed of September 1, 1880, from defendant Moore to E. F. Piggatt, conveying the tract of land of 25 acres in the bill and proceedings mentioned, was made by Moore to hinder and delay his creditors; and that Piggatt took it, was holding it for him, on some sort of secret trust, the full terms of which do not appear. But Moore continued to occupy and use the

land as his own, as he had always done, without the payment of any rent; and after E. F. Piggatt's death this tract of 25 acres was, by reason thereof, treated as not be	longing to his estate, and was omitted when partition came to be made of his lands among his heirs. Therefore the decree complained of is affirmed.
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ECONOMY SAV. BANK v. GORDON et al.

(45 Atl. 176, 90 Md. 486.)

Court of Appeals of Maryland. Jan. 10, 1900.

Appeal from circuit court of Baltimore city; Henry Stockbridge, Judge.

Suit by Douglas H. Gordon and others against the Economy Savings Bank and others. Decree for complainants. Defendant bank appeals. Reversed.

Argued before McSHERRY, C. J., and PAGE, FOWLER, BOYD, SCHMUCKER, and BRISCOE, JJ.

Daniel L. Brinton, for appellant. Arch. H. Taylor, E. P. Keech, Jr., and Foster & Foster, for appellees.

SCHMUCKER, J. On July 30, 1897, Cecil R. Atkinson executed a mortgage upon a warehouse owned by him, on South Howard street, in Baltimore city, to Alonzo J. Steers, which recited that he was indebted to Steers "in the full sum of fifteen thousand dollars, payable February 10th, 1898," and that it was executed to secure the payment of this debt, with interest thereon. The mortgage was in due form, was regularly acknowledged, and had attached to it a proper affidavit as to the bona fides of the consideration therein stated, and it was recorded on the day after its date. No note accompanied the mortgage, but it contained a covenant to pay the mortgage debt and interest. About the same time Steers, the mortgagee, applied to the American National Bank to lend him \$6,000, offering to assign the mortgage as security for the loan. Schott, the cashier of the bank, explained to him that a national bank could not lend money upon real-estate security, but informed him that the appellant savings bank, of which he (Schott) was treasurer, had some money on hand, and would lend him \$5,000 upon the mortgage, if the security proved to be ample, but the matter must first be referred by the appellant to a committee, who would investigate and report upon the security. Steers assented to the terms suggested by Schott, and a committee from the appellant went upon the mortgaged premises and examined them, and reported favorably upon the loan, provided there were no incumbrances upon the property prior to the mortgage. The matter was then referred by the appellant to its attorney to examine the title, Steers placing the mortgage in its hands for that purpose. The attorney examined the title, and reported favorably upon it, whereupon the appellant, on August 6, 1897, lent the \$5,000 to Steers, and at the same time took from him an assignment of the mortgage as security for the loan. The \$5,000 so loaned was given to Steers in the check of the appellant to his order upon the American National Bank, in which the appellant had on deposit at that time more than

the amount of the check. Steers indorsed the check to the Eastern Electric Company, which at once deposited it to its own credit in the bank upon which it was drawn, and the \$5,000 was passed to the credit of the electric company, and charged to the appellant upon the books of the bank. The money was then used by the electric company, to the extent of \$2,000, in the payment of a loan which had been made by one Myerdick upon a previous unrecorded assignment of the Atkinson mortgage, and the remaining \$3,000 was almost entirely paid to the American National Bank in satisfaction of obligations due to it by the Eastern Electric Company or by George H. Atkinson, a brother of Cecil R. Atkinson, the mortgagor. Steers subsequently assigned his equity in the \$15,000 mortgage to one C. S. Hinchman as collateral security for a loan of \$2,000. It appears from the record that Cecil R. Atkinson, the mortgagor, and his four brothers, William J., George H., Harry, and Richard F., were promoters by profession, and together operated and controlled the Eastern Electric Company and other kindred corporations, all of which proved to be speculative enterprises, and soon became insolvent and passed into the hands of receivers. Steers, who was put upon the stand by the appellees, testified that the consideration for the \$15,000 mortgage from Atkinson to him consisted of \$10,000 of Best Telephone Company bonds and \$5,000 of Best Telephone Company stock, which he had let Atkinson have prior to the execution of the mortgage; but his testimony was so inconsistent and contradictory in its different portions that it cannot be accepted as reliable. The whole testimony touching the consideration for the mortgage leads to the conclusion that there was no substantial consideration for it, but that it was executed to provide a means of raising money to assist the Atkinson brothers in staving off the impending insolvency of the Eastern Electric and Best Telephone Companies, and the other enterprises which they were then attempting to keep afloat. On December 29, 1897, nearly five months after the loan of the \$5,000 to Steers by the appellant, and the assignment to the latter of the mortgage, Douglas H. Gordon, one of the appellees, obtained a judgment for \$5,442.30 against the mortgagor, Cecil R. Atkinson, and his brother William J. Atkinson, on a note given by them to him on November 13, 1896, for a loan which he then made to them upon Best Telephone Company bonds and stock as collateral. Gordon testified that at the time he made this loan William J. Atkinson stated that his brother Cecil R. owned the Howard street warehouse, and he (Gordon) suggested that he be given a mortgage on the warehouse as security for the loan about to be made by him. W. J. Atkinson declined to procure the mortgage, saying that it would injure his brother's credit, but stated that Gordon would have the benefit of the proper-

ty by having its owner, Cecil R. Atkinson, upon the note. Gordon testified that he relied on this statement of William J. Atkinson in making the loan. Harry W. Boureau, the other appellee, obtained a judgment for \$503.80 against William J. Atkinson and Cecil R. Atkinson on September 29, 1897. On December 18, 1897, after Boureau had obtained his judgment, and after Gordon had sued the Atkinsons, but before he had gotten his judgment, the appellees instituted the present case, which is a creditors' suit in equity against the appellant, Cecil R. Atkinson, Steers, and Hinchman. The bill of complaint alleged that the mortgage from Atkinson to Steers, and the successive assignments of it by him to the appellant and Hinchman, were all without consideration and fraudulent, and prayed to have them declared void. The appellant answered the bill, denying its material allegations, and setting up its title to the mortgage to the extent of the \$5,000 loaned on it, and interest, as a bona fide purchaser for value, without notice of any infirmity in it. Neither Hinchman nor Steers answered, and a decree pro confesso was entered against them. The case against the appellant came regularly to a hearing, and the court below at first filed an opinion sustaining the appellant's claim; but upon a rehearing of the case the learned judge changed his views of the case, and filed another opinion, of a contrary tenor, and signed the decree appealed from, denying the appellant's claim to a lien on the property, and directed it to be sold for the benefit of the creditors of the mortgagor. In his second opinion the learned judge held, upon the authority of the *Cumberland Coal & Iron Co. Case*, 42 Md. 598, that the appellant, although he found it to be a bona fide purchaser for value of the mortgage, without notice, was not entitled to a lien for its loan to Steers, and interest, made upon the faith of the mortgage, because the latter, not being accompanied by a negotiable obligation, was a mere chose in action, which the appellant must be treated as having taken subject to all equities that might have been urged against it in the hands of Steers, the mortgagee.

Under the facts of the case, the appellant must be regarded as a bona fide purchaser for value of the mortgage, without notice. It advanced its \$5,000 upon the mortgage in the ordinary course of business, after a careful inquiry into the value of the property, and an investigation of the title upon the public records. It was not concerned in the disposition made by Steers of the borrowed money, not one dollar of which went back into its hands, or was expended for its benefit. It was not put upon inquiry as to the bona fides of the mortgage by the fact that Schott, its treasurer, was also cashier of the American National Bank, where Steers and the Eastern Electric Company and one or more of the Atkinson brothers kept their accounts, and that he might have seen by an examination of the books of the bank what disposition was made

of the borrowed money. There was in fact nothing in the use made of the money to suggest any infirmity in the mortgage.

The next question to be determined is, what are the rights of the appellant, as such bona fide purchaser, against the claims of the appellees? As there was no attempt by Steers to assign the mortgage debt to one person, and the mortgage to another, we are not called upon to consider the relative equities of one who claims as assignee of the debt, and another who claims as assignee of the mortgage, as the court were in the cases of *Clark v. Levering*, 1 Md. Ch. 178, and *Byles v. Tome*, 39 Md. 461, which were in part relied on by the appellees. What we have to consider is the attitude of the appellant, as the bona fide purchaser of both debt and mortgage, towards the creditors of the mortgagor, who were such at the time the mortgage was made. The mortgage was not given to secure an actual indebtedness of \$15,000, as it professes on its face to have been. Its execution was evidently a means adopted by the parties to it to clothe Steers, the mortgagee, with the appearance of a good title to a large debt secured by a valid mortgage, in order to enable him to raise money upon it. It was not fraudulent, in the sense that its execution had been procured by fraud, misrepresentation, or constraint practiced on the owner of the land who executed it, as was the case in *Bank v. Copeland*, 18 Md. 305, and *Cumberland Coal & Iron Co. v. Parish*, 42 Md. 598, in each of which the defrauded mortgagor was protected in equity against the assignee of the fraudulent mortgage. In the present case the execution of the mortgage was the voluntary and deliberate act of the mortgagor, from which he had no equity to be relieved, even as against the mortgagee. *Snyder v. Snyder*, 51 Md. 77; *Cushwa v. Cushwa's Lessee*, 5 Md. 44. We have therefore no question before us of subjecting the rights of the appellant, as assignee of the mortgage, to any equities to which the assignor would have been liable in favor of the mortgagor; for here it is plain that there were no such equities. The present mortgage is to be regarded as fraudulent only in the sense that, having been made to secure a simulated, and not a real, indebtedness, it operated to hinder, delay, or defraud the creditors of the mortgagor, and was therefore obnoxious to the provisions of the statute of 13 Eliz. c. 5. The real question in the case is thus narrowed down to a comparison of the relative strength of the claims on the mortgaged property of the appellant, as assignee of the specific lien of the mortgage, and the appellees, as subsisting general creditors of the mortgagor, having reduced their debts to judgments after the assignment of the mortgage had been made. If the conveyance under consideration had been a fraudulent deed, instead of a mortgage, the right of the appellant, as a bona fide purchaser, to a lien on the property for the \$5,000 advanced, and interest, could not seriously be questioned.

Cone v. Cross, 72 Md. 102, 19 Atl. 391; Hull v. William Deering & Co., 80 Md. 432, 31 Atl. 416; Hinkle v. Wilson, 53 Md. 293; Worthington v. Bullitt, 6 Md. 198. The broader and more general proposition that a bona fide purchaser, without notice, under a deed from a fraudulent grantee, takes a good title, which is not impaired by the fact that judgments were obtained against the fraudulent grantor prior to the conveyance by the fraudulent grantee, is well sustained by authority. 4 Kent, Comm. 464; Sleeper v. Chapman, 121 Mass. 404; Phelps v. Morrison, 24 N. J. Eq. 195; Totten v. Brady, 54 Md. 170; Swan v. Dent, 2 Md. Ch. 111 (note 9, Brantly's Ed.); Wait, Fraud. Conv. § 369. In the case of Bank v. Brooke, 40 Md. 257, the title of a bona fide purchaser of a mortgage note to the lien of the mortgage securing it was upheld against the suit of the creditors of the mortgagor, although it was admitted that the note and mortgage had been given in prejudice of the rights of his creditors, and would have been void as against them in the hands of the mortgagee. The fact that the mortgage in that case was accompanied by a promissory note distinguishes it from the case at bar, but the circumstance of the negotiability of the mortgage debt was not expressly mentioned or dwelt upon in the court's opinion. See, also, Danbury v. Robinson, 14 N. J. Eq. 218, 219.

A bona fide mortgagee from a fraudulent grantee has in a number of cases been held to be entitled to protection, to the extent of the debt due him, against the creditors of the fraudulent grantor, upon the ground that a mortgagee is to be treated as a purchaser, to the extent of his interest, within the meaning of the term "purchaser" as used in statutes such as that of 13 Eliz. c. 5; and this where the mortgage was not accompanied by a negotiable instrument. Ledyard v. Butler, 9 Paige, 136, 137; Murphy v. Briggs, 89 N. Y. 451; Shorten v. Drake, 38 Ohio St. 76; Moore v. Bank, 55 N. Y. 41. If the mortgage in the present case had been made directly from Cecil R. Atkinson to the appellant, no question could be made by Atkinson's creditors as to the appellant's lien upon the mortgaged property to the extent of the money advanced bona fide upon the faith of the property at the time the mortgage was made. When, therefore, Atkinson clothed Steers with the appearance of a good mortgage title of record to the property, for the purpose of enabling him to raise money upon the mortgage, and the appellant, relying upon this appearance of good title in Steers, after a careful examination of the public records, and a failure to find any prior incumbrances upon the property, parted with its money in good faith, it is entitled to the favor of a court of equity in the consideration of the relative equities of the parties to the controversy. This court, in Seldner v. McCreery, 75 Md. 296, 23 Atl. 643, said, "Where title is perfect on its face, and no known circumstances exist to impeach it

or put a purchaser on inquiry, one who buys bona fide and for value occupies one of the most highly favored positions in the law." The appellant did not trust to the personal responsibility of the mortgagor, but lent its money upon the faith of the particular property covered by the mortgage, and required an assignment of the mortgage at the time of so doing. On the contrary, the appellees trusted to the mortgagor, or to such other collaterals as he lodged with them; and the appellee Gordon, although he knew when he lent his money that Cecil R. Atkinson owned the Howard street warehouse, did not insist upon having a lien on it for his loan, but deliberately relied, so far as the warehouse was concerned, upon his rights as an ordinary creditor of its owner. The equities of the appellant are at least equal to those of the appellees, and, having the legal title to the warehouse, it has the stronger claim thereon, under the familiar principle that where equities are equal the legal title must prevail. Pom. Eq. Jur. § 417; Wait, Fraud. Conv. § 370; Townsend v. Little, 109 U. S. 512, 3 Sup. Ct. 357, 27 L. Ed. 1012; Black v. Cord, 2 Har. & G. 103; Bassett v. Noteworthy, 2 Lead. Cas. Eq. (4th Am. Ed.) 1. In Dyson v. Simmons, 48 Md. 214, it was held, upon the authority of many cases there cited, that if a party makes, or affects to make, a mortgage which proves to be defective by reason of some informality or omission, even on the part of the mortgagee himself, the conscience of the mortgagor is bound, and equity will recognize and enforce the lien of the defective mortgage, and give it precedence over the subsisting creditors of the mortgagor, and also over judgments obtained against him after the date of the mortgage. General creditors have no lien on the property of the debtor, and a judgment is only a general lien, and is for that reason subordinate to the prior specific equitable lien of such a defective mortgage. The case at bar does not come directly within the principle asserted in the last-mentioned case, but it is certainly one in which, by reason of its peculiar facts, the conscience of the mortgagor was especially bound to the appellant; and we think that the same course of reasoning might well be applied, within proper limits, to the appellant's protection.

This court has frequently been called upon to assert and define the rights of the creditors of a grantor, as against a conveyance made by him which, by reason of inadequacy or want of consideration, or even by design, operated to hinder, delay, or defraud them. The court has not hesitated to strike down such conveyances at the suit of the creditor, holding that one cannot make a voluntary conveyance of his property, as against the rights of subsisting creditors, nor can he, as against such creditors, sell it for a consideration that bears no adequate relation to its real value. When, however, in such cases, the rights of parties, even if they were the immediate

grantees under the conveyance, who had in good faith parted with value in reliance upon the conveyance, have had to be measured against those of the creditors, it has uniformly been held that, in order to do full justice to all the parties in such cases, a court of equity, in setting aside the deed, will allow it to stand as security for the consideration actually paid, and apply the balance to the payment of the vendor's debts. These propositions were distinctly upheld in the cases already cited of *Cone v. Cross*, *Hull v. William Deering & Co.*, *Hinkle v. Wilson*, and *Worthington v. Bullitt*. We regard the principle of the last-mentioned cases, in none of which was the position of the party claiming under the conveyance strengthened by any element of negotiability in the subject-matter of the thing assigned to him, as properly applicable to the one at bar. The mortgaged property should be sold, and the proceeds of sale, after deducting proper expenses, applied first to the payment of the \$5,000 lent by the appellant to Steers, with interest thereon, and then to the payment of the creditors of Cecil R. Atkinson, the mortgagor, who have come or may come into the case, according to their legal priorities.

We do not mean by this decision to disturb the authority of the *Cumberland Coal & Iron Co. Case*, upon which the learned judge below mainly relied in changing his opinion, nor

that of the *Copeland Case*. In each of those cases the issue on trial was between the owner of property, who had been fraudulently induced to execute a mortgage upon it, and an assignee of the fraudulent mortgage, and they were both cases of flagrant fraud in fact. The rights of the creditors of the grantor were not in issue in either case. In the *Cumberland Coal & Iron Co. Case* the court asserted the proposition that the transfer of a mortgage is so far within the rule which applies to choses in action, that when the assignment is made without the concurrence of the mortgagor, as in that case, the assignee takes subject to the same equities and defenses to which the assignor was liable. We do not, however, understand the court, by what was said in that opinion, to intimate that, when the equities in behalf of the creditors of the mortgagor in such a case came to be asserted, their claims would be enforced, without regard to the proposition, so frequently upheld by this court in setting aside fraudulent conveyances at the suit of the creditors of the grantor, that, in order to do justice to all parties in such cases, the conveyances will be allowed to stand as security for the consideration actually paid on the faith of it by the party holding the legal title under it. Decree reversed, and cause remanded for further proceedings in accordance with this opinion.

RICE et al. v. RICE et al.

(2 Drew. 73.)

High Court of Chancery. Dec. 15, 16, 1853.

E. F. Smith, for plaintiffs. Mr. Elmsley and J. V. Prior, for defendants.

The VICE-CHANCELLOR took time to consider, and on the 12th January delivered the following judgment:

The question to be decided in this case is whether the equitable interest of the plaintiffs in respect of the vendor's lien for unpaid purchase money is to be preferred to the equitable interest of the defendant Ede as equitable mortgagee.

What is the rule of a court of equity for determining the preference as between persons having adverse equitable interests? The rule is sometimes expressed in this form, "As between persons having only equitable interests, *qui prior est tempore potior est jure*." This is an incorrect statement of the rule, for that proposition is far from being universally true. In fact not only is it not universally true as between persons having only equitable interests, but it is not universally true even where their equitable interests are of precisely the same nature, and in that respect precisely equal, as in the common case of two successive assignments for valuable consideration of a reversionary interest in stock standing in the names of trustees, where the second assignee has given notice and the first has omitted it.

Another form of stating the rule is this, "As between persons having only equitable interests, if their equities are equal, *qui prior est tempore potior est jure*." This form of stating the rule is not so obviously incorrect as the former; and yet even this enunciation of the rule (when accurately considered) seems to me to involve a contradiction, for, when we talk of two persons having equal or unequal equities, in what sense do we use the term "equity?" For example, when we say that A. has a better equity than B., what is meant by that? It means only that, according to those principles of right and justice which a court of equity recognizes and acts upon, it will prefer A. to B., and will interfere to enforce the rights of A. as against B., and therefore it is impossible, (strictly speaking) that two persons should have equal equities, except in a case in which a court of equity would altogether refuse to lend its assistance to either party as against the other. If the Court will interfere to enforce the right of one against the other on any ground whatever,—say on the ground of priority of time,—how can it be said that the equities of the two are equal? i. e., in other words, how can it be said that the one has no better right to call for the interference of a court of equity than the other? To lay down the rule therefore with perfect accuracy, I think it should be stated

in some such form as this, "As between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity, or *qui prior est tempore potior est jure*."

I have made these observations, not of course for the purpose of a mere verbal criticism on the enunciation of a rule, but in order to ascertain and illustrate the real meaning of the rule itself, and I think the meaning is this, that, in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to, i. e., that a court of equity will not prefer the one to the other, on the mere ground of priority of time, until it finds upon an examination of their relative merits that there is no other sufficient ground of preference between them, or, in other words, that their equities are in all other respects equal, and that, if the one has on other grounds a better equity than the other, priority of time is immaterial.

In examining into the relative merits (or equities) of two parties having adverse equitable interests, the points to which the court must direct its attention are obviously these, the nature and condition of their respective equitable interests, the circumstances and manner of their acquisition, and the whole conduct of each party with respect thereto. And in examining into these points it must apply the test, not of any technical rule or any rule of partial application, but the same broad principles of right and justice which a court of equity applies universally in deciding upon contested rights.

Now in the present case each of the parties in controversy has nothing but an equitable interest; the plaintiffs' interest being a vendor's lien for unpaid purchase money, and the defendant Ede having an equitable mortgage. Looking at these two species of equitable interests abstractedly, and without reference to priority of time, or possession of the title deeds, or any other special circumstances, is there anything in their respective natures or qualities which would lead to the conclusion that in natural justice the one is better, or more worthy, or more entitled to protection than the other?

Each of the two equitable interests arises out of the forbearance by the party of money due to him. There is, however, this difference between them, that the vendor's lien for unpaid purchase money is a right created by a rule of equity, without any special contract. The right of the equitable mortgagee is created by the special contract of the parties. I cannot say that in my opinion this constitutes any sufficient ground of preference, though, if it makes any difference at all, I should say it is rather in favor of the equitable mortgagee, inasmuch as there is no constat of the right of the vendor to his lien for unpaid purchase money until it has been declared by a decree of a court of equity, whereas there is a clear constat of the equi-

table mortgagee's title immediately on the contract being made; but I do not see in this any sufficient ground for holding that the equitable mortgagee has the better equity. So far, then, as relates to the nature and quality of the two equitable interests abstractedly considered, they seem to me to stand on an equal footing; and this I conceive to have been the ground of Lord Eldon's decision in *Mackreth v. Symmons*, 15 Ves. 329, where, in a contest between the vendor's lien for unpaid purchase money and the right of a person who had subsequently obtained from the purchasers a mere contract for a mortgage, and nothing more, he decided in favour of the former, as being prior in point of time.

If, then, the vendor's lien for unpaid purchase money, and the right of an equitable mortgagee by mere contract for a mortgage, are equitable interests of equal worth in respect of their abstract nature and quality, is there anything in the special circumstances of the present case to give to the one a better equity than the other?

One special circumstance that occurs is this, that the equitable mortgagee has the possession of the title deeds. The question therefore arises, between two persons having equitable interests of equal worth, does the possession of the title deeds by one of them give him the better equity? In *Foster v. Blackstone*, 1 Myl. & K. 307. Sir John Leach, M. R., says, "A declaration of trust of an outstanding term, accompanied by a delivery of the deeds creating and continuing the term, gives a better equity than a mere declaration of trust to a prior incumbrancer." That is a case in which the two parties have equitable interests in the term of precisely the same nature, viz., a declaration of trust of the term without an actual assignment; and there the delivery of the deeds to the subsequent incumbrancer gives him the better equity. To the same effect is the decision in *Stanhope v. Lord Verney*, according to Lord St. Leonards' view of it, as reported in *Butl. Co. Litt.* p. 290, 1 Mylne & K. note 1, § 15 (which seems a more satisfactory report than that in 2 Eden, 81). Lord St. Leonards, 3 Sugd. Vend. 218, states it thus, "In *Stanhope v. Earl Verney*, Lord Northington held that a declaration of trust of a term in favour of a person was tantamount to an actual assignment, unless a subsequent incumbrancer, bona fide and without notice, procured an assignment, and that the custody of the deeds respecting the term, with the declaration of the trust of it in favour of a second incumbrancer, was equivalent to an actual assignment of it, and therefore gave him an advantage over the first incumbrancer, which equity could not take from him." The same doctrine appears to be recognized by Lord Eldon in *Maundrell v. Maundrell*, 10 Ves. 271, where he says, "It is clear, with regard to mortgagees and incumbrancers, that if they do not get

in the satisfied term in some sense, either taking an assignment, making the trustee a party to the instrument, or taking possession of the deed creating the term, that term cannot be used to protect them against any person having *mesne charges* or incumbrances," implying that taking possession of the deed creating the term would confer on a subsequent incumbrancer such right of protection by means of the term. We have here, then, ample authority for the proposition, or rule of equity, that as between two persons whose equitable interests are of precisely the same nature and quality, and in that respect precisely equal, the possession of the deeds gives the better equity; and, applying this rule to the present case, it appears to me that, the equitable interests of the two parties being in their nature and quality of equal worth, the defendant having possession of the deeds has the better equity, and that there is, therefore, in this case, no room for the application of the maxim, "*Qui prior est tempore potior est jure*," which is only applicable where the equities of the two parties are in all other respects equal. I feel all the more confidence in arriving at this conclusion inasmuch as it is in accordance with the opinion expressed by Lord St. Leonards in his work on vendors and purchasers; and I have no doubt that in *Mackreth v. Symmons*, if the equitable mortgagee had, in addition to his contract for a mortgage, obtained the title deeds from his mortgagor, Lord Eldon would have decided in his favour.

I must, however, guard against the supposition that I mean to express an opinion that the possession of title deeds will in all cases and under all circumstances give the better equity. The deeds may be in the possession of a party in such a manner and under such circumstances as that such possession will confer no advantage whatever. For example, in *Allen v. Knight*, 5 Hare, 272 (affirmed by the Lord Chancellor and reported on appeal in 11 Jur. 527), the deeds had been delivered to the first equitable mortgagee, and by some unexplained means they had got back into the possession of the mortgagor who delivered them to a subsequent equitable mortgagee. It was insisted by the latter that it must be presumed that it was by the fault or neglect of the first mortgagee that the deeds had got out of his possession, or that at all events the court should direct an inquiry as to the circumstances. But the court held that the onus lay on the second mortgagee of proving such alleged fault or neglect of the first mortgagee; and, as he had failed to prove it, the court could not presume it, nor direct an inquiry on the subject, and decreed in favour of the first mortgagee. I think it may be clearly inferred from this case that if the first mortgagee had never had the deeds delivered to him, or if it had been proved that the deeds had got back to the mortgagor through his fault or

neglect, the decision would have been in favour of the second mortgagee who had the deeds. So the deeds may have come into the hands of a subsequent equitable mortgagee by means of an act committed by another person which constituted a breach of an express trust as against the person having the prior equitable interest. In such a case it would be contrary to the principles of a court of equity to allow the subsequent mortgagee to avail himself of the injury which had been thus done to the party having the prior equitable estate or interest.

Indeed it appears to me that in all cases of contest between persons having equitable interests the conduct of the parties and all the circumstances must be taken into consideration, in order to determine which has the better equity; and, if we take that course in the present case, everything seems in favour of the defendant, the equitable mortgagee. The vendors, when they sold the estate, chose to leave part of the purchase money unpaid, and yet executed and delivered to the purchaser a conveyance, by which they declared in the most solemn and deliberate manner, both in the body and by a receipt indorsed, that the whole purchase money had been duly paid. They might still have required that the title deeds should remain in their custody, with a memorandum by way of equitable mortgage as a security for the unpaid purchase money, and, if they had done so, they would have been secure against any subsequent equitable incumbrance; but that they did not choose to do, and the deeds were delivered to the purchaser. Thus they voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance or adverse equity. In truth it cannot be said that the purchaser in mortgaging the estate by the deposit of the deeds has done the vendors any wrong, for he has only done that which the vendors authorized and enabled him to do. The defendant, who afterwards took a mortgage, was in effect invited and encouraged by the vendors to rely on the purchaser's title. They had, in effect, by their acts, assured the mortgagee that, as far as they (the vendors) were concerned, the mortgagor had an absolute indefeasible title both at law and in equity.

The mortgagee was guilty of no negligence. He was perfectly justified in trusting to the

security of the equitable mortgage by deposit of the deeds, without the slightest obligation to go and inquire of the vendors whether they had received all their purchase money, when they had already given their solemn assurance in writing that they had received every shilling of it and had conveyed the estate and delivered over the deeds; and I do not think that the fact of the conveyance bearing date only the day before the mortgage imposed on him any such obligation. The defendant omitted nothing that was necessary to constitute a complete and effectual equitable mortgage; and although the mortgage was taken, not for money actually advanced at the time, but for an antecedent debt, the forbearance of that debt constitutes a full and sufficient valuable consideration.

Upon a comparison then of the conduct of the two parties, and a consideration of all the circumstances of the case, and especially the fact of the possession of the deeds, which the mortgagee acquired with perfect bona fides, and without any wrong done to the vendors, I am of opinion that the equity of the mortgagee is far better than that of the vendor, and ought to prevail.

I may, in conclusion, venture to make the suggestion that the point now under consideration is often put by text-writers in a form calculated to mislead, when it is propounded as a question whether the vendor, in respect of his lien for unpaid purchase money, or an equitable mortgagee, ought to be preferred, or when an opinion is expressed that the one or the other has the better equity. If I am right in my view of the matter, neither the one nor the other has necessarily and under all circumstances the better equity. Their equitable interests, abstractedly considered, are of equal value in respect of their nature and quality; but whether their equities are in other respects equal, or whether the one or the other has acquired the better equity, must depend upon all the circumstances of each particular case, and especially the conduct of the respective parties. And among the circumstances which may give to the one the better equity the possession of the title deeds is a very material one. But if, after a close examination of all these matters, there appears nothing to give to the one a better equity than the other, then, and then only, resort must be had to the maxim, "*Qui prior est tempore potior est jure*," and priority of time then gives the better equity.

COMSTOCK v. JOHNSON.

(46 N. Y. 615.)

Court of Appeals of New York. 1871.

CHURCH, C. J. The principal question in this case, involving the construction of the grant of water, was correctly decided in the court below. It is well settled in this State that the terms used in this grant are to be taken as a measure of the quantity of water granted, and not a limitation of the use to the particular machinery specified. (*Wakely v. Davidson*, 26 N. Y., 387; *Cromwell v. Selden*, 3 id., 253.) It was found by the court that, at the time the defendant shut the water off, he asserted that the plaintiff had forfeited his right to the water, and claimed a right to shut it off. In this he was mistaken. In depriving the plaintiff of the use of the water under an assertion of forfeiture, he rendered himself amenable to the process of the court for the protection of the plaintiff's rights. The judgment enjoining the defendants from depriving the plaintiff of the quantity of water to which he was entitled under his deed, cannot be disturbed. The only serious question in the case relates to the use of the buzz saw in front of the mill. The plaintiff did not, by his deed, acquire the title to the land in front of the mill, because the description is limited to the land upon which the mill stands; but he did acquire an easement in such land for the purpose of ingress and egress, and also for the purpose of piling and sawing wood for the use of the mill, as it had been used and enjoyed for forty years. Everything necessary for the full and free enjoyment of the mill passed as an incident, appurtenant to the land conveyed. (2 Kent's Com., 467; *Blaine's Lessee v. Chambers*, 1 Serg. & Rawle, 174.) But this would not authorize the plaintiff to erect and use machinery upon this land not necessary to the use of the mill, as it had been used, and would not authorize the use of the buzz saw upon that land. The objection is not that the plaintiff propelled the buzz saw with the water from the dam, as he had the right to use the water for any machinery and in any place which he was entitled to occupy; but he could not occupy the space in front of the mill for that purpose. At the time the water was shut off by the defendants, it was being used only to propel this saw; and it is claimed that the defendants were justified in shutting off the water from that machinery; and for that

reason the judgment should be reversed, or, at least, that it should be modified so as to restrain the plaintiff from using his buzz saw on the defendants' premises. As we have seen, the judgment against the defendants is fully warranted by the findings; and the question is, whether any modification should be made against the plaintiff. It is a rule of equity that he who asks equity must do equity. The plaintiff was in fault in using the buzz saw on the defendants' premises. It is said that this was an independent transaction, for which the defendants might have an action; and this was the view of the court below. The rule referred to will be applied when the adverse equity grows out of the very controversy before the court, or of such circumstances as the record shows to be a part of its history, or is so connected with the cause in litigation as to be presented in the pleadings and proofs, with full opportunity afforded to the party thus recriminated to explain or refute the charges. (*Tripp v. Cook*, 26 Wend., 143; *McDonald v. Neilson*, 2 Cow., 190; *Casler v. Shipman*, 35 N. Y., 533.)

All the facts connected with the right of the plaintiff to use the buzz saw were not only spread out upon the record, but were in fact litigated upon the trial, and, as to his strict legal rights, are undisputed; and we cannot say that, but for his use of the saw on the defendants' premises, the water would not have been shut off. Whether this was so or not, the controversy in relation to his right to use the saw was involved in the litigation, and was intimately connected with the wrongful act of the defendants; and, being so, it is proper to apply the equitable rule. It is not indispensable to the application of this rule that the fault of the plaintiff should be of such a character as to authorize an independent action for an injunction against him. The plaintiff, in strictness, was in the wrong in placing his buzz saw in front of the mill. The defendants were in the wrong in shutting off the water, and especially in asserting a forfeiture; and, as both parties are in court to insist upon their strict legal rights, we think substantial justice will be done by modifying the judgment so as to enjoin the plaintiff from using the buzz saw on the land in front of his mill, and, as modified, judgment affirmed, without costs to either party against the other in this court.

All concur.

Judgment accordingly.

BROWN, BONNELL & CO. v. LAKE SUPERIOR IRON CO. et al.

(10 Sup. Ct. 604, 134 U. S. 530.)

Supreme Court of the United States. April 7, 1890.

Appeal from the circuit court of the United States for the northern district of Ohio.

Henry Crawford, for appellant. *Francis Wing, C. C. Baldwin, S. Shellabarger, and J. M. Wilson*, for appellees.

BREWER, J. On February 20, 1883, two of the appellees, the Lake Superior Iron Company and the Jackson Iron Company, together with the Negaunee Concentrating Company, filed their bill against the appellant, in the circuit court of the United States for the northern district of Ohio. The appellant was a corporation, created under the laws of the state of Ohio, and each of the complainants was a creditor; two holding claims evidenced by notes not then due, and the other, the Negaunee Concentrating Company, holding a judgment. The prayer of the bill was for the appointment of a receiver to take charge of the property and assets of the defendant, and for such other and further relief as was proper. On the same day the defendant entered its appearance, and accepted service of notice of a motion for the appointment of a receiver; and Fayette Brown was thereupon immediately appointed receiver. On the next day subpoena was served on the defendant. On March 28th a supplemental bill was filed making other parties defendants, and on June 14th an order *pro confesso* was entered against all of the defendants in the original and supplemental bills. On April 23d an order was entered directing all creditors to file their claims by petition, and on October 20th nearly every creditor had appeared and filed his petition. On July 17th an order was entered appointing a special master to report on the claims of creditors, and marshal the liens thereof. Up to the 23d of November the appellant made no opposition to the proceeding, and apparently assented to the action which was being taken by the creditors, looking to the appropriation of its property to the payment of their claims. On that day a change took place in its attitude towards this suit. It went into the state courts, and confessed judgment in behalf of several of its creditors; and on the 24th deposited in the registry of the circuit court money enough to pay off the judgment in favor of the concentrating company, and filed two pleas,—one setting forth the fact of payment, and the other that the original and supplemental bills disclosed that the complainants had a plain, adequate, and complete remedy at law, and that therefore the court, sitting as a court of equity, had no jurisdiction; and praying a dismissal of the bills. Subsequently, on December 18th, it filed a motion to discharge the receiver. This motion was overruled, the pleas seem to have been ignored, the master reported upon the claims presented, and on February 23, 1886, the court en-

tered a decree which, finding the indebtedness to be as stated by the master, also what property was in possession of the receiver, decreed that upon default in the payment of those debts the property be sold in satisfaction thereof. From this decree the defendant has brought this appeal, and its principal contention is that the circuit court had no jurisdiction whatever over the subject-matter of the suit, because it appeared upon the face of the bills, original and supplemental, that the complainants had a plain, adequate, and complete remedy at law.

As heretofore stated, the bill showed that two of the complainants held claims not yet due, and the third only a judgment, with no execution. The supplemental bill alleged that execution had, since the filing of the original bill, been issued on that judgment, and returned *nulla bona*. The original bill, besides disclosing the nature of complainants' claims, set forth that they were proceeding not alone in their own behalf, but in that of all other creditors, whose number was so great as to make it impossible to join them as parties. It then averred the insolvency of the defendant; that it was engaged in large and various business, manufacturing, and mining; that its plant and good-will was of great extent and value; and that it employed operatives to the number of at least 4,000; and then alleged as follows: "And your orators further say that vexatious litigation has been commenced against the said defendant, and many more such are threatened, and that such litigations are accompanied by attachments and seizures of property, and such threatened litigations will also be accompanied by attachments and seizures, and that such attachments and seizures will give to those creditors who are pursuing them undue and unfair advantage and priority over your complainants, whose claims are not yet due, and make them irreparable injury and damage; that if such litigations be further instituted and its property seized in attachment, as it already has been, there is great danger that the valuable property of the defendant will be irreparably injured, and to a great extent destroyed; and your orators say that such seizures and interference with the business and the property of the defendant would wholly destroy the value of the good-will of the company as an asset, and wholly break up its long-established business, and thereby cause detriment and irreparable injury to your orators and all other creditors. And your orators further say that, unless this court shall interfere and protect and preserve the property and assets of said defendant by putting it into the hands of a receiver, the said property will be in great danger of destruction and dissipation by the large number of operatives who would necessarily be discharged and left without work or means of obtaining it; and such operatives, by reason of the great distrust they already have, and on account of a fear that they will not in future receive remuneration, will abandon their employment, and thereby cause a stoppage of the extensive business of said

defendant, to the extent that the creditors of said defendant would not be able to realize one-half of the amount upon the several claims that they would if the said business of the defendant were continued."

The appellees, while admitting the general rule to be that creditors must show that they have exhausted legal remedies before coming into a court of equity, insist that the bill disclosed a case in equity on two grounds: *First*, that upon the insolvency of a corporation its properties become a trust fund for the benefit of its creditors, which can be seized and disposed of by a receiver, and in equitable proceedings; and, *second*, that the vast interests and properties of this corporation, with their threatened disintegration through several attachment suits, justified the interference of a court of equity to preserve, for the benefit of creditors, that large value which resulted from the unity of the properties. In support of these propositions counsel cite, as especially applicable, *Terry v. Anderson*, 95 U. S. 628; *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. Rep. 809; *Sage v. Railroad Co.*, 125 U. S. 361, 8 Sup. Ct. Rep. 887; *Mellen v. Iron-Works*, 131 U. S. 352, 9 Sup. Ct. Rep. 781; *Barbour v. Bank*, 45 Ohio St. 133, 12 N. E. Rep. 5; *Rouse v. Bank*, 46 Ohio St. 493, 22 N. E. Rep. 293.

But were it conceded that the bill was defective; that a demurrer must have been sustained; and that the appellant, if it had so chosen to act in the first instance, could have defended its possession, and defeated the action,—still the decree of the circuit court must be sustained. Whatever rights of objection and defense the appellant had, it lost by inaction and acquiescence. Obviously the proceedings had gone on with its consent. Immediately on filing the bill it entered its appearance; and the same day a receiver was appointed, without objection on its part. It suffered the bills to be taken *pro confesso*. It permitted the receiver to go on in the possession of these properties for nine months, transacting large business, entering into many contracts, and assuming large obligations, without any intimation of a lack of authority, or any objection to the proceedings. After a lapse of nine months, suddenly its policy changed; it contested where theretofore it had acquiesced. And this, not because of any restored solvency or purpose to resume business, but with the evident intent to prevent the equality among creditors which the existing equitable proceedings would secure, and to give preference to certain creditors; for clearly it was the thought of the president of the corporation, himself the owner of a large majority of its stock, whose management had wrought its financial ruin, that after the setting aside of the equitable proceedings the lien of the confessed judgments would attach, and thus those favored creditors would be preferred.

So the case stands in this attitude: The corporation was insolvent. Its extensive and scattered properties had been brought into single ownership, and so operated together that large benefit resulted in preserving the unity of ownership and operation. Disintegration was threatened

through separate attacks, by different creditors, on scattered properties. The preservation of this unity, with its consequent value, and the appropriation of the properties for the benefit of all the creditors equally, were matters deserving large consideration in any proper suit. Certain creditors, acting for all, initiated proceedings looking towards this end. In such proceedings the corporation acquiesced. Substantially all of the creditors came into the proceedings. After months had passed, much business had been transacted and large responsibilities assumed, the corporation, for the benefit of a few creditors and to destroy the equality between all, comes in with the technical objection that the creditors initiating the proceedings should have taken one step more at law before coming into equity. But the maxim, "He who seeks equity must do equity," is as appropriate to the conduct of the defendant as to that of the complainant; and it would be strange if a debtor, to destroy equality and accomplish partiality, could ignore its long acquiescence, and plead an unsubstantial technicality to overthrow protracted, extensive, and costly proceedings carried on in reliance upon its consent. Surely no such imperfection attends the administration of a court of equity. Good faith and early assertion of rights are as essential on the part of the defendant as of the complainant. This matter has recently been before this court in *Reynes v. Dumont*, 130 U. S. 354, 395, 9 Sup. Ct. Rep. 486, and was carefully considered, and the rule, with its limitations, thus stated: "The rule as stated in 1 *Daniell's Chancery Practice*, (4th Amer. Ed.) 555, is that if the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court, having the general jurisdiction, will exercise it; and, in a note on page 550, many cases are cited to establish that, 'if a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity. The above rule must be taken with the qualification that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject-matter.' * * * It was held in *Lewis v. Cocks*, 23 Wall. 466, that if the court, upon looking at the proofs, found none at all of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact, and give it effect, though not raised by the pleadings nor suggested by counsel. To the same effect is *Oelrichs v. Spain*, 15 Wall. 211. The doctrine of these and similar cases is that the court, for its own protection, may prevent matters purely cognizable at law from being drawn into chancery at the pleasure of the parties interested; but it by no means follows, where the subject-matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal, that

the latter can exercise no discretion in the disposition of such objection. Under the circumstances of this case, it comes altogether too late, even though, if taken *in limine*, it might have been worthy of attention." See, also, *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. Rep. 594; *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434-468, 6 Sup. Ct. Rep. 809. Further comment is unnecessary. The ruling of the circuit court was correct, and its decree is therefore affirmed.

BLEAKLEY'S APPEAL.

(66 Pa. St. 187.)

Supreme Court of Pennsylvania. Oct. 27, 1870.

AGNEW, J. The facts of this case are few. Robert Lamberton was the owner of a judgment for \$31,000, entered against Samuel P. Irvin on the 8th day of June, 1865. Irvin had purchased of F. D. Kinnear, Esq., lot No. 449 in Franklin at \$2600, of which \$820 only remained unpaid, and would fall due on the 6th of August, 1865, with a provision for forfeiture of the contract in case of non-payment for thirty days after it fell due. On the 19th of July, 1865, Irvin assigned his contract to James Bleakley, binding him to pay the \$820 to save the forfeiture, and with the admitted understanding that Irvin should refund the \$820 to Bleakley, settle his indebtedness to the bank, of which Bleakley was cashier, and that then Bleakley should reconvey to Irvin's wife. But the assignment was antedated to the 1st of May, 1865, thus overreaching Lamberton's judgment. The master finds that this was done to defraud the plaintiff. The finding is ably vindicated in the opinion of Judge Trunkey. The absolute character of the paper, though but a security, the agreement to reconvey to Irvin's wife instead of himself, and the attempt of Bleakley to use the paper to defeat the sheriff's sale of the property by Lamberton on his judgment, evince the true motive for antedating the paper.

Bleakley paid the \$820 to Kinnear, and now claims a decree for this sum, before specific performance shall be decreed to Lamberton, who purchased Irvin's title at the sheriff's sale. Kinnear does not resist specific performance, but stands ready to convey to Lamberton, whenever the covinous assignment to Bleakley is put out of his way. It is Bleakley who resists the decree until he is refunded the \$820, paid upon the footing of the fraudulent agreement with Irvin, to defeat Lamberton's judgment. Bleakley is made a party to the bill only for the purpose of putting aside the covinous assignment to enable Kinnear to convey to Lamberton. The question then is whether a chancellor would require Lamberton to refund the \$820 to Bleakley, as a condition to setting aside the assignment and entitling Lamberton to specific performance of Kinnear.

But clearly Bleakley cannot demand repayment of Lamberton either at law or equity. And first he is not entitled to subrogation to Kinnear's rights. Subrogation is not a mat-

ter of contract but of pure equity and benevolence. *Kyner v. Kyner*, 6 Watts, 221; *Wallace's Appeal*, 5 Pa. St. 103. On what pretence, in foro conscientiae, can a party attempting to carry out a scheme of fraud against another, by a payment, claim compensation of the party he has attempted to defraud? Conscience and benevolence revolt at such an iniquity. Again Bleakley did not recognise Kinnear's title by the payment. He did not profess to bargain for it, and Kinnear did not profess to sell it to him. His act was simply a payment and no more, made by him because of Irvin's duty to pay, and accepted by Kinnear because of his right to receive from Irvin. Besides the payment was accepted by Kinnear in ignorance of the attempted fraud. There can be no legal intentment therefore of a bargain on Kinnear's part to vest his right to receive the money in Bleakley. As to Lamberton the payment by Bleakley was not only fraudulent and intended to displace his judgment, but it was also voluntary. It was not paid at Lamberton's request nor for his use and benefit; but on the contrary was intended to defeat his right, as a creditor by overlapping his judgment, by means of the covinous transfer. Bleakley is therefore neither a purchaser, nor a creditor of Lamberton, nor an object of benevolence, but is forced upon the record to compel him to put out of the way the fraudulent barrier to Kinnear's specific performance to Lamberton. He cannot, thus standing before a chancellor, ask him to make repayment to him a condition to a decree to remove the fraudulent obstruction he threw in the way. The payment is one of the very steps he took to consummate the fraud upon Lamberton. If he have a legal right of recovery he must resort to his action at law, and if he can have none, it is a test of his want of equity. And in addition to all this, it is a rule that a chancellor will not assist a party to obtain any benefit arising from a fraud. He must come into a court of equity with clean hands. It would be a singular exercise of equity, which would assist a party, who had paid money to enable him to perpetrate a fraud, to recover his money, just when the chancellor was engaged in thrusting out of the way of his doing equity to the injured party, the very instrument of the fraud. Who does iniquity shall not have equity. *Hershey v. Weiting*, 50 Pa. St. 244, 245.

We are therefore of opinion the court committed no error in refusing compensation, and the decree of the court below is confirmed.

KAHN v. WALTON et al.

(20 N. E. 203, 46 Ohio St. 195.)

Supreme Court of Ohio. Jan. 8, 1889.

Error to circuit court, Greene county.

On the 15th day of February, 1882, Moses A. Walton commenced his action in the court of common pleas of Greene county against the plaintiff in error, Charles Kahn, Jr., and the Citizens' National Bank of Xenia, to enjoin the bank from paying two checks, one for \$1,500 and the other for \$500, drawn by him upon the bank in favor of Kahn. The petition alleges "that on the 14th day of February, A. D. 1882, the defendant, Charles Kahn, Jr., by fraud and misrepresentation, obtained from the plaintiff his two certain checks of that date for the sums of \$1,500 and \$500, respectively, drawn by him upon the Citizens' National Bank of Xenia, a corporation duly incorporated under the laws of the United States; that said checks were given and are wholly without consideration, and the plaintiff received no value therefor whatever; that defendant, Kahn, is about to present the same for collection, and the bank is about to, and will, unless restrained by the order of the court, pay the checks, which will be an irreparable injury to the plaintiff, and for which he has no adequate remedy at law; that Kahn is not a resident of said county, and has no property therein, and who is, as plaintiff is informed and believes, wholly insolvent." The petition prays "that the bank be restrained and enjoined from paying said checks, and that they may be ordered to be canceled and delivered up to the plaintiff; and for all other and further relief to which in equity he may be entitled."

At the commencement of the action, the plaintiff obtained a temporary injunction as prayed for, and on the 6th day of March amended his petition by adding to its averments the following: "That no consideration exists for said check in said petition mentioned other than certain gaming contracts entered into by said plaintiff on or about the — day of February, 1882, in the city of Cincinnati, Ohio, with the said Kahn, a broker and commission merchant of said city, for the purpose of speculating in the price of wheat, pork, and lard, and which said contracts made by said Kahn were in violation of the statute of gaming, and against public policy, and were false and feigned, and by which he undertook in form to buy and sell wheat, pork, and lard for and with this plaintiff, without intending thereby either to receive or deliver said wheat, pork, or lard, but solely to wager in the market price thereof, and to pay or receive the difference between the price in the contracts and the market rates at any time during the month of March, 1882, at the option of said Kahn, whichever the same would be; that said contracts were made as

a cover for gambling in the prices of wheat, pork, and lard; that no wheat, pork, or lard was actually to be delivered or received, but the difference in price only was to be paid on the one side or received on the other at any time during the said month of March, at the option of said Kahn; that in pursuance of the said gaming contracts, and in addition to the execution and delivery of said checks, this plaintiff delivered and paid to said Kahn the sum of \$500; that no consideration for the payment of said sum of \$500 passed to the plaintiff other than that set forth aforesaid; that the said Kahn received to the plaintiff's use said sum of \$500 so lost and paid to said defendant, and said defendant, Charles Kahn, Jr., is indebted to plaintiff in the said sum of \$500, with interest from the — day of February, 1882. Wherefore plaintiff prays as in his original petition, and for judgment against said defendant Kahn, for said sum of \$500, with interest from February —, 1882." The temporary injunction was, on motion of the defendant, Kahn, dissolved, and the plaintiff appealed to the district court, where, on the 28th of April, 1882, the plaintiff, by leave of that court, filed another amendment to his petition, adding the following averments: "That at the time of the execution and delivery of the said checks the plaintiff had on deposit with said bank sufficient money to pay said checks; that prior to the presentation thereof said Kahn, who is insolvent, by his agent, made inquiry of said other defendant as to whether said checks were good and would be paid on presentation; to which inquiry said bank made answer that said checks were good, and would be paid, and said bank claims to have certified to said checks, and bound itself thereby to pay the same; that prior to the filing of the petition herein, and the allowance of said restraining order, this plaintiff requested and notified said bank not to pay said checks; but said bank refused said request, and threatened to, and will, unless restrained, pay said checks."

The defendant, Kahn, then answered, admitting "the corporate character of said bank; that said Kahn was about to present said checks for collection; his non-residence; that plaintiff had said money on deposit in said bank; said inquiries whether said checks would be honored, and the response of said bank that they would; that said bank claims to have certified the same, and bound itself to pay the same, and said notification to said bank not to pay the same, and the refusal of said bank; that a contract was made between said Kahn and plaintiff for the sale of property; that sales were made, and \$500.00 cash and said checks were paid thereon. But said Kahn denies each and every other allegation of said petition."

The record shows that at the April term, 1884, of the district court the cause was by

consent of the parties submitted to the court upon the pleadings and evidence, and the court found the equities of the case in favor of the plaintiff and against said defendant, Kahn, made the injunction perpetual, and adjudged the costs against Kahn. A motion for a new trial, filed by Kahn, was overruled, and a bill of exceptions was duly taken, containing all the testimony given on the trial of the cause. It also appears in the bill of exceptions that at the close of the testimony the defendant, Kahn, requested the court to find the facts, and state its conclusions of law and of fact separately, and also to find "the following conclusions of fact: (1) Whether there was any agreement between the plaintiff and Charles Kahn, Jr., that the property purchased should not be delivered; but that simply the difference, if any, between the price at which the property was purchased and the price at which it should rule in March, 1882, should be paid. (2) Whether Charles Kahn, Jr., N. B. Ream & Co., or the persons of whom the property was purchased in January, 1882, intended that it should not be delivered, and that simply the difference, if any, between the price at which it should rule in March, 1882, and the price at which it was purchased should be paid, and who so intended. (3) Whether the court finds that simply the difference was to be paid, and no property delivered, from the circumstances of the transaction, and, if so, what are the circumstances upon which said finding is predicated? (4) Whether the price of said property on the Chicago Board of Trade, in March, 1882, was more or less than the purchase price in January, 1882, and, if less, how much less. (5) Whether, by the terms of the contract between the plaintiff and Kahn, or by reason of notice to plaintiff, Kahn was justified in selling said property on March 1, 1882. (6) Whether the persons of whom the property was purchased in January, 1882, or their brokers, N. B. Ream & Co., had the property on hand ready to deliver on March 1, 1882, and whether they gave Kahn notice, and whether Kahn gave plaintiff notice of their readiness to deliver the property, and that it would be sold March 1, 1882, if plaintiff would not take it. (7) Upon whom the court finds the burden of proof rests to establish the character of the transaction; whether it was or was not a gambling transaction. (8) Whether Charles Kahn, Jr., was simply a broker, agent, and employé of plaintiff in causing the purchase and sale of said property on commission, without any interest in the profit or loss in the transaction." And it further appears from the bill of exceptions that the court, in response to the foregoing request, found as follows:

"Answer to Requests 1 and 2. We find that the transactions in which the parties were engaged were mere speculations or ventures on the future prices of the products named in the pleadings, without any inten-

tion on the part of Walton, Kahn, or Ream & Co. that the property would be either paid for or delivered, but that the intention was that settlements between buyer and seller would be made on the differences between the market prices at the date named for delivery and the prices named in the contracts; that this was understood by all parties interested in the deals; that the same were gambling transactions, and illegal.

"Answer to Request 3. We find the foregoing facts from all the circumstances in the case and surrounding the transactions, and particularly from the fact that if any inquiry had been made it would have developed the fact that Walton was wholly unable to pay one-fourth the amount of the price of the property ostensibly purchased, (being \$43,000,) and that in fact said Walton was not worth over \$3,000 or \$4,000 at the time.

"Answer to Requests 4 and 5. We find that in March, 1882, the price of property embraced in the deals mentioned had declined to an extent that absorbed the margins put up, and that, under the rules of the Board of Trade of Chicago, Kahn was justified in selling whatever interest Walton had in any property under his (Kahn's) control; but we have not regarded this as an important fact in the case.

"Answer to Request 6. We find it probable that Ream & Co. had control of an amount of property equal in bulk and quality to that named in the several contracts, and could have delivered it on demand March 1, 1882; but we further find that in said deals they had no intention of so delivering it, nor had Kahn any intention of receiving it. Ream & Co. gave Kahn notice, and Kahn gave Walton notice, of their readiness to deliver the property, and that it would be sold March 1st if plaintiff did not take it; but this was done after the commencement of this suit, and with knowledge that it would not be so taken by plaintiff.

"Answer to Request 7. Upon the plaintiff.

"Answer to Request 8. Kahn was, as between plaintiff and defendant, a broker agent, interested only to the amount of his commissions.

"We further find that after the checks named in the pleadings were delivered to Kahn, a bank in Cincinnati telegraphed the Citizens' National Bank of Xenia as follows: 'Are M. A. Walton's checks for \$2,000 good?' To which said Citizens' Bank sent an answer as follows: 'Yes, sir.' We find that this does not amount to 'certifying' the checks, and the Citizens' Bank did not thereby become bound to the holders of the checks for the amounts. We find that the contract was not executed by the giving of the checks, and that by enjoining the payment of the checks we simply stop the carrying out of a gambling contract, and thereby leave the parties where we find them."

Judgment having been rendered against

Kahn, as before stated, he prosecutes error to this court to reverse the same, upon the grounds that the conclusions of law are not supported by the facts found, and the evidence does not sustain the finding of facts.

Jordan & Jordan, for plaintiff in error.
John Little, for defendants in error.

WILLIAMS, J. The evidence tends to prove the facts found by the district court, and as this court is not required to determine the weight of the evidence, the facts so found will, in the disposition of the case, be regarded as established by the evidence. The case shown by these facts, and those admitted by the pleadings, is that Kahn was a commission broker in Cincinnati, doing business with and for Ream & Co., brokers and commission merchants in Chicago, and bought of or through them wheat and pork for future delivery, so called, on Walton's account. The transactions were mere speculations or ventures on the prices of the commodities named, without any intention on the part of the parties concerned that the property should either be delivered or paid for; but all the parties understood and intended that settlements should be made between them, on the differences between the market prices, at the dates fixed for delivery, and those named in the contracts. Kahn was to have a commission for his services, and he advanced margins on the deals. Walton was loser, and drew his two checks, amounting to \$2,000, on the bank where he had funds, payable to Kahn, for moneys paid by him on the deals and losses. Walton also paid Kahn \$500 in money on the same account. Kahn telegraphed to the bank, inquiring if Walton's checks for the amount of those drawn to him were good, and received an affirmative answer. Walton notified the bank not to pay the checks, and before their presentation brought his action to enjoin their payment.

1. Upon this state of the case, the first inquiry naturally is, were the speculative transactions in which the parties engaged in the nature of wagers, and, for that reason, illegal? In the determination of this question it is not deemed material whether they fall within the provisions of our statutes against gaming and wagering, or do not; for it is generally held in this country that wagering contracts, though not prohibited by statute, are illegal, and void as against public policy, and the great weight of authority is to the effect that contracts of the kind the district court found those involved in this case to be are void as wagering agreements. This has been held by the courts of last resort in every state where the question has been presented, and by the supreme court of the United States. The rule generally accepted is that contracts for the sale of personal property to be delivered in the future are valid if the parties really in-

tend and agree that the property is to be delivered by the seller, and the price is to be paid by the purchaser, though the seller has not the goods, nor any other means of getting them, than to go into the market and buy them. But if the real intent be merely to speculate on the rise and fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the contract partakes of the nature of a wager, and is void. *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160; *Higgins v. McCrea*, 116 U. S. 671, 6 Sup. Ct. 557; *Mann v. Bishop*, 136 Mass. 495; *Gregory v. Wendell*, 40 Mich. 432; *Cole v. Milmine*, 88 Ill. 349; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Lowry v. Dillman*, 59 Wis. 197, 18 N. W. 4.

2. The facts found by the district court plainly define Kahn's relation to the unlawful agreements. He was directly connected with them, and, with full knowledge of their character, performed services and expended money to promote and forward them. It was his intention, as well as the intention of the other parties, that the property should not be delivered or paid for, but that the differences in the prices should be adjusted in money. It is true, Kahn was the broker, and had no pecuniary interest in the business except his commissions, and the repayment of whatever sums he might advance for margins, and to pay losses as the business progressed. He, nevertheless, negotiated the wagering contracts, and was party to them. The legal effect of such relation to contracts of that nature was determined in the case of *Irwin v. Williar*, supra. The conclusion of the court is thus stated: "In *Rountree v. Smith*, 108 U. S. 269, 2 Sup. Ct. 630, it was said that brokers who had negotiated such contracts, suing, not on the contracts themselves, but for services performed, and money advanced for defendant, at his request, though they might, under some circumstances, be so connected with the immorality of the contract as to be affected by it, they are not in the same position as a party sued for the enforcement of the original agreement. It is certainly true that a broker might negotiate such a contract without being privy to the illegal intent of the principal parties to it, which renders it void; and in such case, being innocent of any violation of law, and not suing to enforce an unlawful contract, has a meritorious ground for the recovery of compensation for services and advances. But we are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is particeps criminis, and cannot recover for services rendered or losses incurred by himself on behalf of either in

forwarding the transaction." We accept this as a sound and wholesome rule, and under its operation the checks given by Walton to Kahn for services rendered and losses paid by him in the unlawful enterprise are tainted with the vice of their origin, and are subject to all the infirmities of securities given for illegal considerations.

3. It is contended that the drawing of the checks by Walton on the bank, where he had sufficient funds to pay them, and the bank's response to the inquiry of Kahn's agent that checks to their amount were good, was a specific appropriation of the funds, and amounted to payment of the debt for which they were drawn, whereby the contract became fully executed. A check, being simply a written order of a depositor to his banker to make a certain payment out of his funds, is executory, and, of course, revocable at any time before the bank has paid it or committed itself to its payment. It operates, it is true, as an assignment of the fund on which it is drawn *pro tanto*, and binds the bank to its payment out of the fund when presented, unless revoked; but it is not itself payment of the debt for which it is drawn, unless it be so agreed between the parties. Ordinarily it is only a means of payment, and the debt is not extinguished unless and until the check be paid, or the holder be guilty of laches, which may operate as a discharge of the drawer. The bank is the agent of the drawer. Its duty is to pay his money as he directs. It owes no duty to the holder except under the drawer's directions, until, by virtue of those directions, it assumes some obligation to the holder. Up to that time the latest order from the drawer governs. But after the bank has paid the check, or placed itself under an obligation to pay it, the drawer's power of revocation is ended. This obligation may be incurred by acceptance. It is sometimes said that the legal effect of the acceptance is to place the holder of the check in the position of a depositor. By the acceptance a new and specific engagement is entered into by the bank; which is to unconditionally pay the sum named to the legal holder of the check. The acceptance or certification is sometimes evidenced by writing the word "good" on the check by the authorized officer or agent of the bank; but no particular mode or form is necessary, and it is generally held that a verbal acceptance is sufficient. But whatever the word or form employed, there must be enough to indicate the acceptance of the particular check.

It is manifest there was no acceptance or certification of the checks in question in this case. The telegraphic correspondence between the bank and Kahn's agent amounted to no more than an assurance that valid checks to the amount stated, drawn by Walton, or that might be drawn by him, were then good. No particular checks were men-

tioned in the inquiry, nor any intimation given that the inquirer had received, or was about to receive, such checks; nor had the bank any means of identifying the checks to which the inquiry related. Its telegram, therefore, did not commit the bank to the payment of any particular check. At most it was information that Walton had, at its date, money on deposit to the amount stated, subject to check. *Espy v. Bank*, 18 Wall. 604. If, therefore, before the checks were presented for payment, and before they were certified or accepted by the bank, or it otherwise became committed to their payment, Walton revoked them, and notified the bank not to pay them, as he claims, and as the district court found he did, his defensive remedy at law would appear to be adequate.

4. But what standing has the plaintiff in a court of equity? The transactions upon which he founds his claim for relief were unlawful, and the remedy he seeks is protection against the consequences of his own participation in them. In such cases equity keeps its hands off, and leaves the parties where it finds them. It is a fundamental rule of equity that parties wanting its aid must come with clean hands. Courts of equity require honesty, good faith, and legality in transactions between men, and if a party would pursue his remedy therein, his demand must not rest on a violation of law for its foundation, or arise from his own illegal acts, or conduct *contra bonos mores*. 1 Wait, Act. & Def. 153; 3 Wait, Act. & Def. 685. It was said by Lord Mansfield, in *Holman v. Johnson*, Cowp. 341, that "no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*." In *Atwood v. Fisk*, 101 Mass. 363, which was a bill in equity to compel the surrender and cancellation of a note, and mortgage given to secure its payment, on the ground that the consideration for them was illegal, the court, in denying the relief sought by the bill, declares it to have long been settled "that the law will not aid either party to an illegal contract to enforce it against the other; neither will it relieve a party to such a contract who has actually fulfilled it, and who seeks to reclaim his money or whatever articles of property he may have applied to such a purpose. The meaning of the familiar

maxim in pari delicto potior est conditio defendentis is simply that the law leaves the parties exactly where they stand; not that it prefers the defendant to the plaintiff, but that it will not recognize a right of action founded on the illegal contract in favor of either party against the other. They must settle their own questions in such cases without the aid of the courts." The statement of the rule by Chancellor Walworth, in *Harrington v. Bigelow*, 11 Paige, 349, may be applied directly to this case. He says: "Where both parties have been engaged in an illegal transaction, the court will not lend its active aid to the one party to get rid of the securities taken upon the illegal transaction, nor will it aid the other party in retaining them, but will leave both to their strict technical rights."

In *Weakley v. Watkins*, 7 Humph. 356, it is held that "no court of chancery will entertain a bill to cancel an obligation, the consideration of which was a violation of chastity, compounding a felony, smuggling of goods, gaming, false swearing, or the commission of any crime, or a breach of good morals." This was a bill in chancery filed by *Weakley* against *Watkins* and *Ferguson* to obtain the cancellation of a note under seal executed upon a gaming consideration. A demurrer was filed to the bill, and the court in the opinion says: "It is true that a court of chancery, upon the principle of *quia timet*, will order said instruments to be delivered up and canceled. But this is when the complainant has been imposed upon, and executed an instrument void for fraud, accident, mistake, or other cause, which renders it iniquitous and unjust that it should be enforced against him, and when, in the execution of it, he has himself been guilty of no violation of law or good morals. But this principle has never been held applicable to instruments knowingly executed in violation of good morals or express prohibition, either by common or statute law. For instance, no court of chancery will entertain a bill to cancel an obligation, the consideration of which was a violation of chastity, compounding a felony, the smuggling of goods in violation of the revenue law, gaming, false swearing, etc.; and this for very obvious reasons. The complainant shall not be permitted to charge himself with crime, and obtain relief out of it; and because public policy requires that the execution of all such contracts shall be discouraged, which cannot be more effectually done than by repelling all actions upon them in courts of justice. In contracts of the kind now under consideration we have held that they are inoperative, and void, as contrary to good morals and positive enactment, and that, as such, they are not fit subjects for the action of a court. It is true that in the cases we have heretofore had the attempt has been to enforce them, but we can see no difference in the position

of the winner and loser, so far as to their right in becoming active movers upon such contracts in the courts; the one seeking to enforce them by the judgment of a court of law, the other seeking by the aid of a court of chancery to have them delivered up and canceled. They are equally repelled upon reason and authority."

It was said by this court, in *Roll v. Raguet*, 4 Ohio, 400, that "whenever an agreement appears to be illegal, immoral, or against public policy, a court of justice leaves the parties as it finds them. If the agreement be executed, the court will not rescind it; if executory, the court will not aid in its execution." This was again held in *Raguet v. Roll*, 7 Ohio, pt. 1, p. 77. And see *Raguet v. Roll*, 7 Ohio, pt. 2, p. 70. The doctrine of these cases has recently been approved and enforced by this court. *McQuade v. Rosecrans*, 36 Ohio St. 442; *Williams v. Englebrecht*, 37 Ohio St. 383. And in *Thomas v. Cronise*, 16 Ohio, 54, it is laid down as "a universal principle both in law and equity that where an agreement is founded upon a consideration illegal, immoral, or against public policy, a court will leave the parties where it finds them." In *Hooker v. De Palos*, 28 Ohio St. 251, the same doctrine is announced in the following language: "The maxim '*Ex turpi causa non oritur actio*' is an old and familiar one, resting on the clearest principles of public policy, and never to be ignored. In accordance with this maxim nothing is better settled than that, in regard to contracts, which are entered into for fraudulent or illegal purposes, the law will aid neither party to enforce them while they remain executory, either in whole or in part, nor, when executed, will it aid either party to place himself in statu quo by a rescission, but will in both cases leave the parties where it finds them. It is true that particular statutes have been from time to time enacted in this state as well as in many of our sister states, which are to some extent in contravention of this common-law doctrine. The statutes of this state which allow money won by gaming or betting to be recovered back by the loser, furnish an example of this kind. But such statutes are a recognition of the established rule that no recovery could be had in such cases at common law. They are exceptional in their character, are in derogation of the common law, and therefore are to be construed strictly, and not extended by implication beyond the particular cases of illegality for which they provide." The statutes adverted to change the common law so far as to give the loser the right to recover back what he has lost, and provide a remedy therefor, but no further. In all other respects the common law governs. Whether the statutes have any application to contracts like those under discussion need not now be decided, for if it be granted that they have, yet, since they make no provision for equitable actions for injunctions, the right to such

remedy must be determined by considerations independent of the statutory regulations. *Veach v. Elliott*, 1 Ohio St. 139; *Thomas v. Cronise*, 16 Ohio, 54.

The legislature, apparently recognizing the inapplicability of the statutes theretofore in force to such contracts and transactions, enacted that of May 4, 1885, (82 Ohio Laws, p. 254,) which declares all contracts for the sale of grain, provisions, and other specified articles, when there is no intention to deliver or pay for the articles sold, to be void, and makes them gambling and criminal acts. This statute, having been passed after the contracts between the parties were made, of course cannot affect the decision of the case, and, if it were otherwise, they do not confer upon the plaintiff the right to maintain the action prosecuted by him. Precisely what effect has been given the English statutes in the decisions of the courts of that country upon this subject is not very clear. It is, nevertheless, true that parties to gaming securities were expressly authorized by statute to go into chancery for discovery, which gave ground for the application of the familiar rule that courts of chancery, having jurisdiction for one purpose, will retain the case for final relief. In the case of *Rawden v. Shadwell*, 1 Amb. 268, which was a bill for discovery and cancellation, the report states: "Lord Hardwicke decreed with great clearness, and said that by St. 9 Anne all securities for money won at play are made void. Consequently the payment under any such security cannot be supported." And *Baker v. Williams* is referred to in the report as an authority for the decree. In the note to the case it is said that the statute of 9 Anne "gives leave to come into a court of chancery for discovery;" and Sir J. Jekyll, M. R., in the note, citing *Baker v. Williams*, said: "And if it [the note] was put in suit at law, no doubt but the party might make a defense against it under the act; but that is no objection against coming into this court, [chancery,] for the person giving the note is entitled to a discovery here. It could not be the intention of the legislature that, after the discovery, he should be sent to another court for relief. So it is that upon the discovery of assets the court grants relief without sending the party to law." And it may be noticed that in *Woodson v. Barrett*, 2 Hen. & M. 88, the supreme court of Virginia followed *Rawden v. Shadwell*, under a statute which was an exact copy of 9 Anne, except that the word "contract" was inserted in it, which was omitted in the statute of Anne. And the case is followed by the same court in *Skipwith v. Strother*, 3 Rand. (Va.) 216. In this respect the statute of Anne differs essentially from ours. The only actions provided for by our statute are the purely legal ones to recover back the money lost, and for the conversion of the goods won of the plaintiff. No suit in equity is authorized or contemplated. The provision of the statute that the

plaintiff may annex to his petition in the legal actions it permits interrogatories for discovery at once removes the necessity and cause for recourse to equity, and the statute which created the right having especially prescribed the legal remedies mentioned, and none other, they must be deemed exclusive. It cannot be denied, however, the courts have differed in the application of these kindred maxims, "*ex turpi causa non oritur actio*," and "*in pari delicto potior est conditio defendentis*;" especially to gaming securities, which, it has been held by some courts, are so far excepted from the operation of the maxims that equity will decree them to be surrendered and canceled. The reasons given for so holding are that "the circulation of gaming bonds is no less to be discountenanced than the giving of them, and no means are more likely to prevent the giving of them than to put an effectual stop to their circulation;" and that because the losers are permitted to defend against securities given by them, on the ground that they were given for a gaming consideration, courts of equity should entertain suits for their cancellation.

These appear to be arguments not so much in favor of the asserted exception as against the maxims themselves, for it is apparent that the same reasoning would, in the same measure, exclude from their operation every contract and security founded upon any other illegal consideration. The circulation of all bonds and securities given for any illegal or immoral consideration is quite as much to be discountenanced as the giving of them,—gaming bonds and securities, no more than others; and if putting a stop to the circulation of gaming bonds, by a resort to a court of equity to compel their surrender and cancellation, be the most effective means of preventing the giving of them, then the same means should be permitted and adopted, and for the same reason, to accomplish the same end, with regard to bonds and securities given for any other illegal consideration. And if because parties may defend against securities given by them, on the ground that they were given for a gaming consideration, is a valid reason why a court of equity should entertain a suit for the cancellation of such securities, it is an equally valid reason why that court should entertain suits for the cancellation of instruments founded upon any other illegal consideration; for such consideration may also be made a ground of defense to them. Such is the logical result of the argument in favor of the exception contended for; and some English cases have gone to that extent. In *Neville v. Wilkinson*, 1 Brown, Ch. 547, Lord Chancellor Thurlow is reported to have said "that in all cases where money was paid for an unlawful purpose, the party, though particeps criminis, might recover at law, and that the reason was that if courts of justice mean to prevent the perpetration of crimes it must be not by

allowing a man who has got possession to remain in possession, but by putting the parties back to the state in which they were before." But Mr. Justice Story, referring to the words of the lord chancellor, says: "This is pushing the doctrine to an extravagant extent, and effectually subverting the maxim 'in pari delicto potior est conditio defendentis.'" The ground of reasoning upon which his lordship proceeded is exceedingly questionable in itself, and the suppression of illegal contracts is far more likely in general to be accomplished by leaving the parties without remedy against each other, and by thus introducing a preventive check naturally connected with a want of confidence, and a sole reliance upon personal honor. And so, accordingly, the modern doctrine is established." 1 Story, Eq. Jur. § 298. The difference between the earlier cases and the current authorities on the subject is pointed out in the following note to this section: "I say at present, for there has been considerable fluctuation of opinion, both in courts of law and equity, on this subject. The old cases often gave relief, both at law and in equity, where the party would otherwise derive an advantage from his iniquity. But the modern doctrine has adopted a more severely just, and, probably, politic, moral rule, which is to leave the parties where it finds them, giving no relief and no countenance to claims of this sort." Mr. Bispham, in his Principles of Equity, (section 223,) says: "The rule, both at law and in equity, in regard to gambling transactions, now seems to be that the courts will not only refuse to lend their aid for the purpose of enforcing such contracts, but they will not assist the losing party in setting the contract aside, or recovering back the money paid. The maxim applicable to such cases is *potior est conditio possidentis*." The opinion of the supreme court of Massachusetts, in the case of *Atwood v. Fisk*, before cited, is to the same effect. It is there stated as the prevailing doctrine that "the suppression of illegal contracts is far more likely in general to be accomplished by leaving the parties without remedy against each other; and so the modern doctrine is established that relief is not granted where the parties are in *pari delicto*." A review of all the authorities would occupy much space and be of little practical value.

The test for determining when the objection that the parties are in *pari delicto* can be sustained is whether the plaintiff can

make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party, and, when applied to this case, is conclusive against the plaintiff. He asserts that he knowingly entered into an unlawful engagement; one contrary to good morals and against public policy. He entered into it with knowledge that either he or the other party must lose, and with the intention of reaping the fruits of his unlawful venture, if he should prove to be the winner. His expectations were disappointed. He lost, paid part of the loss, and, for the purpose of making further payment, drew his check on a bank in which he had sufficient funds on deposit to pay them. These checks he delivered to the winner, or his agent, and, having gone thus far, he appeals to a court of equity to interfere in his behalf, and interpose its extraordinary aid by injunction to stop their payment. After he lost, he might have refused further to act, and still be safe, and if, by giving the checks, the other party has acquired an advantage over him, it results from his voluntary act on the executor of his illegal enterprise. We fail to perceive how to relieve parties in cases like this from the consequences in which their own wrongful conduct has involved them would tend to discourage such adventures, promote good morals, increase respect for the law, or accord with a sound public policy.

In reaching this conclusion, we have not overlooked the rule that a party who advances money upon an undertaking or agreement to do an act that is illegal, immoral, or against public policy, may, at any time before the wrongful act is done, and while the agreement or undertaking remains wholly unexecuted, repent and retract. He may wholly rescind the contract, prevent the act from being done, and recover back. The law encourages such repentance and abandonment of the unlawful undertaking, and will aid the party, because it tends to prevent wrongdoing. But to be efficacious the repentance must be timely, and it comes too late after the unlawful act has been done, and the undertaking in whole or in part performed. Then the law will assist neither party in its further execution, nor to undo what has been done in its execution. *Hooker v. De Palos*, 28 Ohio St. 251.

Judgment reversed and petition dismissed.

MINSHALL and SPEAR, JJ., dissent.

CRAIG v. LESLIE.

(3 Wheat. 563-576.)

Supreme Court of the United States. 1818.

Robert Craig's will contained the following clause: "I give and bequeath to my brother, Thomas Craig, of Baith parish, Ayrshire, Scotland, all the proceeds of my estate, both real and personal, which I have herein directed to be sold, to be remitted to him, according as the payments are made." Thomas Craig being an alien, the question was, could he take the proceeds of this land, which had been devised to one Leslie, in trust, the proceeds from the sale of which were to be paid to him?

Mr. Justice WASHINGTON delivered the opinion of the court. The incapacity of an alien to take, and to hold beneficially, a legal or equitable estate in real property, is not disputed by the counsel for the plaintiff; and it is admitted by the counsel for the state of Virginia, that this incapacity does not extend to personal estate. The only inquiry, then, which this court has to make is, whether the above clause in the will of Robert Craig is to be construed, under all the circumstances of this case, as a bequest to Thomas Craig of personal property, or as a devise of the land itself.

Were this a new question, it would seem extremely difficult to raise a doubt respecting it. The common sense of mankind would determine, that a devise of money, the proceeds of land directed to be sold, is a devise of money, notwithstanding it is to arise out of land; and that a devise of land, which a testator by his will directs to be purchased, will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made.

¹ The settled doctrine of the courts of equity corresponds with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made. In the case of *Fletcher v. Ashburner*, 1 Brown, Ch. 497, the master of the rolls says, that "nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given." He adds, "the owner of the fund, or the contracting parties, may make land money or money land. The cases establish this rule universally." This declaration is well warranted by the cases to which the master of

the rolls refers, as well as by many others. See *Doughty v. Bull*, 2 P. Wms. 320; *Yates v. Compton*, Id. 308; *Trelawney v. Booth*, 2 Atk. 307.

The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance, and not the mere forms and circumstances of agreements and other instruments, considers things directed or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity.

² Thus, where the whole beneficial interest in the money in the one case, or in the land in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the cestui que trust, but will permit him to take the money or the land, if he elect to do so before the conversion has actually been made; and this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity. It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal, at the will of the party entitled to the beneficial interest.

If this election be not made in time to stamp the property with a character different from that which the will or other instrument gives it, the latter accompanies it, with all its legal consequences, into the hands of those entitled to it in that character. ³ So that in case of the death of the cestui que trust, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done had the trust been executed, and the conversion actually made in his lifetime.

In the case of *Kirkman v. Milles*, 13 Ves. 338, which was a devise of real estate to trustees upon trust to sell, and the moneys arising as well as the rents and profits till the sale, to be equally divided between the testator's three daughters, A. B. and C. The estate was, upon the death of A. B. and C., considered and treated as personal property, notwithstanding the cestui que trusts, after the death of the testator, had entered upon,

² Where the whole beneficial interest in the land in one case, or in the money in the other, belongs to the person for whose use it is given, a court of equity will permit the cestui que trust to take the money or land at his election, if he elect before the conversion is made.

³ But if the cestui que trust die, without having determined his election, the property will pass to his heirs or personal representatives, in the same manner as it would have done if the conversion had been made, and the trust executed in his lifetime.

¹ Equity considers land, directed to be sold and converted into money, as money; and money directed to be employed in the purchase of land as land.

and occupied the land for about two years prior to their deaths; but no steps had been taken by them, or by the trustees, to sell, nor had any requisition to that effect been made by the former to the latter. The master of the rolls was of opinion, that the occupation of the land for two years was too short to presume an election. He adds: "The opinion of Lord Rosslyn, that property was to be taken as it happened to be at the death of the party from whom the representative claims, had been much doubted by Lord Eldon, who held that without some act, it must be considered as being in the state in which it ought to be; and that Lord Rosslyn's rule was new, and not according to the prior cases."

The same doctrine is laid down and maintained in the case of *Edwards v. Countess of Warwick*, 2 P. Wms. 171, which was a covenant on marriage to invest £10,000, part of the lady's fortune, in the purchase of land in fee, to be settled on the husband for life, remainder to his first and every other son in tail male, remainder to the husband in fee. The only son of this marriage having died without issue, and intestate, and the investment of the money not having been made during his life, the chancellor decided that the money passed to the heir at law; that it was in the election of the son to have made this money, or to have disposed of it as such, and that, therefore, even his parol disposition of it would have been regarded; but that something to determine the election must be done.

⁴ This doctrine, so well established by the cases which have been referred to, and by many others which it is unnecessary to mention, seems to be conclusive upon the question which this court is called upon to decide, and would render any farther investigation of it useless, were it not for the case of *Roper v. Radcliffe*, which was cited, and mainly relied upon, by the counsel for the state of Virginia.

The short statement of that case is as follows: John Roper conveyed all his lands to trustees and their heirs, in trust, to sell the same, and out of the proceeds, and of the rents and profits till sale, to pay certain debts, and the overplus or the money to be paid as he, the said John Roper, by his will or otherwise, should appoint, and for want of such appointment, for the benefit of the said John Roper, and his heirs. By his will reciting the said deed, and the power reserved to him in the surplus of the said real estate, he bequeathed several pecuniary legacies, and then gave the residue of his real and personal estate to William Constable and Thomas Radcliffe, and two others, and to their heirs. By a codicil to this will, he bequeathed other pecuniary legacies; and the remainder, whether in lands or personal

estate, he gave to the said W. C. and T. R.

Upon a bill filed by W. C. and T. R. against the heir at law of John Roper, and the other trustees, praying to have the trust executed, and the residue of the money arising from the sale of the lands to be paid over to them; the heir at law opposed the execution of the trust, and claimed the land as a resulting trust, upon the ground of the incapacity of Constable and Radcliffe to take, they being papists. The decree of the court of chancery, which was in favour of the papists, was, upon appeal to the house of lords, reversed, and the title of the heir at law sustained; six judges against five, being in his favour.

Without stating at large the opinion upon which the reversal took place, this court will proceed, 1st. To examine the general principles laid down in that opinion; and then, 2d. The case itself, so far as it has been pressed upon us as an authority to rule the question before the court.

In performing the first part of this undertaking, it will not be necessary to question any one of the premises laid down in that opinion. They are, 1. That land devised to trustees, to sell for payment of debts and legacies, is to be deemed as money. This is the general doctrine established by all the cases referred to in the preceding part of this opinion. ⁵ 2. That the heir at law has a resulting trust in such land, so far as it is of value, after the debts and legacies are paid, and that he may come into equity and restrain the trustee from selling more than is necessary to pay the debt and legacies; or he may offer to pay them himself, and pray to have a conveyance of the part of the land not sold in the first case, and the whole in the latter, which property will, in either case, be land, and not money. This right to call for a conveyance is very correctly styled a privilege, and it is one which a court of equity will never refuse, unless there are strong reasons for refusing it. The whole of this doctrine proceeds upon a principle which is incontrovertible, that where the testator merely directs the real estate to be converted into money, for the purposes directed in his will, so much of the estate, or the money arising from it, as is not effectually disposed of by the will, (whether it arise from some omission or defect in the will itself, or from any subsequent accident, which prevents the devise from taking effect,) results to the heir at law, as the old

⁵ Land, devised to trustees, to sell for payment of debts and legacies, is to be deemed as money.

The heir at law has a resulting trust in such lands, after the debts and legacies are paid, and may come into equity and restrain the trustee from selling more than sufficient to pay them, or may offer to pay them himself, and pray a conveyance of the part of the land not sold in the first case, and the whole in the latter, which property in either case will be land, and not money.

⁴ The case of *Roper v. Radcliffe*, 9 Mod. 167, examined.

use not disposed of. Such was the case of *Cruse v. Barley*, 3 P. Wms. 20, where the testator having two sons, A. and B., and three daughters, devised his lands to be sold to pay his debts, &c., and as to the moneys arising by the sale, after debts paid, gave £200 to A. the eldest son, at the age of 21, and the residue to his four younger children. A. died before the age of 21, in consequence of which the bequest to him failed to take effect. The court decided that the £200 should be considered as land to descend to the heir at law of the testator, because it was in effect the same as if so much land as was of the value of £200 was not directed to be sold, but was suffered to descend. The case of *Ackroyd v. Smithson*, 1 Brown, Ch. 503, is one of the same kind, and establishes the same principle. So, likewise, a money provision under a marriage contract, to arise out of land, which did not take effect, on account of the death of the party for whose benefit it was intended, before the time prescribed, resulted as money to the grantor, so as to pass under a residuary clause in his will. *Hewitt v. Wright*, 1 Brown, Ch. Cas. 86.

⁶ But even in cases of resulting trusts, for the benefit of the heir at law, it is settled that if the intent of the testator appears to have been to stamp upon the proceeds of the land described to be sold, the quality of personality, not only to subserve the particular purposes of the will, but to all intents, the claim of the heir at law to a resulting trust is defeated, and the estate is considered to be personal. This was decided in the case of *Yates v. Compton*, 2 P. Wms. 308, in which the chancellor says, that the intention of the will was to give away all from the heir, and to turn the land into personal estate, and that that was to be taken as it was at the testator's death, and ought not to be altered by any subsequent accident, and decreed the heir to join in the sale of the land, and the money arising therefrom to be paid over as personal estate to the representatives of the annuitant, and to those of the residuary legatee. In the case of *Fletcher v. Ashburner*, before referred to, the suit was brought by the heir at law of the testator, against the personal representatives and the trustees claiming the estate upon the ground of a resulting trust. But the court decreed the property, as money, to the personal representatives of him to whom the beneficial interest in the money was bequeathed, and the master of the rolls observes, that the case of *Emblin v. Freeman*, and *Cruse v. Barley*, are those where real estate being directed to be sold, some part

⁶ But if the intent of the testator appears to have been to stamp upon the proceeds of the land directed to be sold, the quality of personality, not only for the particular purposes of the will, but to all intents, the claim of the heir at law to a resulting trust is defeated, and the estate is considered to be personal.

of the disposition has failed, and the thing devised has not accrued to the representative, or devisee, by which something has resulted to the heir at law.

It is evident, therefore, from a view of the above cases, that the title of the heir to a resulting trust can never arise, except when something is left undisposed of, either by some defect in the will, or by some subsequent lapse, which prevents the devise from taking effect; and not even then, if it appears that the intention of the testator was to change the nature of the estate from land to money, absolutely and entirely, and not merely to serve the purposes of the will. But the ground upon which the title of the heir rests is, that whatever is not disposed remains to him, and partakes of the old use, as if it had not been directed to be sold.

The third proposition laid down in the case of *Roper v. Radcliffe*, 9 Mod. 167, is, that equity will extend the same privilege to the residuary legatee which is allowed to the heir, to pay the debts and legacies, and call for a conveyance of the real estate, or to restrain the trustees from selling more than is necessary to pay the debts and legacies.

⁷ This has, in effect, been admitted in the preceding part of this opinion; because, if the cestui que trust of the whole beneficial interest in the money to arise from the sale of the land, may claim this privilege, it follows, necessarily, that the residuary legatee may, because he is, in effect, the beneficial owner of the whole, charged with the debts and legacies, from which he will be permitted to discharge it, by paying the debts and legacies, or may claim so much of the real estate as may not be necessary for that purpose.

⁸ But the court cannot accede to the conclusion, which, in *Roper v. Radcliffe*, is deduced from the establishment of the above principles. That conclusion is, that in respect to the residuary legatee, such a devise shall be deemed as land in equity, though in respect to the creditors and specific legatees it is deemed as money. It is admitted, with this qualification, that if the residuary legatee thinks proper to avail himself of the privilege of taking it as land, by making an election in his life time, the property will then assume the character of land. But if he does not make this election, the property retains the character of personality to every intent and purpose. The cases before cited

⁷ Equity will extend the same privilege to the residuary legatee which is allowed to the heir, to pay the debts and legacies, and call for a conveyance of the real estate, or to restrain the trustees from selling more than is necessary to pay the debts and legacies.

⁸ The conclusion—which, in *Roper v. Radcliffe*, is deduced from the above principles, that in respect to the residuary legatee such a devise shall be considered as land in equity, though in respect to the creditors and specific legatees, it is deemed as money—denied.

seem to the court to be conclusive upon this point; and none were referred to, or have come under the view of the court, which sanction the conclusion made in the unqualified terms used in the case of *Roper v. Radcliffe*.

As to the idea that the character of the estate is affected by this right of election, whether the right be claimed or not, it appears to be as repugnant to reason, as we think it has been shown to be, to principle and authorities. Before any thing can be made of the proposition, it should be shown that this right of privilege of election is so indissolubly united with the devise, as to constitute a part of it, and that it may be exercised in all cases, and under all circumstances. This was, indeed, contended for with great ingenuity and abilities by the counsel for the state of Virginia, but it was not proved to the satisfaction of the court.

It certainly is not true, that equity will extend this privilege in all cases to the cestui que trust. It will be refused if he be an infant. In the case of *Seeley v. Jago*, 1 P. Wms. 389, where money was devised to be laid out in land in fee, to be settled on A. B. and C., and their heirs, equally to be divided: On the death A., his infant heir, together with B. and C., filed their bill, claiming to have the money, which was decreed accordingly as to B. and C.; but the share of the infant was ordered to be put out for his benefit, and the reason assigned was, that he was incapable of making an election, and that such election, if permitted, would, in case of his death, be prejudicial to his heir.

In the case of *Foone v. Blount*, Cowp. 467, Lord Mansfield, who is compelled to acknowledge the authority of *Roper v. Radcliffe* in parallel cases, combats the reasoning of Chief Justice Parker upon this doctrine of election, with irresistible force. He suggests, as the true answer to it, that though in a variety of cases this right exists, yet it was inapplicable to the case of a person who was disabled by law from taking land, and that therefore a court of equity would, in such a case, decree that he should take the property as money.

This case of *Walker v. Denne*, 2 Ves. Jr. 170, seems to apply with great force to this part of our subject. The testator directed money to be laid out in lands, tenements, and hereditaments, or on long terms, with limitations applicable to real estate. The money not having been laid out, the crown, on failure of heirs, claimed the money as land. It was decided that the crown had no equity against the next of kin to have the money laid out in real estate in order to claim it by escheat. It was added that the devisees, on becoming absolutely entitled, have the option given by the will; and a deed of appointment by one of the cestui que trusts, though a feme covert, was held a sufficient indication of her intention that it should con-

tinue personal against her heir claiming it as ineffectually disposed of for want of her examination. This case is peculiarly strong, from the circumstance, that the election is embodied in the devise itself; but this was not enough, because the crown had no equity to force an election to be made for the purpose of producing an escheat.

Equity would surely proceed contrary to its regular course, and the principles which universally govern it, to allow the right of election where it is desired, and can be lawfully made, and yet refuse to decree the money upon the application of the alien, upon no other reason, but because, by law, he is incapable to hold the land: In short, to consider him in the same situation as if he had made an election, which would have been refused had he asked for a conveyance. The more just and correct rule would seem to be, that where the cestui que trust is incapable to take or to hold the land beneficially, the right of election does not exist, and consequently, that the property is to be considered as being of that species into which it is directed to be converted.

Having made these observations upon the principles laid down in the case of *Roper v. Radcliffe*, and upon the arguments urged at the bar in support of them, very few words will suffice to show that, as an authority, it is inapplicable to this case.

* The incapacities of a papist under the English statute of 11 & 12 Wm. III., c. 4, and of an alien at common law, are extremely dissimilar. The former is incapable to take by purchase, any lands, or profits out of lands; and all estates, terms, and any other interests or profits whatsoever out of lands, to be made, suffered, or done, to, or for the use of such person, or upon any trust for him, or to, or for the benefit, or relief of any such person, are declared by the statute to be utterly void.

Thus, it appears that he cannot even take. His incapacity is not confined to land, but to any profit, interest, benefit, or relief, in or out of it. He is not only disabled from taking or having the benefit of any such interest, but the will or deed itself, which attempts to pass it, is void. In *Roper v. Radcliffe*, it was strongly insisted, that the money given to the papist, which was to be the proceeds of the land, was a profit or interest out of the land. If this be so, (and it is not material in this case to affirm or deny that position,) then the will of John Roper in relation to the bequest to the two papists, was void under the statute; and if so, the right of the heir at law of the testator, to the residue, as a resulting trust, was incontestable. The cases above cited have fully established that principle. In that case, too, the rents and profits, till the sale, would have belonged to the papists, if they were capable

* The case of *Roper v. Radcliffe* distinguished from the present case.

of taking, which brought the case still more strongly within the statute; and this was much relied on, not only in reasoning upon the words, but the policy of the statute.

¹⁰ Now, what is the situation of an alien? He cannot only take an interest in land, but a freehold interest in the land itself, and may hold it against all the world but the king, and even against him until office found, and he is not accountable for the rents and profits previously received.¹¹ In this case the will being valid, and the alien capable of taking under it, there can be no resulting trust to the heir, and the claim of the state is founded solely upon a supposed equity, to have the land by escheat as if the alien had, or could upon the principles of a court of equity, have elected to take the land instead of the money. The points of difference between the two cases are so striking that it would be a waste of time to notice them in detail.

It may be further observed, that the case of *Roper v. Radcliffe* has never, in England, been applied to the case of aliens; that its authority has been submitted to with reluctance, and is strictly confined in its application to cases precisely parallel to it. Lord Mansfield in the case of *Foone v. Blount*, speaks of it with marked disapprobation; and we know, that had Lord Trevor

¹⁰ An alien may take, by purchase, a freehold, or other interest in land, and may hold it against all the world except the king; and even against him until office found; and is not accountable for the rents and profits previously received.

¹¹ Vide 3 Wheat. 12. *Jackson ex dem. State of New York v. Clarke*, note c.

been present, and declared the opinion he had before entertained, the judges would have been equally divided.

The case of the Attorney General and Lord Weymouth, Amb. 20, was also pressed upon the court, as strongly supporting that of *Roper v. Radcliffe*, and as bearing upon the present case.

The first of these propositions might be admitted; although it is certain that the mortmain act, upon which that case was decided, is even stronger in its expression than the statute against papists, and the chancellor so considers it; for he says, whether the surplus be considered as money or land, it is just the same thing, the statute making void all charges and encumbrances on land, for the benefit of a charity.

But if this case were, in all respects, the same as *Roper v. Radcliffe*, the observations which have been made upon the latter would all apply to it. It may be remarked, however, that in this case, the chancellor avoids expressing any opinion upon the question, whether the money to arise from the sale of the land, was to be taken as personalty or land; and, although he mentions the case of *Roper v. Radcliffe*, he adds, that he does not depend upon it, as it is immaterial whether the surplus was to be considered as land or money under the mortmain act.

Upon the whole we are unanimously of opinion, that the legacy given to Thomas Craig, in the will of Robert Craig, is to be considered as a bequest of personal estate, which he is capable of taking for his own benefit.

Certificate accordingly.

WYMAN v. FT. DEARBORN NAT. BANK
et al.

(54 N. E. 946, 181 Ill. 279.)

Supreme Court of Illinois. Oct. 16, 1899.

Appeal from appellate court, First district. Bill by Walter Wyman against the Ft. Dearborn National Bank and others. From a decree of the superior court of Cook county in favor of complainants, defendants sued out a writ of error to the appellate court, where the decree was reversed. 80 Ill. App. 150. Plaintiff appealed. Reversed.

On September 1, 1896, the First National Bank of Helena, Mont., drew its check upon the Ft. Dearborn National Bank of Chicago for \$10,000, in favor of appellant. At the time this check was given, the Ft. Dearborn National Bank had in its possession, on deposit to the credit of the First National Bank of Helena, \$20,523.67. The Ft. Dearborn National Bank at the same time held a certificate of deposit of date May 15, 1895, from the First National Bank of Helena, in the sum of \$25,000, which latter was secured by collateral for the face amount of \$30,000 of notes taken by the First National Bank of Helena and indorsed to the Ft. Dearborn National Bank. The Helena bank was indebted to the Ft. Dearborn National Bank, on account, \$649.89. On the 4th day of September, 1896, the Helena bank was placed in the hands of a receiver, and on the same day the Ft. Dearborn National Bank transferred the account on deposit with it to the amount of \$20,523.67 to itself, and credited its certificate of deposit with that amount, debiting the Helena bank with the same sum, and leaving a balance due the Ft. Dearborn National Bank of \$2,321.39, with interest thereon. On the 5th day of September the check drawn in favor of appellant was presented for payment to the Ft. Dearborn National Bank, which was refused. On the 21st day of January, 1897, the appellant filed in the superior court of Cook county his bill, making the Ft. Dearborn National Bank and the receiver of the Helena bank defendants, and sought to marshal assets. To this bill of complaint a demurrer was interposed and overruled. Subsequently the defendants to the bill filed an answer, and the cause was submitted upon bill and answer, and a decree was entered in accordance with the prayer of the bill, to reverse which the defendants sued out a writ of error to the appellate court for the First district, where the decree was reversed, and the cause remanded, with directions to dismiss the bill, whereupon the appellee in the appellate court prosecuted this appeal.

Peckham, Brown & Packard, for appellant. Gilbert & Fell, for appellees.

PHILLIPS, J. (after stating the facts). It is insisted by the appellant that by the

execution and delivery of its check for \$10,000 against the deposit account of the Ft. Dearborn National Bank the First National Bank of Helena assigned and transferred to the appellant, from that deposit account, an amount sufficient to pay the check on September 1, 1896, the time at which it was drawn; and as sustaining this contention appellant cites *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483, 2 N. E. 401; *Abt v. Bank*, 159 Ill. 467, 42 N. E. 856; and *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 49 N. E. 420. The principle is clearly established by the foregoing and other authorities in this state that the check of a depositor upon his banker, delivered to another for value, transfers to that other the title to so much of the deposit as the check calls for, and the banker becomes the holder of the money for the use of the holder of the check, and is bound to account to him for the amount thereof, provided the party drawing the check has funds to that amount on deposit, subject to his check, at the time the same is presented. *Munn v. Burch*, 25 Ill. 21. The check operates as an absolute assignment of the fund on which it is drawn from the time it is delivered, as between the drawer and the payee, and the bank is bound as soon as the check is presented, and whatever sum stands upon the books to the credit of the depositor at the time of such presentation is absolutely assigned to the holder of the check. *Bickford v. Bank*, 42 Ill. 238; *Brown v. Leckie*, 43 Ill. 497; *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; *Union Nat. Bank v. Oceana Co. Bank*, 80 Ill. 212; *Bank v. Jones*, 137 Ill. 634, 27 N. E. 533; *Niblack v. Bank*, 169 Ill. 517, 48 N. E. 438. And the relation existing between the drawer, the check holder, and the banker becomes such, when there are sufficient funds on deposit to meet the check at the time of presentation, that, because such funds were appropriated at the time of the drawing of the check, the contract to be implied between the depositor, the banker, and the check holder is that the check holder, whoever he may be, may have his action, and recover against the bank the amount, pro tanto, of the check. *Gage Hotel Co. v. Union Nat. Bank*, supra. In the latter case it was said (page 536, 171 Ill., and page 422, 49 N. E.): "If the funds are in the bank when the check is drawn, the drawing is an appropriation, as between the drawer and the payee, of the sum of money named in the check, which is to lie in the bank until called for by a presentation of the check. It is true that in such a case there is no privity between the bank and the check holder until presentment, and that priority in drawing a check does not give priority of right to the fund as against the banker, but that such priority of right is determined by the order of presentation." It was held in *Niblack v. Bank*, supra (page 521, 169 Ill., and page 439, 48 N. E.): "It

is also the law, where a bank holds a demand note, or a note past due, it has the right to charge such obligation up against the maker's deposit account; and, if it does so before a check drawn by the depositor is presented for payment, it will be entitled to hold the deposit against any check afterwards presented." In this case, on the 4th of September—at least one day before the presentment of the check for payment—the Chicago bank transferred the account, and by proper entries on its books credited the Helena bank with all the money held by it to the credit of the latter bank, which credit was made on a certificate of deposit, which was, in effect, a demand note. *Hunt v. Divine*, 37 Ill. 137; *Tripp v. Curtenius*, 36 Mich. 494. Appropriating the deposit fund in good faith, in pursuance of strict legal rights, for the purpose of protecting its own interests, and without notice of the appropriation of the money by drawing the check in favor of appellant, was not a wrongful act, but one authorized by law, and absolutely transferred the legal and equitable right to the fund so deposited to the Ft. Dearborn National Bank, the check not having been presented to it, nor it having any notice of the same, until the day after the transfer of the account. Under the recognized rule in this state there was between the Helena bank and the payee of the check an absolute assignment of \$10,000, then on deposit with the Ft. Dearborn National Bank, and no right existed in the Helena bank to change that deposit in any way, or to so draw against it as to prevent the assignment pro tanto from being carried out. It is clear that the holder of the check had an interest in the fund so assigned, while it is equally clear that until the bank had notice it could pay subsequently drawn checks, or credit the amount of the deposit on any overdue paper of its own. The equitable interest of the check holder, however, remained the same.

It is a principle controlling the marshaling of securities that where one creditor can resort to two funds, and another to one of them only, the former must seek satisfaction out of that fund which the latter cannot touch. In *Pom. Eq. Jur.* § 1414, it is said: "If, therefore, the prior creditor resorts to the doubly-charged fund, the subsequent creditor will be substituted, as far as possible, to his rights. These rules must be taken with the modifications and exceptions that in their application the paramount incumbrancer shall not be delayed or inconvenienced in the collection of his debt, * * * that the rights of third parties shall not be prejudiced, and that the parties themselves are creditors of the same debtor." Numerous authorities are there cited as sustaining these propositions. The principle of marshaling securities has been frequently applied to cases where there is an equitable interest or lien on collateral securities. In *Colebrooke on Collateral Securities*

it is said (section 98): "By this rule, a creditor having a lien upon two funds for the payment of his debt, and a subsequent creditor a lien upon one only of such funds, the former is required to exhaust his remedy against the fund which is especially for his security before resorting to that in which the subsequent creditor is interested. The rule, however, is never enforced in cases where it would cause an injury or damage to the creditor holding such liens upon separate funds, or would work injustice to other parties. The rule was applied where a merchant had forwarded his note to a broker for sale, and the proceeds, less commissions, remitted. The broker fraudulently pledged the note, with other collaterals, to a bank, to secure a loan to himself, of which the merchant received nothing. The merchant, learning of the misappropriation, gave notice to the bank, and claimed to be subrogated to any surplus arising from other securities held by it after the payment of the loan. Subsequently, and before the maturity of the loan, the note fell due, and was paid without suit. Upon realizing the other securities, the bank held a surplus in its hands. The merchant was entitled to be paid from such surplus, his voluntary payment not affecting his right of recovery." This principle is sustained by *Farwell v. Bank*, 90 N. Y. 483. In that case the merchant had an equitable interest in collaterals, which, with his note, were put up to secure the loan to the broker by reason of the broker's misappropriation of the note, and it is not, equitably, a stronger case for the marshaling of assets than where, as in this case, the bank had as security for its certificate of deposit and for its account due notes aggregating about \$30,000, and a deposit of over \$20,000. Here, \$10,000 of the amount deposited having been equitably assigned to the complainant, by reason of its appropriation by the bank before receiving notice of the drawing of the check the complainant was deprived of all interest in the deposit, and the Helena bank, or its receiver (who could have no greater interest than the bank itself), received the benefit of the application of the deposit by the Ft. Dearborn National Bank on its certificate of deposit, and the complainant, as holder of the check, had such an interest in the sum deposited that he should be subrogated, as against the Helena bank or its receiver, to the notes held by the Ft. Dearborn National Bank after the payment of the residue due the latter bank; and this principle of subrogation is applicable because, by reason of the appropriation of the fund by the bank with which the deposit was made to the payment of a debt for which it held two distinct characters of securities, one of those securities is, to an extent sufficient to pay the complainant, released from liability so far as the Ft. Dearborn National Bank was concerned, and the latter bank had lawfully

used \$10,000 of a deposit theretofore assigned to the complainant by the Helena bank. 2 Beach, Mod. Eq. Jur. § 784; 1 Story, Eq. Jur. §§ 635, 636.

It is a maxim of equity that "equity regards and treats that as done which in good conscience ought to be done," and in writing of this maxim Mr. Pomeroy, in his work on Equity Jurisprudence (section 365), says: "The principle involves the notion of an equitable obligation existing from some cause; of a present relation of equitable right and duty subsisting between two parties; a right held by one party, from whatever cause arising, that the other should do some act, and the corresponding duty—the 'ought'—resting upon the latter to do such act. Equity does not regard and treat as done what might be done or what could be done, but only what ought to be done. Nor does the principle operate in favor of every person, no matter what may be his situation and relations, but only in favor of him who holds the equitable right to have the act performed, as against the one upon whom the duty of such performance has devolved." A court of equity, acting upon this fundamental principle, may go beneath the appearance of things, and deal with the real facts, where the interest is a purely equitable one, recognized by courts of equity alone. When, therefore, a prior incumbrancer of two funds, by his election of remedies, deprives a junior incumbrancer, who has a lien upon one of the funds only, from reaching the particular fund on which he has a lien, the junior incumbrancer, to the extent of his lien, should be substituted to the lien of the paramount incumbrancer upon the other fund bound, as against the debtor and all claiming under him by lien or title subsequent in time. *Gibson v. Seagrim*, 20 Beav. 614; *James v. Hubbard*, 1 Paige, 228; *Clowes v. Dickenson*, 5 Johns. Ch. 235. Under a bill for marshaling securities relief may be had in that character of case. The Ft. Dearborn National Bank had

a right to apply the deposit in payment of the indebtedness pro tanto to the extent of the deposit, and deprive the check holder of any part of that deposit as a fund assigned to him; but he had such an equitable interest in that fund, by reason of its assignment by the check, that he is entitled to be subrogated to the extent of his check, with interest thereon from the time it was presented, to the fund to be derived from the collection or sale of the collateral securities held by the Ft. Dearborn National Bank as security on its certificate of deposit and bank account, after the residue is paid to it. The superior court erred in decreeing that the Ft. Dearborn National Bank should deliver to the receiver of the First National Bank of Helena the collateral notes, but did not err in decreeing that from the proceeds of the same there should first be paid to the Ft. Dearborn National Bank the amount, including interest, due it, and to pay to Wyman the amount due on said check and interest, and to retain the balance as part of the assets of the First National Bank of Helena. Nor was there error in the decree of the superior court in directing, if there was not enough to pay Wyman in full, the amount unpaid should be allowed as a claim against said First National Bank of Helena, to be paid in due course of administration of its assets, and that the receiver pay the costs. It was error in the appellate court for the First district to reverse the entire decree of the superior court, and remand the cause with directions to dismiss the bill. So far as the superior court decreed that the Ft. Dearborn National Bank deliver to the receiver of the First National Bank of Helena the collateral notes, its decree is reversed, but in all other respects the decree of said court is affirmed. For the error of the appellate court for the First district in reversing the entire case, and remanding with directions to dismiss the bill, its decree is reversed, and the cause is remanded. Reversed and remanded.

STINCHFIELD v. MILLIKEN.

(71 Me. 567.)

Supreme Judicial Court of Maine. December, 1880.

PETERS, J. The following facts are deducible from the evidence in this case: The complainant purchased of the defendants, certain steam-mill machinery, for removal from Hallowell to Danforth, in this State. There was at the time a verbal agreement, that the complainant should build a mill, and put the machinery into it, on a lot of land in Danforth, bought by him of one Russell, who was to deed the lot directly to the defendants. The complainant was also to procure a deed of his home (another) lot to the defendants from the heirs of H. E. Prentiss, who held an absolute title thereof as security for the complainant's indebtedness to them, there being a small balance only unpaid, which the defendants were to pay for him. The defendants were to give an agreement, to convey to the complainant if he paid his indebtedness to them according to the tenor of certain notes to be given.

On June 15, 1875, the complainant gave to the defendants a mortgage on the machinery as personal property to secure the notes hereafter named, in order to protect a lien thereon until the machinery should be put into the mill to be built, and become a part of the real estate. And there was embodied in this mortgage, an agreement of the complainant to build the mill and put the machinery into it. On June 16, 1875, Russell conveyed the mill lot to the defendants. On August 2, 1875, Prentiss conveyed the home lot to them, they paying the balance of the Prentiss claim. On August 4, 1875, the defendants gave a writing to the complainant, agreeing to convey the property to him upon the condition that he would pay to them his notes on one, two, three, and five years, respectively, with interest. The notes were given for the amount payable for the machinery, the sum paid to Prentiss, and for other loans and advances. The complainant went on and erected and completed a mill on the Russell lot, and the steam-mill machinery became a part of it.

The complainant seeks to redeem the property, claiming the transaction to be a mortgage. The defendants contend that the transaction was not a mortgage, that it was a conditional sale.

It was not a legal mortgage: Because the defeasance has no seal. *Warren v. Lovis*, 53 Maine, 463. And because the papers were not between the same parties. At law, the conveyance must be made by the mortgagor and the defeasance by the mortgagee. *Shaw v. Erskine*, 43 Maine, 371.

But the transaction was in equity a mortgage—an equitable mortgage. The criterion is the intention of the parties. In equity, this intention may be ascertained from all pertinent facts either within or without the

written parts of the transaction. Where the intention is clear that an absolute conveyance is taken as a security for a debt, it is in equity a mortgage. No matter how much the real transaction may be covered up and disguised. The real intention governs. "If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage." *Flagg v. Mann*, 2 Sumn. 533, Fed. Cas. No. 4,847.

The existence of a debt is well nigh an infallible evidence of the intention. The intention here is transparent. The defendants have a debt and held the property as a security for its collection. A legal mortgage was avoided; an equitable mortgage was made.

Although different at law, in equity a mortgage is not prevented because the conveyance does not come from the equitable mortgagor. It is sufficient that the debtor has an interest in the property conveyed, either legal or equitable. Having such an interest, if he procures a conveyance to one who advances money upon it for him, taking the property as security for the money advanced, he has a right to redeem. The grantee in such case, acquiring the title by his act, holds it as his mortgagee. Jones on Mort. 2d ed. § 331. *Stoddard v. Whiting*, 46 N. Y. 627; *Carr v. Carr*, 52 N. Y. 251.

It is denied that this court has the power to declare that an absolute deed shall be deemed to be a mortgage, allowing an equitable mortgagor the right to redeem. At law, it has no such power. Nor, when the court had a limited jurisdiction in equity, was the doctrine admitted. It was always understood, however, that, in a case like the present, if, instead of a demurrer, an answer was filed admitting the facts alleged, the court had the power to apply the remedy. *Thomaston Bank v. Stimpson*, 21 Maine, 195; *Whitney v. Bachelder*, 32 Maine, 313; *Howe v. Russell*, 36 Maine, 115; *Richardson v. Woodbury*, 43 Maine, 206. But since the act of 1874 conferred general chancery powers upon the court, it has full and complete jurisdiction in such cases. *Rowell v. Jewett*, 69 Maine, 293-303; Jones, Mort. (2d ed.) § 282.

Courts of equity generally exercise such power. While the grounds upon which the doctrine is admitted vary with different courts, there is a great concurrence of opinion as far as the result is concerned. In our judgment, it is a sound policy as well as principle to declare that, to take an absolute conveyance as a mortgage without any defeasance, is in equity a fraud. Experience shows that endless frauds and oppressions would be perpetrated under such modes, if equity could not grant relief. It is taking an agreement, in one sense, exceeding and differing from the true agreement. Instead of setting it wholly aside, equity is worked out by adapting it to the purpose originally intended. Equity allows reparation to be

made by admitting a verbal defeasance to be proved. The cases which support this view are too numerous to cite. The American cases are collected in Jones, Mort. 2d ed. § 241, *et seq.* See *Campbell v. Dearborn*, 109 Mass. 130; and *Hassam v. Barrett*, 115 Mass. 256.

The complainant seeks to separate the articles originally mortgaged as personal property, and, being allowed the value of them, redeem the balance of the estate only. That would not be equitable. The personal became a part of the real as originally designed to be. It was affixed and solidly bolted thereto. The mortgage was evidently only to serve a temporary purpose. It was not just to either party that there should be two mortgages instead of one. It is urged that the defendants foreclosed the personal mortgage. It could not be done. The personal mortgage was extinguished when attempted to be done. That was but a ruse to get the possession which the defendants were entitled to. No severance was ever made or attempted to be made.

It is intimated that the mill has burned down, *pendente lite*, under an insurance obtained by the defendants, and a question may arise, before the master, whether the complainant should have a credit of the net proceeds. If the insurance was obtained on the mortgagees' own account only, they should not be allowed. *Cushing v. Thompson*, 34 Maine, 496; *Pierce v. Faunce*, 53 Maine, 351. The head note in *Larrabee v. Lambert*, 32 Maine, 97, is erroneous in that respect. It was allowed in that case by consent. *Insurance Co. v. Woodbury*, 45 Maine, 447.

But where a mortgagee insures the property by the authority of the mortgager, and charges him with the expense, then any insurance recovered should be accounted for. And if a mortgager covenants to insure, and fails to do so, the mortgagee can himself insure at the mortgager's expense.

One of the defendants testifies that "Stinch-

field agreed to pay all taxes and insurance." He also says, "We have had the house, stable and mill insured, and have paid the insurance, \$108." We think this is evidence of an insurance obtained by the mortgagees at the expense of the mortgager on account of his failure to keep his verbal covenant to insure, and renders it proper that the net proceeds of any insurance obtained should be allowed in the settlement between them.

But this cannot be, if the insurance was collected under a policy in which it is agreed between the insured and insurer that the company in case of loss should be subrogated to the right of the mortgagee. For in such case the insurance is not in fact on the mortgager's account, nor is it such an insurance as could be made available to him. Jones, Mort. (2d ed.) § 420, and cases in note.

The complainant may redeem the whole property upon payment of whatever may be due upon the whole debt. Inasmuch as the complainant sets up a claim exceeding the equitable right, neither party to recover costs up to the entry of this order; and whether future costs shall be recovered by either side, to be reserved for decision when the proceedings are to be finally terminated. Another reason why complainant should not recover costs is, that when his bill was commenced the mortgage debt was not due. The mortgage could not be redeemed until 1880. The bill was commenced long before that time. But as the mortgage is now due, and no point is taken that the proceeding was premature, it will probably be for the interest of all the parties that their matters may be adjusted under this bill. For which purpose a master must be appointed, unless the parties can best determine the accounts between themselves.

Decree accordingly.

APPLETON, C. J., WALTON, DANFORTH, VIRGIN, and LIBBEY, JJ., concurred.

McLAREN v. BREWER.

(51 Me. 402.)

Supreme Judicial Court of Maine. 1863.

Bill in equity. Heard on demurrer.

B. Bradbury, for complainant. A. Hayden, for defendants.

KENT, J. The case, as stated in the bill, to which a general demurrer has been filed, is in substance this: I. N. M. Brewer, the intestate, on the 25th of October, 1851, gave to the complainant a mortgage of a ship, then on the stocks, to secure all sums of money then due, and such further sums as the complainant might furnish and advance to said Brewer, for the purpose of finishing said ship and fitting her for sea. The vessel was completed, and was registered in the name of said Brewer as owner of seven-eighths, and of Nathaniel Y. French of one-eighth. The said Brewer, on the back of said mortgage, acknowledged in writing that the ship thus registered was the vessel named in the mortgage. The mortgage was duly recorded, on the day of registry, in the custom house, and afterwards in the town clerk's office. Soon afterwards the ship proceeded to sea, and has never since been in this state, except in June, 1858, and the complainant has not exercised control over her or received any possession under his mortgage. In February, 1858, the ship being in New Orleans, the said Brewer sold to said French the seven-eighths of the ship, which then stood in his name, for their full value, making no reservation of the rights of the complainant under his mortgage, but giving an absolute bill of sale, with warranty, of said seven-eighths. Upon the sale, Brewer received from French, as part of the consideration, his three negotiable notes, amounting in all to \$12,240, in nearly equal sums, and payable at different dates, the latest being the first day of March, 1859; the said notes being secured by a mortgage of said vessel given by French to Brewer. In March, 1858, a few weeks after the sale, Brewer died, and the respondent has been appointed as administratrix on his estate, and said notes and mortgage to Brewer have come into her hands as such administratrix. One of the notes has been paid to her, and she still holds the other notes and mortgage. Brewer's estate is represented as insolvent, and commissioners have been appointed, and have reported that the claim of the complainant is \$3,654.85; and, at the time of the decease of Brewer, a large part of the debt intended to be secured by the mortgage to him was due and unpaid, and has not since been paid.

The prayer of the bill is that the proceeds of the sale of the ship, thus existing in the notes, should be applied by the administratrix to the payment of the complainant's debt secured by the mortgage, and for such

relief as the nature of the case may require.

The principal question which arises is whether a mortgagee of a vessel which has been sold in another and a distant state, by the mortgagor in possession, by an absolute bill of sale of the entire vessel or interest, and with warranty, without any prior authority from the mortgagee, can follow the proceeds of the sale, existing in the notes given for the purchase, and in the possession of the mortgagor, or his representative.

It is a well-settled doctrine, both in law and in equity, that a mere change of property from one form to another cannot, in itself, divest the owner, or those who have distinct and immediate rights in the thing in its original shape, of their property in it. As a general rule, that right attaches to the new form, so long as such new property is capable of being identified and distinguished from all other property, and no rights of any bona fide purchaser for a valuable consideration, without notice, intervene. It makes no difference, in law, into what other form the change may have been made, whether into promissory notes received as the consideration of the transfer, or into other merchandise. The product is substituted for the original thing, and so remains, as long as it can be clearly shown to be such substitute. It ceases when the means of distinguishing and identifying fail. *Scott v. Surman*, Willes, 400; *Whitcomb v. Jacobs*, Salk. 160; *Taylor v. Plumer* (a leading case) 3 Maule & S. 562; *Story*, Eq. Jur. §§ 1258, 1259.

Money itself may be followed if it can be thus identified. The difficulty in relation to money usually is that, as it has "no ear mark," it cannot be thus distinguished; but this is simply a failure of proof, but does not alter or disprove the principle. *Taylor v. Plumer*, above cited.

This doctrine has been often applied to agents, factors, and trustees, where the sale has been rightfully made, and the proceeds are existing in notes or other property, and the agent dies or becomes insolvent. *Thompson v. Perkins*, 3 Mason, 232, Fed. Cas. No. 13,972; *Story's Equity*, before cited.

This class of cases is where the sale was made by a person intrusted with the property with a power to sell, or where the sale has been subsequently ratified and confirmed.

But the same principle applies to cases where the property of a party has been misapplied, or a trust fund has been wrongfully converted. "An abuse of trust can confer no rights upon the party abusing it, or on those who are in privity with him." *Story*, Eq. Jur. § 1258. The case of *Taylor v. Plumer*, before cited, was one of fraudulent transfer. Mr. Justice Story, in *Conrad v. Insurance Co.*, 1 Pet. 448, says that this general principle "has been extended to cases where there has been a fraudulent or tortious misapplication of property."

It may be admitted that the relation of

mortgagor and mortgagee does not of itself, and unconnected with other facts, create the relation of principal and agent, or give any right to the mortgagor to sell the whole property by an absolute bill of sale, with warranty of a perfect title. The mortgagor in possession may sell his interest, i. e., his right to redeem, but he is a wrongdoer if he sells and delivers the entire property to a purchaser without the knowledge or assent of the mortgagee. Such sale, if the existence of the mortgage is not disclosed, is now made a criminal offense. St. 1860, c. 150. It may also be granted that, as to the mortgagee and his title and interest, such sale does not convey, nor impair his title, and that he may pursue and enforce his right to the thing, wherever he may find it.

But we think that, under the circumstances stated in this bill, he has an election to do so, or to follow the proceeds existing in the new form of negotiable notes in the hands of the mortgagor or the representative of his estate. He may do this on the ground that he assents to and affirms the sale, and to the change of the property mortgaged to him from a vessel to the notes taken. A subsequent ratification is equivalent to a prior authority. We have seen that, if he had had prior authority, he would have come under the rule so often applied to agents and factors.

He may do this, also, on the other ground, that it was a wrongful, if not a fraudulent, conversion of his property by the mortgagor in possession, and he may so far waive the tort as to pursue the proceeds in the new form, whilst they can be identified. He must elect which course to pursue. He cannot have both remedies. *Murray v. Libbern*, 2 Johns. Ch. 441; *Murray v. Ballou*, 1 Johns. Ch. 566.

The bill sufficiently sets out an indebtedness covered by the mortgage. The complainant must, of course, establish such indebtedness, i. e., for money advanced for the purpose of finishing the ship and fitting her for sea. No other debt or claim is covered by the mortgage.

But as to this debt, under the circumstances of this case, the law imputes a trust in the mortgagor during his life, and that trust

follows the notes in the hands of his personal representative. The proceeds of the sale of the ship, in her hands, stand in place of the thing sold, and should be applied as we have a right to presume Mr. Brewer, if he had lived, would have applied them, so far as needed, to the discharge of the debt secured by the mortgage.

In this case there is not a plain and adequate remedy at law. The estate is insolvent, and, to say the least, it would require a peculiar action and judgment in law to take these proceeds out of the general mass of the estate, which by law should be distributed pro rata among all the creditors, and appropriate it specifically to the complainant's debt. Such appropriation is peculiarly the proper province of a court of equity.

According to the statement in the bill, the claim of the complainant is not equal to any one of the notes, and it would be difficult to find any principle of law by which an action of trover could be maintained for them. The estate is entitled to the notes and the proceeds after the mortgage debt is paid, and the claim set up is based on an imputed trust, and not on a legal title to the notes.

It is worthy of observation that the words limiting the equity powers of this court to cases, "where the parties have not a plain and adequate remedy at law," which are found in Rev. St. 1841, c. 96, are omitted in the present Revised Statutes. We are not called upon, in this case, to determine whether the omission of these words does in fact enlarge or alter the equity powers of this court. It seems to leave them under the general rules of equity in all cases where the subject-matter is made by statute cognizable in equity.

It was declared by this court, in *Tappan v. Deblois*, 45 Me. 131, that "by the Revised Statutes of this state (1857) we have jurisdiction of all cases of trust, whether arising by implication of law or created by deed or will."

Demurrer overruled.

APPLETON, C. J., CUTTING, DAVIS, DICKERSON, and BARROWS, JJ., concurred.

CLEMENTS v. TILLMAN et al.

(5 S. E. 194, 79 Ga. 451.)

Supreme Court of Georgia. February 13, 1888.

Error from superior court, Muscogee county; Smith, Judge.

Suit by Hattie E. Tillman and William L. Tillman, plaintiffs and defendants in error, against John W. Clements, defendant and plaintiff in error, for an account and settlement of a legacy due said Hattie E. Tillman under the will of one Jacob A. Clements, John W. Clements being an executor of the same.

The following is the official report:

Hattie E. Tillman, a legatee under the will of Jacob A. Clements, deceased, with her husband and trustee, William L. Tillman, filed their bill for account and settlement against John W. Clements, executor, and Sarah B. Clements, executrix, of said will. The bill contained charges of mismanagement of the estate, violations of the provisions of said bill, and non-payment by the executors of the interest of complainant as legatee. The defendants answered the bill; but as their answers are not material or necessary to an understanding of the errors complained of, they are not set forth. The jury returned the following verdict: "We, the jury, find that Sarah B. Clements has no property or effects of the estate of Jacob A. Clements, deceased, in her hands, as executrix or otherwise. We, the jury, further find that John W. Clements, as executor of the will of Jacob A. Clements, deceased, has now in his hands the sum of eight hundred and ten dollars principal and five hundred dollars interest, belonging to Hattie E. Tillman, as legatee under the will of Jacob A. Clements." Upon this verdict the following decree was rendered by the court: "Whereupon, the premises considered, it is ordered, adjudged, and decreed by the court that the complainant do recover the same sum of eight hundred and ten dollars principal and the further sum of five hundred dollars interest to this date, and the further sum of ——— dollars, costs of suit in this behalf laid out and expended, for which said several sums let execution issue, to be levied in the first place of the goods and chattels, lands and tenements, of said Jacob A. Clements, deceased, in the hands of John W. Clements, executor of the will of said Jacob A. Clements, if to be found; and if not to be found, then to be levied of the personal goods and chattels, lands and tenements, of said John W. Clements. It is further ordered and decreed by said court that the said John W. Clements do satisfy and pay the aforesaid amounts, principal, interest, and costs, to the said complainant, on or before the first day of January next; and, in default thereof, that he be held and deemed to be in contempt of the order and decree of this court." Plaintiff in error excepts to the portion of the decree

embodied by the last sentence, and says the court erred in rendering a decree to be enforced by attachment for contempt—"First, because the verdict was a money verdict, and the same could only be enforced by execution; second, because the verdict of the jury was a money verdict, and could not be enforced by an attachment for contempt, and could only be enforced by execution; third, because the verdict of the jury was a money verdict, and was a debt, and to enforce the decree by an attachment for contempt would be to imprison the defendant for debt, which is prohibited by the constitution of the state; fourth, because the decree sought and moved for provides both for the enforcement of it by execution, and an attachment for contempt; and the complainant should be required to elect whether she would proceed to enforce it by execution or attachment for contempt if the court determined that it could be enforced by attachment for contempt."

C. J. Thornton, for plaintiff in error. L. F. Garrard, for defendants in error.

KIBBEE, J.¹ Originally, in the absence of statutes providing otherwise, decrees of courts of equity, of whatever kind or nature, operated strictly and exclusively in personam. The only remedy for their enforcement was by what is termed "process of contempt," under which the party failing to obey them was arrested and imprisoned until he yielded obedience, or purged the contempt by showing that disobedience was not wilful, but the result of inability not produced by his own fault or contumacy. The writ of assistance to deliver possession, and even the sequestration to compel the performance of a decree, are comparatively of recent origin. Our statutes expressly provide that "all orders and decrees of the court may be enforced by attachment against the person; decrees for money may be enforced by execution against the property." Code, § 3099. "A decree in favor of any party, for a specific sum of money, or for regular installments of money, shall be enforced by execution against property as at law." Code, § 4215. "Every decree or order of a court of equity may be enforced by attachment against the person for contempt; and if a decree be partly for money and partly for the performance of a duty, the former may be enforced by execution, and the latter by attachment or other process." Code, § 4216. The clear legislative intent is manifest to enlarge and render more efficacious equitable remedies, while preserving the remedies the courts had previously employed in the absence of statutes providing others. Under our statutes, when a party is decreed to perform a duty, or to do any act other than the

¹ Blandford, J., being disqualified, Judge Kibbee, of the Oconee circuit, was designated to preside in his stead.

mere payment of money, which the court has jurisdiction to adjudge he shall do, if he disobeys, the authority of the court is defied; he is guilty of contempt, and the arrest and imprisonment of his person is not imprisonment for debt in any appropriate sense of the term. But if a court of equity should render a simple decree for money on a simple money verdict,—a decree which it may now enforce by the ordinary common-law process against property,—the failure to pay the decree would not be contempt, nor could compulsory process against the person of the party in default be resorted to to enforce payment. In *Coughlin v. Ehlert*, 39 Mo. 285, the court uses the following language: "We do not mean to say that a party may not be put in contempt for disobeying a decree for the performance of acts which are within his power, and which the court may properly order to be done. If it were shown, for instance, that the party had in his possession a certain specific sum of money or other thing which he refused to deliver up, under the order of the court, for any purpose, it may very well be that his disobedience would be a contempt for which he might lawfully be imprisoned." In *Carlton v. Carlton*, 44 Ga. 220, Judge McCay, delivering the opinion, says: "We do not intend to say that simply because a debt is adjudged by a decree in chancery, instead of by a judgment at law, it may therefore be enforced by imprisonment. The imprisonment must be clearly for the contempt of the process of the court, and be of one who is able and unwilling to obey the order of the court. * * * It ought never to be resorted to except as a penal process, founded on the unwillingness of the party to obey.

The moment it appears that there is inability, it would clearly be the duty of the judge to discharge the party," etc. The court further held that, "ordinarily, it would be improper to include in the order the alternative order for imprisonment on failure, since it is not to be presumed that a contempt will ensue." The constitutional provision, "there shall be no imprisonment for debt," was not intended to interfere with the traditional power of chancery courts to punish for contempt all refusals to obey their lawful decrees and orders. This proposition may be conceded to be sound without affecting the case at bar in any respect. "The power in question was never exercised by chancery courts except in those cases where a trust in the property or fund arose between the parties litigant, or some specific interest in it was claimed, or the chattel had some peculiar value and importance that a recovery of damages at law for its detention or conversion was inadequate. Such interference was in the nature of a bill quia timet, and was asserted only on a proper showing that the fund or property was in danger of loss or destruction." 1 Story, Eq. Jur. §§ 708-710. "No jurisdiction to compel the payment of an ordinary money demand unconnected with such peculiar equities ever existed in chancery courts, nor had they the power to compel such payment by punishing the refusal to pay under the guise of contempt."

In the case at bar the decree was right in awarding an execution against the executor as set forth in said decree, but the facts did not authorize an alternative order imprisoning the defendant on failure to pay. Judgment reversed.

HART v. SANSONM et al.

(3 Sup. Ct. 586, 110 U. S. 151.)

Supreme Court of the United States. January 21, 1884.

Error to the Circuit Court of the United States for the Northern District of Texas.

Henry J. Leovy and W. Hallett Phillips, for plaintiff in error. A. S. Lathrop, for defendants in error.

GRAY, J. This is a writ of error sued out by Edmond J. Hart, a citizen of Louisiana, to reverse a judgment rendered against him in the circuit court of the United States for the Northern district of Texas, in an action brought by him against Marion Sansom and the heirs at law of Thomas M. League, citizens of Texas, to recover a tract of land in Johnson county, in that state, of which they had dispossessed him. At the trial, Hart proved his title under a patent from the republic of Texas to League, and a deed with general covenants of warranty from League, dated August 19, 1846, and both recorded on December 9, 1879, and it appeared that the defendant Sansom held possession of the land under a lease from the other defendants and as their tenant. The defendants offered in evidence the record of a judgment rendered by the district court of Johnson county, on August 24, 1875, upon a petition filed June 11, 1873, by the heirs at law of League, (who died intestate November 5, 1865,) against Virgil Wilkerson, Orlando Dorsey, and several other persons, and Hart, alleging that Wilkerson ejected the plaintiffs from this land, and unlawfully withheld possession thereof from them; that on October 29, 1870, the defendant Dorsey, by deed duly recorded, conveyed to some of the other defendants than Wilkerson and Hart three-fourths of the land, reserving in that deed the remaining fourth to himself, and that other deeds (particularly set forth) of parts of the land were afterwards made to the rest of such other defendants and recorded; that the defendant Hart "sets up some pretended claim and title to said land;" and that "the defendant Wilkerson is a naked trespasser upon the land of the plaintiffs, and that the several other defendants' several deeds, which appear upon the record of deeds of Johnson county as aforesaid, are fraudulent and void, and that the said pretended claims and deeds, and each and all of them, cast a cloud upon the title of the plaintiffs;" and praying "that they have judgment, that the cloud upon the title of the plaintiffs, created by the several deeds aforesaid, be removed, and that the said deeds, and each and all of them, be declared null and void, and be canceled and discharged of record, and that the title of the plaintiffs in and to said premises and every part thereof, may be confirmed and established as against said defendants and each and every of them, and all per-

sons claiming through or under them," and for a writ of possession, damages, and costs. That record also showed the issue and due service of citations to all the defendants except Dorsey and Hart; the issue of a citation directing the sheriff to serve Hart, being a citizen of Louisiana, by publication, and the sheriff's return showing the execution of the citation by such publication in a newspaper of the county four successive weeks before the return day, and a like service by publication on Dorsey, a citizen of New York. That record further showed a default of all the defendants; and that upon a writ of inquiry the jury assessed damages against Dorsey and Hart; found as facts the issue of the patent to League and the title of the plaintiffs as his heirs; that Hart "claimed said land;" and that a deed was made by Dorsey and recorded, as alleged in the petition, but that Hart and Dorsey respectively had no title of record or otherwise; and returned a verdict "for the plaintiffs; and that they recover the land described in the petition." That record finally showed a judgment "that the plaintiffs recover of the defendants the premises described," and "that the several deeds in the plaintiff's petition mentioned be and the same are hereby annulled and canceled, and for naught held, and the cloud thereby removed," and for costs, and that execution issue for the costs. The circuit court, against the plaintiff's objection, admitted the judgment in evidence, instructed the jury that it divested the plaintiff of his title to the land, and directed a verdict for the defendants.

The plaintiff, deriving his title under a deed with covenants of general warranty from League, is entitled to maintain this action against League's heirs, who are estopped by those covenants, unless the former judgment in the action brought by them in the state court has adjudicated the title as between them and the present plaintiff. It is therefore necessary to consider the nature and effect of that judgment. The petition combined, in accordance with the practice prevailing in that state, an action in the nature of ejectment to recover possession of the land, and a suit in equity to remove a cloud upon the plaintiffs' title; and the service by publication was in the form authorized by the local statutes against non-residents. 1 Pasch. Dig. Laws Tex. (4th Ed.) art. 25. The petition alleges that Wilkerson was in possession; and that the other defendants, except Hart, held recorded deeds, which were fraudulent and void, and cast a cloud upon the plaintiffs' title. But as to Hart, it did not allege that he was in possession, or was in privity with the other defendants, or that he held any deed, but only that he set up some pretended claim and title. And the verdict finds that he claimed the land, but had no title of record or otherwise therein. The judgment is that the plaintiffs recover the land of the defendants, and that

the deeds mentioned in the petition be and are annulled and canceled, and the cloud thereby removed, and for costs; and execution is awarded for costs only, and not for any writ or process in the nature of a writ of possession or *habere facias*.

It is difficult to see how any part of that judgment (except for costs) is applicable to Hart; for that part which is for recovery of possession certainly cannot apply to Hart, who was not in possession; and that part which removes the cloud upon the plaintiff's title appears to be limited to the cloud created by the deeds mentioned in the petition; and the petition does not allege, and the verdict negatives, that Hart held any deed. But if there is any judgment (except for costs) against Hart, it is, upon the most liberal construction, only a decree removing the cloud created by his pretended claim of title, and is no bar to the present action. Generally, if not universally, equity jurisdiction is exercised in *personam*, and not in *rem*, and depends upon the control of the court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment in *rem*, establishing a title in land, but operates in *personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be canceled, or to execute a relief to the plaintiff. *Langd. Eq. Pl. (2d Ed.)* §§ 43, 184; *Massie v. Watts*, 6 Cranch, 148; *Orton v. Smith*, 18 How. 263; *Vandever v. Freeman*, 20 Tex. 334. It would doubtless be within the power of the state in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose. *Felch v. Hooper*,

119 Mass. 52; *Ager v. Murray*, 105 U. S. 126, 132. But in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts in *personam*, by compelling a deed to be executed or canceled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed or to establish a title.

In the judgment in question, no trustee to act in behalf of the defendant was appointed by the court, nor have we been referred to any statute authorizing such an appointment to be made. The utmost effect which can be attributed to the judgment, as against Hart, is that of an ordinary decree for the removal by him, as well as by the other defendants, of a cloud upon the plaintiff's title. Such a decree, being in *personam* merely, can only be supported against a person who is not a citizen or resident of the state in which it is rendered, by actual service upon him within its jurisdiction; and constructive service by publication in a newspaper is not sufficient. The courts of the state might perhaps feel bound to give effect to the service made as directed by its statutes. But no court deriving its authority from another government will recognize a merely constructive service as bringing the person within the jurisdiction of the court. The judgment would be allowed no force in the courts of any other state; and it is of no greater force, as against a citizen of another state, in a court of the United States, though held within the state in which the judgment was rendered. *Hollingsworth v. Barbour*, 4 Pet. 466, 475; *Boswell's Lessee v. Otis*, 9 How. 336; *Bischoff v. Wethered*, 9 Wall. 812; *Knowles v. Gaslight Co.*, 19 Wall. 58; *Pennoyer v. Neff*, 95 U. S. 714. See, also, *Schibsby v. Westenholtz*, L. R. 6 Q. B. 155; *The City of Mecca*, 6 Prob. Div. 106.

The circuit court having ruled and instructed the jury otherwise, its judgment must be reversed, and the cause remanded with directions to set aside the verdict, and to order a new trial.

ADAMS v. MESSENGER.

(17 N. E. 491, 147 Mass. 185.)

Supreme Judicial Court of Massachusetts.
Middlesex. June 19, 1888.

Appeal from supreme judicial court, Middlesex county.

Bill in equity, by George B. Adams against William T. Messenger, to compel the performance of an agreement to furnish the plaintiff with certain perfect working injectors for steam-boilers, and to apply for and assign to plaintiff certain letters patent in the dominion of Canada. Hearing in the supreme judicial court upon defendant's demurrer, which was sustained, and the plaintiff appealed. The facts are stated in the opinion.

Wm. B. Durant, for plaintiff. Charles S. Knowles, for defendant.

DEVENS, J. It is the contention of the defendant that the plaintiff has a full, complete, and adequate remedy at common law by a suit for damages, and that the court, sitting in equity, cannot grant the relief sought by the prayers of the bill. The controversy arises from the failure to perform an executory written contract. So far as this relates to personal property, the objections arising from the statute of frauds, which have sometimes been found to exist when oral contracts were sought to be enforced, have, of course, no application. The general rule that contracts as to the purchase of personal property are not specifically enforced, as are those which relate to real property, does not rest on the ground of any distinction between the two classes of property other than that which arises from their character. Contracts which relate to real property can necessarily only be satisfied by a conveyance of the particular estate or parcel contracted for, while those which relate to personal property are often fully satisfied by damages which enable the party injured to obtain elsewhere in the market precisely similar property to that which he had agreed to purchase. The distinction between real and personal property is entirely subordinate to the question whether an adequate remedy can thus be afforded. If, from the nature of the personal property, it cannot, a court of equity will entertain jurisdiction to enforce the contract. 1 Story, Eq. Jur. § 717; Clark v. Flint, 22 Pick. 231. A contract for bank, railway, or other corporation stock, freely sold in the market, might not be thus enforced, but it would be otherwise where the stock was limited in amount, held in a few hands, and not ordinarily to be obtained. White v. Schuyler, 1 Abb. Prac. (N. S.) 300; Treasurer v. Mining Co., 23 Cal. 390; Poole v. Middleton, 29 Beav. 646; Doloret v. Rothschild, 1 Sim. & S. 590. Where articles of personal property, also, are peculiar

and individual in their character, or have an especial value on account of the associations connected with them, as pictures, curiosities, family furniture, or heirlooms, specific performance of a contract in relation to them will be decreed. Lloyd v. Loaring, 6 Ves. 773; Fells v. Read, 3 Ves. 70; Lowther v. Lowther, 13 Ves. 95; Williams v. Howard, 3 Murph. 74. An agreement to assign a patent will be specifically enforced. Binney v. Annan, 107 Mass. 94. Nor do we perceive any reason why an agreement to furnish articles which the vendor alone can supply, whether because their manufacture is guarded by a patent or for any other reason, should not also be thus enforced. Hapgood v. Rosenstock, 23 Fed. 86. As the value of a patent-right cannot be ascertained by computation, so it is impossible, with any approach to accuracy, to ascertain how much a vendee would suffer from not being able to obtain such articles for use in his business.

The contract of the defendant was twofold: to furnish and deliver certain described working steam-injectors, within a specified time, to the plaintiff; and also that if the defendant shall make improvements in injectors for steamboilers, and shall take out patents therefor in the United States, he will apply for letters patent in Canada, and, on obtaining them, will assign and convey the same to the plaintiff, and that he will not do any act prejudicial to these letters patent of Canada, or the monopoly thus secured. It is said that the court will not enforce a contract for personal services when such services require the exercise of peculiar skill, intellectual ability, and judgment, and that, therefore, the defendant cannot be ordered to make and deliver the injectors contracted for. But the principle on which it is held that a court of equity cannot decree one to perform a personal service involving peculiar talent or skill, because it cannot so mould its order and so supervise the individual executing it that it can determine whether he has honestly obeyed it or not, has no application here. The defendant has agreed to furnish and deliver certain injectors, which the contract shows to be patented articles. There is nothing in the bill from which it is to be inferred that they were yet to be made when the contract was executed; but, if it be assumed that they were, there is nothing from which it can be inferred that any skill peculiar to the defendant was required to construct them. For aught that appears, they could be made by any intelligent artificer in the metals of which they were composed. The details of their manufacture are given by reference to the patents, which are referred to in the agreement; so that no difficulty, such as has sometimes been experienced, could have been found in describing accurately and even minutely the articles to be furnished. Nor are there found in the case at bar any continuous du-

ties to be done, or work to be performed, requiring any permanent supervision, which, as it could not be concluded within a definite and reasonable time, has sometimes been held an obstacle to the enforcement of a contract by the court. Agreements to make an archway under a railway, or to erect a siding at a particular point for the convenience of the land-owner, have been ordered to be specifically enforced. Although the party aggrieved might have obtained damages which would have been sufficient to have enabled him to pay for constructing them, and although the work to be done necessarily involved engineering skill as well as labor, he was not bound to assume the responsibility or the labor of doing that which the defendant had agreed to do. *Storer v. Railway Co.*, 2 *Younge & C. Ch.* 48; *Greene v. Railway Co.*, L. R. 13 *Eq.* 44. The case at bar is readily distinguishable from that of *Wollensak v. Briggs*, 20 *Bradw.* 50, on which the defendant much relies. In that case the defendant was to construct for the plaintiff certain improved machinery for a particular purpose, but no details were given as to the form, structure, principle, or mode of operating the proposed machine. It was obviously a contract too indefinite to enable the court to order its specific enforcement.

It is urged that specific performance of a part only of a contract will not be ordered when it is not in the power of the court to order the enforcement of the whole, and that it would not be possible to enforce that portion of the contract which relates to the application for letters patent in Canada, and the subsequent assignment of them. But where two parts of a contract are distinctly separable, as in the case at bar, there is no reason why one should not be enforced, and the plaintiff compensated in damages for the breach of the other. When a contract relates to but a single subject, and it is impossible for the defendant to perform it except partially, the plaintiff is entitled to the benefit of such partial performance, and to compensation, if it be possible to compute what is just, so far as it is unperformed. It was therefore held in *Davis v. Parker*, 14 *Allen*, 94, that where one had agreed to convey land, with release of dower, and was unable to procure a release of dower, the purchaser was entitled to a conveyance without such release, with an abatement from the purchase money of the value of the wife's interest at the time of the conveyance. See, also, *Milkman v. Ordway*, 106 *Mass.* 253; *Curran v. Water-Power Co.*, 116 *Mass.* 90.

We have assumed, in favor of the defendant's contention, that the only relief that the

plaintiff could obtain for the breach of that portion of the agreement which relates to the application for a patent in Canada for the improvements which defendant had made, would be in damages. We have not intended thus to decide. That equity, by virtue of its control over the persons before the court, takes cognizance of many things which they may do or be able to do abroad, while they are themselves personally here, will not be controverted. One may be enjoined from prosecuting a suit abroad. He may be compelled to convey land situated abroad, although the conveyance must be according to the laws of the foreign country, and must be sent there for record. *Pingree v. Coffin*, 12 *Gray*, 288; *Dehon v. Foster*, 4 *Allen*, 545; *Cunningham v. Butler*, 142 *Mass.* 47, 6 *N. E.* 782; *Bailey v. Ryder*, 10 *N. Y.* 363; *Newton v. Bronson*, 13 *N. Y.* 587. There is nothing to show that the plaintiff, in making his application in Canada for the patent, is compelled to leave the state, any more than he would be compelled to do so if he was an applicant at Washington. The grant of such a patent is an act of administration only. If it were to be granted here, the party would be ordered to make application. It was held in *Runstetler v. Atkinson*, 4 *MacArthur*, 382, that where a formal assignment of an invention had not been made, but a valid agreement had been made so to assign, equity would order the party to make the formal assignment, and also to make application for the patent, which, in such case, would issue to the assignee. The laws of Canada, which we can know only as facts, are not before us by any allegations as to them. If all that is required by them is a formal application in writing by the inventor, there would seem to be, from the allegations of the bill, sufficient reason why the defendant should be required to make and forward it, or place it in the hands of the plaintiff to be forwarded, to the Canadian authorities. In any event, as the application is preliminary only to obtaining letters patent for the purpose of assigning them to the plaintiff, the averments of the bill, taken in connection with the terms of the agreement, set forth a good reason why the plaintiff may ask an assignment of his title to the improvements in question from the defendant, so far as the dominion of Canada is concerned, and also why the defendant should be restrained from alienating or in any way incumbering any right he may have to letters patent from Canada if plaintiff should decide to seek his remedy in this form, rather than in damages for breach of this part of the contract. *Demurrer overruled.*

EWING v. LITCHFIELD et al.

(22 S. E. 362, 91 Va. 575.)

Supreme Court of Appeals of Virginia. June 27, 1895.

Appeal from circuit court, Washington county; Sheffey, Judge.

Bill by one Litchfield and others against Thomas Ewing. Decree for complainants, and defendant appeals. Reversed.

White & Penn, for appellant. Daniel Trigg, for appellees.

KEITH, P. This bill was filed in the circuit court of Washington county by Litchfield and others, and sets forth the following facts: In January, 1890, the plaintiffs entered into a contract with J. D. Imboden, by which the plaintiffs and the said Imboden agreed to procure \$100,000 of the stock of the Virginia & Tennessee Coal & Iron Company at the price of \$10 or less per share of \$100 each. These shares, together with 15,000 shares owned by the plaintiffs, were to be voted in a stockholders' meeting, to be held within a period named, and upon a notice prescribed in the contract, so as to acquire the control of \$1,950,000 of the stock which remained in the treasury of the Virginia & Tennessee Coal & Iron Company. This block of 19,500 shares of stock was to be sold to Imboden at \$10 per share, and in consideration of his purchase of the said treasury stock at this reduced rate he undertook to secure and cause to be submitted to the said meeting of stockholders, for their ratification, a contract, by and on behalf of the Danville & East Tennessee Railroad Company and the Atlantic & Danville Railroad Company with the Virginia & Tennessee Coal & Iron Company, binding the railroad companies to extend their roads into the lands and coal fields of the coal and iron company, or to make connections therewith satisfactory to the said parties by means of other railroads, by the 1st of January, 1893, and to complete and have in operation the line of said railroad companies from Abingdon to Damascus on or before the 1st day of January, 1891, and to complete and have in operation all that part of the line of said railroads and their connections, so as to connect Abingdon and the coal fields, by the 1st of January, 1893, and then binding the said railroad companies, under certain terms therein named, for the transportation of the product of the coal fields, owned by the Virginia & Tennessee Coal & Iron Company. It is further provided that, unless the party of the first part, J. D. Imboden, or his assignees, shall, at the meeting of the stockholders provided in the contract, purchase the treasury stock and deliver or cause to be delivered the contract of the railroad companies, as hereinbefore provided, or in the event of the failure of the first party to notify the parties of the second part of his readiness to conform to and to comply with the provisions of this

agreement, then the contract entered into was to be null and void, except that the parties of the second part "shall be entitled to demand and receive from the party of the first part the amount of \$50,000 of the stock of the Virginia & Tennessee Coal & Iron Company, or \$5,000 in lieu thereof by way of ascertained and liquidated damages on account of the breach of this contract." There are details of the contract entered into between the parties which I have thought it unnecessary to set out, but have contented myself with reciting what I conceived to be the features of the contract upon which this controversy depends. The \$50,000 of stock was to be deposited with the Exchange National Bank of Lynchburg by the party of the first part, to be held in accordance with the provisions of the contract, and it was also provided that the party of the first part should have the right to elect to pay either the stock or the money in cash as damages, in the event of his failure to comply with his contract. Subsequently an amended bill was filed, and Thomas Ewing was made a party defendant, it appearing that J. D. Imboden, in executing the contract set out in the original bill, was acting as the agent of Ewing, and that Imboden had no personal interest in it. To this bill there was a demurrer, which the circuit court overruled, and such proceedings were had that a final decree was entered in the cause, from which Thomas Ewing has appealed, and his appeal presents for our consideration at the outset the propriety of the decree of the circuit court upon the demurrer to the bill.

It will be observed that this suit is not brought to enforce the specific performance of that which the defendant contracted to do,—that is, to procure contracts from certain railroad corporations to build a line of railway into the coal fields controlled by the plaintiffs within a stipulated period; in other words, it is not a suit for the specific performance of the principal contract entered into between the parties. Stated broadly, that was a contract upon the part of Ewing to construct, or for him to procure others to construct, certain lines of road to certain points named in the contract, the object being to develop the coal fields owned by the Virginia & Tennessee Coal & Iron Company, in which company the plaintiffs were large stockholders. Upon the part of the plaintiffs, in consideration of Ewing procuring this road to be built, or procuring a satisfactory contract upon the part of others to build it, they were to unite with him, who, in the meantime, with their aid, was to secure \$100,000 of the stock of the Virginia & Tennessee Coal & Iron Company, thus constituting a controlling interest in the company, and thereby give to the appellant the control of 19,500 shares of stock, at \$10 per share. In a proper case a court of equity delights specifically to enforce contracts where the parties have no other remedy, or the remedy afforded elsewhere is less complete or satisfactory; but

here the undertaking of the defendant is to build a railroad, or to procure others to build it, and courts of equity will not enforce contracts for that purpose. This seems to be well settled.

The object, and the only object, of this bill is to recover what the parties have agreed upon, either as a penalty or forfeiture, or as liquidated damages. The breach of the contract is recognized as the foundation of the relief sought, and the plaintiffs have resorted to this court, and invoked its aid to enable them to gather in the form of damages the fruits of a mere breach of contract. There are cases in which courts of equity will award damages, but they are cases where, having obtained jurisdiction over the subject and of the parties, under some of the well-recognized sources of equity jurisdiction, it is found necessary to award damages in order to do full and complete justice by way of compensation, as when, in the enforcement of a contract for the sale of land, the court finds itself unable to give the party seeking and entitled to its aid all that, under his contract, he should recover. In such a case the court will, as far as possible, specifically execute the contract, and then ascertain the damages accruing by reason of its inability in the particular case thus to afford complete relief. The giving of the damages is ancillary or auxiliary to the jurisdiction specifically to enforce the performance of the contract. See *Nagle v. Newton*, 22 Grat. 814. The case before us being in its essence for the recovery of damages for a breach of contract, a court of equity is not to be beguiled into granting the relief sought because it is ingeniously and artfully concealed under cover of a prayer to compel the assignment of certain shares of stock. The great weight of authority in this country is that a court of equity will not entertain a bill for such a purpose, though in England it seems to be otherwise. Had the subject and object of the principal contract between the parties in this case been the sale and purchase of the \$50,000 of the stock in question, a court of equity would have left them to their remedy at law, and will certainly not harken to their prayer when it appears that the stock, the assignment of which is sought, is itself but one form of the penalty or liquidated damages agreed upon as the measure of the injury sustained by the breach of the contract entered into. Much of the argument addressed to us had for its object to enable us to determine whether or not the stock, or in lieu thereof the \$5,000 in money, agreed to be transferred or paid by the appellant in case of a failure to perform the contract, was to be considered as a penalty or as liquidated damages. This is a feature of the controversy which it is not necessary for us to determine, because in neither aspect of it are the plaintiffs entitled to the relief sought. A court of equity will neither enforce a penalty or forfeiture, nor permit it to be enforced in a court of law.

It will go even further than this. It will not permit a party, by the voluntary payment of the agreed penalty, to defeat the enforcement of the alternative contract. It will not entertain a suit for the recovery of damages merely, nor will it undertake to give damages save, as before observed, as ancillary or auxiliary to some one of its recognized subjects of jurisdiction; and so far from liquidated damages constituting an exception to the rule that courts of equity will not entertain suits for damages for breach of contract, it seems that, if the damages for the breach of a contract have been liquidated by the parties to the contract (that is, ascertained and agreed upon), that fact, so far from inviting the assistance of a court of equity, is sufficient to repel it. Indeed, this must of necessity be so, for, as the jurisdiction of the court to enforce contracts specifically rests upon the insufficiency of damages as a redress or remedy for failure to comply with a contract, the very foundation of jurisdiction seems wanting in those cases where the parties themselves have otherwise determined, and have fixed a money value in the form of liquidated damages upon the injury sustained by its breach. In this view is found an explanation of the leaning shown by courts of equity, in doubtful cases, to construe such agreements as we are here considering as creating a penalty or forfeiture rather than liquidated damages. For, if it be determined that it is but liquidated damages, the jurisdiction of a court of equity is at an end, but if it be construed as a forfeiture or penalty, then it affords no obstruction to the interpretation of the court of equity, because it will prohibit either the enforcement or the voluntary payment of the penalty or forfeiture, and will compel the performance of the alternative contract if a proper case be made. Courts of equity, therefore, always strongly incline to that construction which declares it to be a forfeiture or penalty rather than liquidated damages. In this case, however, a court of equity is without motive to prefer the one to the other construction. The alternative for which the penalty is given, if it be a penalty, is the securing of a contract for the building of a railroad. It is obviously impossible to compel the defendant either to build it himself or to procure others to build it. It will leave the parties, in the forum appropriate for that relief, to recover damages for its breach,—liquidated damages, if a court of law shall be of opinion that the parties so intended the stipulation in the contract, or damages in ordinary cases, if a court of law shall be of opinion that the stock or money stipulated to be paid was a penalty. We have not referred to cases. Cases upon the subject of the specific performance of contracts and other subjects discussed are too numerous even for citation. The whole subject has been treated with great fullness and ability in *Pomeroy's Equity*, and we shall content ourselves with referring to the appropriate chapters in that

work, and especially to sections 446, 447, 1401-1403, and to Lawson, Rights, Rem. & Prac. pp. 2588, 2590, 2591, as sustaining the views here presented.

We are of opinion that the demurrer to the

bill should have been sustained, and the bill dismissed, and therefore enter a decree reversing the decree of the circuit court.

BUCHANAN, J., absent.

CRAIG v. HUKILL et al.

(16 S. E. 363, 37 W. Va. 520.)

Supreme Court of Appeals of West Virginia.
Dec. 22, 1892.

Appeal from circuit court, Monongalia county.

Bill by Joseph W. Craig against E. M. Hukill & Co. and others for partition of land. There was a decree for partition. Defendant E. M. Hukill appeals. Reversed.

Okey Johnson, W. P. Hubbard, and Keck, Son & Fast, for appellant. Cox & Baker, for appellee.

BRANNON, J. W. M. Davis executed to David Kennedy a lease of a tract of land for a term of years, for the purpose of drilling for petroleum oil, which lease has come by assignment to E. M. Hukill. The deed of lease contains a covenant on the part of the lessee to commence operations for oil development within nine months, or for payment of a certain sum of money per month until commencement of work, with a provision that a failure to do one or the other should work an absolute forfeiture of the lease. Afterwards Davis executed an instrument by which he agreed to sell to H. P. Griffith all the oil and gas under the said tract, and Griffith transferred all his right in said tract to Joseph W. Craig. Davis had a life estate in said tract, with remainder in fee to his children; and, by the death of one of them, he inherited an undivided one-fifth share therein. Hukill, claiming under the first-mentioned lease, as also under a lease from the guardian of the surviving children, bored for and produced oil on the premises. Craig brought a suit in equity in the circuit court of Monongalia county against Hukill, Davis, and others, praying that the tract be partitioned, and one-fifth assigned as the share of Davis in fee, and that all the oil and gas under it be assigned to the plaintiff, Craig. The theory of Craig for relief is that by reason of failure to commence operations, or to pay money in lieu thereof, as provided in the lease to Kennedy, it had become forfeited, and he had, by the said agreement between Davis and Griffith, become entitled, in exclusion of all rights under the Kennedy lease, to all oil which Davis could convey. Obviously, Craig can get relief only through an enforcement of the forfeiture of the Kennedy lease. Thus, at the threshold of the case, we are

met with the question whether a court of equity will enforce this alleged forfeiture.

Affirmative relief against penalties and forfeitures was one of the springs or fountains of equity jurisdiction, and the jurisdiction was very early exercised; and it would be going in the very opposite direction, and acting contrary to its essential principles, to affirmatively enforce a forfeiture. The elementary books on equity jurisprudence state the rule as almost an axiom, that equity never enforces a penalty or forfeiture. 2 Story, Eq. Jur. § 1319; 1 Pom. Eq. Jur. § 459; Bisp. Eq. § 181; Beach, Mod. Eq. Jur. § 1013. Mr. Pomeroy, in 1 Pom. Eq. Jur. § 460, says that rule is without exception; and I confess my search has led me to the same conclusion. This doctrine is supported in America by decisions of the highest authority, coming from jurists of the most eminent name,—among them, Kent and Marshall; and there seems to be no change or qualification in later decisions. *Livingston v. Tompkins*, 4 Johns. Ch. 415; *Horsburg v. Baker*, 1 Pet. 232; *Marshall v. Vicksburg*, 15 Wall. 146. The estate under the Kennedy lease certainly vested; and the plaintiff seeks, by a suit in equity, to divest it, which he can only do by declaring and enforcing the forfeiture of that lease, for the plaintiff's right must depend for its birth and existence on that forfeiture. In *Livingston v. Tompkins*, supra, it was held that "equity will not assist the recovery of a penalty or forfeiture, or anything in the nature of a forfeiture," and "will not lend its aid to divest an estate for the breach of a condition subsequent." *McKim v. Mason*, 2 Md. Ch. 510; *Warner v. Bennett*, 31 Conn. 468; *Smith v. Jewett*, 40 N. H. 530. In *Oil Creek R. Co. v. Atlantic & G. W. R. Co.*, 57 Pa. 65, a bill was filed to enforce a forfeiture of a lease because of failure to build a road according to the express provisions of the lease; and the court refused, on the ground that equity never lends its aid in enforcement of a forfeiture, but will leave the parties to their legal remedies. Many cases cited in the text-books above cited sustain this principle. Though equity has jurisdiction in partition, yet it will not exercise it when it can be done only by enforcing a forfeiture, when the plaintiff's right grows only out of a forfeiture. As equity has no jurisdiction, we cannot decide the merits of the case, and therefore reverse the decree and dismiss the bill, without prejudice to the plaintiff to seek to assert his rights by any appropriate legal remedy.

KUNKLE et al. v. WHERRY.

(42 Atl. 112, 189 Pa. 198.)

Supreme Court of Pennsylvania. Jan. 2, 1899.

Appeal from court of common pleas, Allegheny county.

Action by H. H. Kunkle and Conrad Jordan, partners doing business as Kunkle & Jordan, against James Wherry, to recover a balance alleged to be due on a contract for granite construction. Judgment for plaintiffs, and defendant appeals. Reversed.

R. A. & Jas. Balph, for appellant. J. S. & E. G. Ferguson, for appellees.

FELL, J. The defendant was the contractor for the construction of a large, 10-story building, which he was required to complete in 11 months. By the terms of his contract with the owner, he was to receive \$100 for each day less than the time limit, and to pay \$1,000 for each day that he should exceed it, in the completion of the work. He entered into a contract with the plaintiffs for the stone and granite work. They agreed to furnish the materials, and to finish the work to the top of the second story, ready for the bricklayers, in six weeks' time after three stories of ironwork had been erected, and bound themselves "to pay the sum of \$150 per day as a penalty for each and every day thereafter that the said work remains unfinished, as and for liquidated damages." The learned judge held that this stipulation should be regarded as a penalty, and not as liquidated damages, and that the defendant could set off against the plaintiffs' claim such damages only as he proved to have been actually sustained by him because of the delay of the plaintiffs in completing the work.

The rule that in actions *ex contractu*, where the breach of an agreement admits of compensation, the recovery may be limited to the loss actually sustained, notwithstanding a stipulation for a penalty, is founded upon the principle that one party should not be allowed to profit by the default of the other, and that compensation, and not forfeiture, is the equitable rule. Equity will regard a penalty or forfeiture as intended to secure the fulfillment of a contract, and it may preclude the injured party from recovering more than a just compensation, or from obtaining a collateral advantage. Notes to Peachy v. Duke of Somerset, 2 White & T. Lead. Cas. Eq. 2044; Bisp. Eq. 178. Whether a sum named

as compensation for the breach of a contract is to be considered as a penalty to secure its fulfillment, from which equity will relieve, or as damages liquidated by the parties themselves, is a question which cannot be answered by the application of any general rule. The question is always one of construction, and any rule upon the subject is a mere guide to the intention of the parties. The grounds on which each case is to be considered and determined are clearly stated by our Brother Mitchell in Keck v. Bieber, 148 Pa. St. 645, 24 Atl. 170: "The general principle upon which the law awards damages is compensation for the loss suffered. The amount may be fixed by the parties in advance, but, where a lump sum is named by them, the court will always look into the question whether this is really liquidated damages, or only a penalty; the presumption being that it is the latter. The name by which it is called is of but slight weight; the controlling elements being the intent of the parties, and the special circumstances of the case." And he quotes with approval March v. Allabough, 103 Pa. St. 335: "The question * * * is to be determined by the intention of the parties, drawn from the words of the whole contract, examined in the light of its subject-matter and its surroundings; and in this examination we must consider the relation which the sum stipulated bears to the injury which may be caused by the several breaches provided against, the ease or difficulty of measuring a breach in damages, and such other matters as are legally or necessarily inherent in the transaction." From the nature of this case, the actual damages which would result from a breach of the contract would not readily be susceptible of ascertainment, and it seems to us that it was the manifest intention of the parties not to leave them to the uncertain estimate of a jury, but to fix them by express agreement. "Uncertainty as to the extent of the injuries which may ensue" was said in Powell v. Burroughs, 54 Pa. St. 329, and Coal Co. v. Schultz, 71 Pa. St. 180, "to be a criterion by which to determine whether it is a case of liquidated damages or a penalty." The damages named were for the breach of a single stipulation, and were not disproportionate to the loss which would probably result to the defendant from the failure of the plaintiffs to complete their work in time. The fifth and seventh assignments of error are sustained, and the judgment is reversed, with a *venire facias de novo*.

JAQUITH v. HUDSON.

(5 Mich. 123.)

Supreme Court of Michigan. May Term,
1858.

Error to circuit court, Wayne county.

The action was by Jaquith against Hudson, upon a promissory note for one thousand dollars, given by the latter to the former, April 15th, 1855, and payable twelve months after date. Defendant pleaded the general issue, and gave notice that on the trial he would prove that, previous to said 15th day of April, 1855, plaintiff and defendant had been and were partners in trade, at Trenton, in said county of Wayne, under the name of Hudson & Jaquith; that, on that day the copartnership was dissolved, and the parties then entered into an agreement, of which the following is a copy:

"This article of agreement, made and entered into between Austin E. Jaquith, of Trenton, Wayne county, and state of Michigan, of the first part, and Jonathan Hudson, of Trenton, county of Wayne, and state of Michigan, of the second part, witnesseth, that the said Austin E. Jaquith agrees to sell, and by these presents does sell and convey unto the said Jonathan Hudson, his heirs and assigns, all his right, title, and interest in the stock of goods now owned by the firm of Hudson & Jaquith, together with all the notes, books, book accounts, moneys, deposits, debts, dues, and demands, as well as all assets that in anywise belong to the said firm of Hudson & Jaquith; and that the copartnership that has existed between the said firm of Hudson & Jaquith is hereby dissolved; and that the said Austin E. Jaquith, by these presents, agrees that he will not engage in the mercantile business, in Trenton, for himself, or in connection with any other one, for the space of three years from this date, upon the forfeiture of the sum of one thousand dollars, to be collected by the said Hudson as his damages. In consideration whereof, the said Jonathan Hudson, of the second part, agrees for himself, his heirs and administrators, to pay unto the said Austin E. Jaquith the sum of nine hundred dollars, for his services in the firm of Hudson & Jaquith, together with all the money that he (the said Austin E. Jaquith) paid into said firm, deducting therefrom the amount which he (the said Austin E. Jaquith) has drawn from said firm; the remainder the said Hudson agrees to pay to the said Jaquith, his heirs or assigns, at a time and in a manner as shall be specified in a note bearing even date with these presents. And the said Hudson, for himself, his heirs and assigns, agrees to pay all the debts, notes and liabilities of the firm of Hudson & Jaquith, and to execute unto the said Jaquith a good and sufficient bond of indemnifi-

cation against all claims, debts, or liabilities of the firm of Hudson & Jaquith.

"Trenton, April, 1855.

"Austin E. Jaquith. [L. S.]

"Jonathan Hudson. [L. S.]

"Witness: Arthur Edwards. Arthur Edwards, Jr."

And defendant further gave notice, among other things, that he would show, on the trial, that, after the execution of said agreement in writing, and the giving of said note in pursuance thereof, and on or about the 15th day of July, 1855, plaintiff, in violation of said agreement, entered into the mercantile business at Trenton, and had continued to carry on the same ever since; by means whereof the consideration of said note had failed. And he further gave notice, that he (the defendant) continued to carry on the mercantile business at Trenton, after the dissolution of said copartnership; and by means of the breach of said articles by plaintiff, defendant had sustained damages to the sum of one thousand dollars, liquidated by said articles for a breach thereof, which sum he would claim to have deducted from the amount of said note, on the trial.

On the trial, the plaintiff, having introduced the note in evidence, rested his case.

Defendant then proved by Arthur Edwards the due execution of said agreement. The defendant also proved by the said witness that the plaintiff resumed mercantile business in July, 1855, in the village of Trenton, within eighty rods of the old stand of Hudson & Jaquith, and had ever since continued in such business.

On cross-examination, Capt. Edwards testified that the above agreement was made in duplicate, and signed by the parties about the middle of April, 1855, which duplicates were placed in his hands, to be kept till the bond of indemnity and note mentioned in the agreement were executed; that the duplicates were not to be delivered till both parties came and demanded them. Hudson at once took exclusive possession of the store, goods, books, and papers of the old firm of Hudson & Jaquith, where the duplicate agreements were signed, and they were left in witness' hands until the other papers mentioned in them were executed. Witness did not recollect whether it was said by the parties that the agreement was not to take effect till both parties came for the duplicates. Witness never delivered to the defendant the agreement now produced by him, and cannot tell how it came into his possession. The plaintiff and defendant never came and jointly demanded the duplicates of him. He has no recollection that either of the parties ever notified him not to deliver over the papers.

On re-examination, witness said he lived at Trenton in 1855, and his papers were for the most part kept there. Witness cannot remember delivering this duplicate to de-

fendant. It might have been delivered by him to defendant, but witness has no recollection of it.

The defendant then, by another witness, gave evidence tending to show that, not long after the date of said agreement, the bond of indemnity mentioned in the agreement was executed by defendant and delivered to the plaintiff.

No evidence was given to show any damage sustained by the defendant by reason of plaintiff's again engaging in business in Trenton.

The plaintiff then called as a witness Arthur Edwards, Jr., who testified that he was one of the subscribing witnesses to said agreement. The duplicate agreements were to go into Capt. Edwards' hands, and to be delivered only when plaintiff and defendant came together for and demanded them. When they were ready for signing, plaintiff hesitated about signing the duplicates, but witness thinks that Capt. Edwards then said that plaintiff could sign them safely, as he (the said Capt. Edwards) would hold them until they were jointly demanded; cannot remember whether Hudson or Edwards made the remark, but one of them made some remark which gave witness the impression that these duplicate papers were to be null until they should be both simultaneously delivered to the parties. Witness was in and out of the room, and did not hear the whole conversation, and cannot say positively whether Hudson was there when this remark was made. There was something said about some other papers, but witness could not recollect it distinctly.

The court was then asked by plaintiff's counsel to charge the jury as follows:

"(1) That a delivery to both parties, at the same time, of the agreement in duplicate, by Capt. Arthur Edwards, was essential to give it effect, and render it operative between the said plaintiff and defendant; and, before the defendant can claim the full benefit of it, he must show either such a delivery as was agreed upon, or a willful refusal, on the part of the plaintiff, that such delivery should be made.

"(2) That, even if the agreement set up was, in the opinion of the jury, properly delivered, as between the parties, the defendant can not recoup any damages against the plaintiff, except upon evidence showing that some damage was actually sustained by him; that the clause in the agreement as to damages cannot, of itself, and in the absence of evidence, operate to the reduction of the claim of the plaintiff, as the sum fixed in the agreement is in the nature of a penalty, and not liquidated damages; and no damages can be recovered under it except such as are proven."

The court refused so to charge; and plaintiff excepted.

The court then charged the jury in substance as follows:

That, if the jury were satisfied that the duplicate agreements were placed in Capt. Edwards' hands under the agreement between the parties that the same were not to become operative until both parties called on him to deliver them, that then they must be satisfied that such a delivery had taken place, or the agreement had never taken effect; but if, on the other hand, they should be satisfied that the real nature of the transaction was that the said duplicate agreements were to be placed in Capt. Edwards' hands solely to await the future execution and delivery of the bond, note, etc., mentioned in the agreement, and were thereupon to become operative, that then no formal delivery of said duplicates was necessary. The agreement in such case would take effect as soon as the bond, note, etc., mentioned, were made and delivered to plaintiff.

The court further charged the jury, that it was not necessary for the defendant to prove any actual damage under the plaintiff's breach of the said agreement, as the damages therein fixed were liquidated damages, and not a penalty.

The issue was then submitted to the jury on the evidence, who found a verdict for the plaintiff, in the sum of eighteen dollars and eight cents, allowing the defendant the sum of one thousand dollars mentioned in the agreement.

Plaintiff brought the case to this court, by writ of error, accompanied by bill of exceptions.

D. Bethune Duffield, for plaintiff in error.
G. V. N. Lothrop, for defendant in error.

CHRISTIANCY, J. The first point upon which the court below was requested to charge, and for the refusal of which the first exception is taken, assumed that, by the arrangement between the parties, the contract was not to become operative, or to have any force or effect, until the duplicates should be delivered by Capt. Edwards to both parties at the same time.

Whether such was the effect of the arrangement, or whether the agreements were placed in the hands of Capt. Edwards solely to await the execution and delivery of the bond and note mentioned in the contract, and thereupon to become operative, was a question which depended upon the intention of the parties, to be gathered from the whole transaction, their acts and declarations, and, in some measure, upon the nature and provisions of the contract itself. It was a question of fact involved in the issue. The court had no right to assume the truth or falsehood of either side of the question. The evidence bearing upon the point was conflicting. It was as clearly a question of fact for the jury as any other fact in issue in the cause. To have charged the jury as requested would have been an encroachment by the court upon the province of the jury.

The question was, therefore, properly submitted to the jury. The charge of the court in this particular was in all respects fair and correct, and the verdict of the jury is conclusive upon this point. The first exception, therefore, is not well taken.

The second exception raises the single question, whether the sum of \$1,000, mentioned in the covenant of Jaquith not to go into business in Trenton, is to be construed as a penalty, or as stipulated damages—the plaintiff in error insisting it should be construed as the former, the defendant as the latter.

We shall not attempt here to analyze all the decided cases upon the subject, which were read and cited upon the argument, and which, with others, have been examined. It is not to be denied that there is some conflict, and more confusion, in the cases; judges have been long and constantly complaining of the confusion and want of harmony in the decisions upon this subject. But, while no one can fail to discover a very great amount of apparent conflict, still it will be found, on examination, that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case. And while there are some isolated cases (and they are but few), which seem to rest upon no very intelligible principle, it will be found, we think, that the following general principles may be confidently said to result from, and to reconcile, the great majority of the cases, both in England and in this country:

First. The law, following the dictates of equity and natural justice, in cases of this kind, adopts the principle of just compensation for the loss or injury actually sustained; considering it no greater violation of this principle to confine the injured party to the recovery of less, than to enable him by the aid of the court to extort more. It is the application, in a court of law, of that principle long recognized in courts of equity, which, disregarding the penalty of the bond, gives only the damages actually sustained. This principle may be stated, in other words, to be, that courts of justice will not recognize or enforce a contract, or any stipulation of a contract, clearly unjust and unconscionable; a principle of common sense and common honesty so obviously in accordance with the dictates of justice and sound policy as to make it rather matter of surprise that courts of law had not always, and in all cases, adopted it to the same extent as courts of equity. And, happily for the purposes of justice, the tendency of courts of law seems now to be towards the full recognition of the principle, in all cases.

This principle of natural justice, the courts of law, following courts of equity, have, in this class of cases, adopted as the law of the contract; and they will not permit the parties by express stipulation, or any form of language, however clear the intent, to set

it aside; on the familiar ground, "*conventus privatorum non potest publico juri derogare.*"

But the court will apply this principle, and disregard the express stipulation of parties, only in those cases where it is obvious from the contract before them, and the whole subject-matter, that the principle of compensation has been disregarded, and that to carry out the express stipulation of the parties, would violate this principle, which alone the court recognizes as the law of the contract.

The violation, or disregard, of this principle of compensation, may appear to the court in various ways,—from the contract, the sum mentioned, and the subject-matter. Thus, where a large sum (say one thousand dollars) is made payable solely in consequence of the non-payment of a much smaller sum (say one hundred dollars), at a certain day; or where the contract is for the performance of several stipulations of very different degrees of importance, and one large sum is made payable on the breach of any one of them, even the most trivial, the damages for which can, in no reasonable probability, amount to that sum; in the first case, the court must see that the real damage is readily computed, and that the principle of compensation has been overlooked, or purposely disregarded; in the second case, though there may be more difficulty in ascertaining the precise amount of damage, yet, as the contract exacts the same large sum for the breach of a trivial or comparatively unimportant stipulation, as for that of the most important, or of all of them together, it is equally clear that the parties have wholly departed from the idea of just compensation, and attempted to fix a rule of damages which the law will not recognize or enforce.

We do not mean to say that the principle above stated as deducible from the cases, is to be found generally announced in express terms, in the language of the courts; but it will be found, we think, to be necessarily implied in, and to form the only rational foundation for, all that large class of cases which have held the sum to be in the nature of a penalty, notwithstanding the strongest and most explicit declarations of the parties that it was intended as stipulated and ascertained damages.

It is true, the courts in nearly all these cases profess to be construing the contract with reference to the intention of the parties, as if for the purpose of ascertaining and giving effect to that intention; yet it is obvious, from these cases, that wherever it has appeared to the court, from the face of the contract and the subject-matter, that the sum was clearly too large for just compensation, here, while they will allow any form of words, even those expressing the direct contrary, to indicate the intent to make it a penalty, yet no form of words, no force of language, is competent to the expression of

the opposite intent. Here, then, is an intention incapable of expression in words; and as all written contracts must be expressed in words, it would seem to be a mere waste of time and effort to look for such an intention in such a contract. And as the question is between two opposite intents only, and the negation of the one necessarily implies the existence of the other, there would seem to be no room left for construction with reference to the intent. It must, then, be manifest that the intention of the parties in such cases is not the governing consideration.

But some of the cases attempt to justify this mode of construing the contract with reference to the intent, by declaring, in substance, that though the language is the strongest which could be used to evince the intention in favor of stipulated damages, still, if it appear clearly, by reference to the subject-matter, that the parties have made the stipulation without reference to the principle of just compensation, and so excessive as to be out of all proportion to the actual damage, the court must hold that they could not have intended it as stipulated damages, though they have so expressly declared. See, as an example of this class of cases, *Kemble v. Farren*, 6 Bing. 141.

Now this, it is true, may lead to the same result in the particular case, as to have placed the decision upon the true ground, viz., that though the parties actually intended the sum to be paid, as the damages agreed upon between them, yet it being clearly unconscionable, the court would disregard the intention, and refuse to enforce the stipulation. But, as a rule of construction, or interpretation of contracts, it is radically vicious, and tends to a confusion of ideas in the construction of contracts generally. It is this, more than anything else, which has produced so much apparent conflict in the decisions upon this whole subject of penalty and stipulated damages. It sets at defiance all rules of interpretation, by denying the intention of the parties to be what they, in the most unambiguous terms, have declared it to be, and finds an intention directly opposite to that which is clearly expressed—*"divinatio, non interpretatio est, quæ omnino recedit a litera."*

Again, the attempt to place this question upon the intention of the parties, and to make this the governing consideration, necessarily implies that, if the intention to make the sum stipulated damages should clearly appear, the court would enforce the contract according to that intention. To test this, let it be asked, whether, in such a case, if it were admitted that the parties actually intended the sum to be considered as stipulated damages, and not as a penalty, would a court of law enforce it for the amount stipulated? Clearly, they could not, without going back to the technical and long exploded doctrine which gave the whole penalty of

the bond, without reference to the damages actually sustained. They would thus be simply changing the names of things, and enforcing, under the name of stipulated damages, what in its own nature is but a penalty.

The real question in this class of cases will be found to be, not what the parties intended, but whether the sum is, in fact, in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the words or the understanding of the parties. The intention of the parties can not alter it. While courts of law gave the penalty of the bond, the parties intended the payment of the penalty as much as they now intend the payment of stipulated damages; it must, therefore, we think, be very obvious that the actual intention of the parties, in this class of cases, and relating to this point, is wholly immaterial; and though the courts have very generally professed to base their decisions upon the intention of the parties, that intention is not, and can not be made, the real basis of these decisions. In endeavoring to reconcile their decisions with the actual intention of the parties, the courts have sometimes been compelled to use language wholly at war with any idea of interpretation, and to say "that the parties must be considered as not meaning exactly what they say." *Homer v. Flintoff*, 9 Mees. & W., per Park, B. May it not be said, with at least equal propriety, that the courts have sometimes said what they did not exactly mean?

The foregoing remarks are all to be confined to that class of cases where it was clear, from the sum mentioned and the subject-matter, that the principle of compensation had been disregarded.

But, secondly, there are great numbers of cases, where, from the nature of the contract and the subject-matter of the stipulation, for the breach of which the sum is provided, it is apparent to the court that the actual damages for a breach are uncertain in their nature, difficult to be ascertained, or impossible to be estimated with certainty, by reference to any pecuniary standard, and where the parties themselves are more intimately acquainted with all the peculiar circumstances, and therefore better able to compute the actual or probable damages, than courts or juries, from any evidence which can be brought before them. In all such cases, the law permits the parties to ascertain for themselves, and to provide in the contract itself, the amount of the damages which shall be paid for the breach. In permitting this, the law does not lose sight of the principle of compensation, which is the law of the contract, but merely adopts the computation or estimate of the damages made by the parties, as being the best and most certain mode of ascertaining the actual damage, or what sum

will amount to a just compensation. The reason, therefore, for allowing the parties to ascertain for themselves the damages in this class of cases, is the same which denies the right in the former class of cases; viz., the courts adopt the best and most practicable mode of ascertaining the sum which will produce just compensation.

In this class of cases where the law permits the parties to ascertain and fix the amount of damages in the contract, the first inquiry obviously is, whether they have done so in fact? And here, the intention of the parties is the governing consideration; and in ascertaining this intention, no merely technical effect will be given to the particular words relating to the sum, but the entire contract, the subject-matter, and often the situation of the parties with respect to each other and to the subject-matter, will be considered. Thus though the word "penalty" be used (*Sainter v. Ferguson*, 7 Man., G. & S. 716; *Jones v. Green*, 3 Younge & J. 299; *Pierce v. Fuller*, 8 Mass. 223), or "forfeit" (*Noble v. Noble*, 7 Cow. 307), or "forfeit and pay" (*Fletcher v. Dycke*, 2 Term R. 32), it will still be held to be stipulated damages, if, from the whole contract, the subject-matter, and situation of the parties, it can be gathered that such was their intention. And in proportion as the difficulty of ascertaining the actual damage by proof is greater or less, where this difficulty grows out of the nature of such damages, in the like proportion is the presumption more or less strong that the parties intended to fix the amount.

It remains only to apply these principles to the case before us. It is contended by the plaintiff in error, that the payment of the one thousand dollars mentioned in the covenant of Jaquith is not made dependent solely upon the breach of the stipulation not to go into business in Trenton, but that it applies equally—First, to the agreement to sell to Hudson his interest in the goods; second, to sell his interest in the books, notes, accounts, etc.; and, third, to the agreement to dissolve the partnership. But we can perceive no ground for such a construction. The language in reference to the sale of the interest in the goods, books, notes, accounts, etc., and that in reference to the dissolution, is not that of a sale in futuro, nor for the dissolution of the partnership at a future period, but it is that of a present sale and a present dissolution—"does hereby sell," and "the copartnership is hereby dissolved," is the language of the instrument. It is plain, from this language, from the subject-matter, and from all the acts of the parties, that these provisions were to take, and did take, immediate effect. There could be no possible occasion to provide any penalty or stipulated damages for the non-performance of these stipulations, because this sale and dissolution would already have been accomplished the moment the contract took

effect for any purpose; and, until it took effect, the stipulation for the one thousand dollars could not take effect or afford any security, nor would Hudson be bound or need the security. But it remained to provide for the future. If Jaquith were to be at liberty to set up a rival store in the same village, it might seriously affect the success of Hudson's business; and we are bound to infer, from the whole scope of this contract, that Hudson would never have agreed to pay the consideration mentioned in it, nor to have entered into the contract at all, but for the stipulation of Jaquith "that he will not engage in the mercantile business in Trenton, for himself or in connection with any other one, for the space of three years from this date, upon the forfeiture of the sum of one thousand dollars, to be collected by said Hudson as his damages." This stipulation of Jaquith not to go into business, is the only one on his part which looks to the future; and it is to this, alone, that the language in reference to the one thousand dollars applies. Any other construction would do violence to the language, and be at war with the whole subject matter.

The damages to arise from the breach of this covenant, from the nature of the case, must be not only uncertain in their nature, but impossible to be exhibited in proof, with any reasonable degree of accuracy, by any evidence which could possibly be adduced. It is easy to see that while the damages might be very heavy, it would be very difficult clearly to prove any. Their nature and amount could be better estimated by the parties themselves, than by witnesses, courts, or juries. It is, then, precisely one of that class of cases in which it has always been recognized as peculiarly appropriate for the parties to fix and agree upon the damages for themselves. In such a case, the language must be very clear to the contrary, to overcome the inference of intent (so to fix them), to be drawn from the subject-matter and the situation of the parties; because, it is difficult to suppose, in such a case, that the party taking the stipulation intended it only to cover the amount of damages actually to be proved, as he would be entitled to the latter without the mention of any sum in the contract, and he must also be supposed to know that his actual damages, from the nature of the case, are not susceptible of legal proof to anything approaching their actual extent. That the parties actually intended, in this case, to fix the amount to be recovered, is clear from the language itself, without the aid of a reference to the subject-matter, "upon the forfeiture of the sum of one thousand dollars, to be collected by the said Hudson as his damages." It is manifest from this language that it was intended Hudson should "collect," or, in other words, receive this amount, and that it should be for his damages for the breach of the stipulation. This language is stronger

than "forfeit and pay," or "under the penalty of," as these might be supposed to have reference to the form of the penal part of a bond, or to the form of action upon it, and not to the actual "collection" of the money.

It is, therefore, very clear, from every view we have been able to take of this case, that it was competent and proper for the parties to ascertain and fix for themselves the amount of damages for the breach complained of, and equally clear that they have done so in fact. From the uncertain nature of the damages, we cannot say that the sum in this case exceeds the actual damages, or that the principle of compensation has been violated. Indeed, it would have been perhaps difficult to discover a violation of this

principle had the sum in this case been more than it now is, though, doubtless, even in such cases as the present, if the sum stated were so excessive as clearly to exceed all reasonable apprehension of actual loss or injury for the breach, we should be compelled to disregard the intention of the parties, and treat the sum only as a penalty to cover the actual damages to be exhibited in proof. In this case the party must be held to the amount stipulated in his contract.

The second exception, therefore, is not well taken; the court properly refused to charge as requested, and no error appearing in the record, the judgment of the circuit court for the county of Wayne must be affirmed.

The other justices concurred.

KEEBLE v. KEEBLE.

(5 South. 149, 85 Ala. 552.)

Supreme Court of Alabama. Dec. 8, 1888.

Appeal from city court, Dallas county; John Haralson, Judge.

This was an action brought by the appellant, Henry C. Keeble, against the appellee, Julia P. Keeble, as the executrix of R. C. Keeble, deceased, for the recovery of money alleged to be due the plaintiff by the defendant's testator. The defendant pleaded the general issue, payment, accord and satisfaction, and set-off. The only question in the case arose on the instruction given the jury by the court, founded on the facts set out in the seventh plea. The demurrer to this plea was overruled by the court. It was, in substance, that plaintiff and defendant's testator had been in partnership in the mercantile business. Plaintiff sold out to defendant's testator, but was employed by the latter as business manager. The terms of the employment imposed on plaintiff the obligation to wholly abstain from the use of intoxicating liquors, and, in the event he should become intoxicated, that he should pay, "as liquidated damages," the sum of \$1,000. The plea alleged that plaintiff violated his promise to keep sober, and thereby became bound to pay to defendant's testator said sum of \$1,000, which sum was offered as a set-off to plaintiff's demand.

Mr. Roy and White & White, for appellant. Pettus & Pettus, for appellee.

SOMERVILLE, J. The only question in this case is whether the sum of \$1,000, agreed to be paid by the appellant, Henry C. Keeble, to Richard C. Keeble, the testator of the appellee, as mentioned in the written contract of employment between the parties, is to be regarded by the court as a penalty or as liquidated damages. The city court held it, in effect, to be liquidated damages, by charging the jury to find for the defendant, if the facts set out in the seventh plea were satisfactorily proved. The solution of this question is one which the courts have often confessed embarrassment in determining. No one rule can be announced which will furnish a single test or criterion for all cases, but, in most cases, a multitude of considerations are to be regarded in seeking to reach the real intention of the parties. The following general rules may be deduced from the authorities, each having more or less weight, according to the peculiar circumstances of each case, and the nature of the contract sought to be construed: (1) The court will always seek to ascertain the true and real intention of the contracting parties, giving due weight to the language or words used in the contract, but not always being absolutely controlled by them, when the enforcement of such contract operates with unconscionable hardship, or otherwise works an injustice.

(2) The mere denomination of the sum to be paid as "liquidated damages," or as "a penalty," is not conclusive on the court as to its real character. Although designated as "liquidated damages" it may be construed as a penalty, and often when called a "penalty" it may be held to be liquidated damages, where the intention to the contrary is plain. (3) The courts are disposed to lean against any interpretation of a contract which will make it liquidated damages; and, in all cases of doubtful intention, will pronounce the stipulated sum a penalty. (4) Where the payment of a smaller sum is secured by an obligation to pay a larger sum, it will be held a penalty, and not liquidated damages. (5) Where the agreement is for the performance or non-performance of a single act, or of several acts, or of several things which are but minor parts of a single complex act, and the precise damage resulting from the violation of each covenant is wholly uncertain or incapable of being ascertained save by conjecture, the parties may agree on a fixed sum as liquidated damages, and the courts will so construe it, unless it is clear on other grounds that a penalty was really intended. (6) When the contract provides for the performance of several acts of different degrees of importance, and the damages resulting from the violation of some, although not all, of the provisions are of easy ascertainment, and one large gross sum is stipulated to be paid for the breach of any, it will be construed a penalty, and not as liquidated damages. (7) When the agreement provides for the performance of one or more acts, and the stipulation is to pay the same gross sum for a partial as for a total or complete breach of performance, the sum will be construed to be a penalty. (8) Whether the sum agreed to be paid is out of proportion to the actual damages, which will probably be sustained by a breach, is a fact into which the court will not enter on inquiry, if the intent is otherwise made clear that liquidated damages, and not a penalty, are in contemplation. (9) Where the agreement is in the alternative, to do one of two acts, but is to pay a larger sum of money in the one event than in the other, the obligor having his election to do either, the amount thus agreed to be paid will be held liquidated damages, and not a penalty. (10) In applying these rules, the controlling purpose of which is to ascertain the real intention of the parties, the court will consider the nature of the contract, the terms of the whole instrument, the consequences naturally resulting from a breach of its stipulations, and the peculiar circumstances surrounding the transaction; thus permitting each case to stand, as far as possible, on its own merits and peculiarities. These rules are believed to be sustained by the preponderance of judicial decisions. *Graham v. Bickham*, 1 Am. Dec. 328, and note, pp. 331-340; *Williams v. Vance*, 30 Am. Rep. 26, and note, pp. 28-36; 1 Pom. Eq. Jur. §§ 440-446; *McPherson v.*

Robertson, 82 Ala. 459, 2 South. 333; Hooper v. Railroad Co., 69 Ala. 529; Watts v. Shepard, 2 Ala. 425; Bish. Cont. § 1452; Curry v. Larer, 7 Pa. St. 470; Foley v. McKeegan, 4 Iowa, 1; Nash v. Hermosilla, 9 Cal. 584; Muse v. Swayne, 2 Lea, 251; 2 Greenl. Ev. § 258.

The appellant was in the employment of the appellee's testator as a business manager, at very liberal wages, having been a partner with him in the mercantile business, under the firm name of R. C. Keeble & Co. Although he was but an employé, having sold to R. C. Keeble his entire interest in the partnership business, he remained ostensibly a partner. The terms of the employment, reduced to writing, imposed on the appellant, Henry Keeble, the obligation, among other duties, "to wholly abstain from the use of intoxicating liquors," and "to continue and remain sober," giving his diligent attention to the business of his employer, and promising, in the event he should become intoxicated, that he would pay, "as liquidated damages," the sum of \$1,000, which the testator, Richard Keeble, was authorized to retain out of a certain debt he owed the appellant. The appellant violated his promise by becoming intoxicated, and remained so for a long time, and acted rudely and insultingly towards the customers and employés of the testator, and otherwise deported himself, by reason of intoxication, in such manner as to do injury to the business. It is not denied by appellant's counsel that this is a total breach of the promise to keep sober; nor is it argued that the damage resulting from the violation of such a promise can be ascertained with any degree of certainty; nor even that the amount agreed to be paid as liquidated damages, in the event of a breach, is disproportionate to the damages which may have been actually sustained in this case. But the contention seems to be that, inasmuch as it was possible for a breach to occur with no actual damages other than nominal, the amount agreed to be paid should be construed to be a penalty. Unless this view is correct, the application of the foregoing rules to the construction of the agreement manifestly stamps it as a stipulation for liquidated damages, and not a penalty. It is argued, in other words, that becoming intoxicated in private, while off duty, would be a violation of the contract, but would be attended with no actual damage to the business of R. C. Keeble & Co. This fact would, in our opinion, except the case from the operation of the rules above enunciated. There are but few agreements of this kind where the stipulation is to do or not do a particular act, in which the damages may not, according to circumstances, vary, on a sliding scale, from nominal damages to a considerable sum. One may sell out the good-will of his business in a given locality, and agree to abstain from its further prosecution, or, in the event of his breach of his agreement, to pay a cer-

tain sum as liquidated damages; as, for example, not to practice one's profession as a physician or lawyer, not to run a steam-boat on a certain river or to carry on the hotel business in a particular town, not to re-establish a newspaper for a given period, or to carry on a particular branch of business within a certain distance from a named city. In all such cases, as often decided, it is competent for the parties to stipulate for the payment of a gross sum by way of liquidated damages for the violation of the agreement, and for the very reason that such damages are uncertain, fluctuating, and incapable of easy ascertainment. Williams v. Vance, 30 Am. Rep. 29-31, note; Graham v. Bickham, 1 Am. Dec. 336-338, note; 1 Pom. Eq. Jur. § 442, note 1. It is clear that each of these various agreements may be violated by a substantial breach, and yet no damages might accrue except such as are nominal. The obligor may practice medicine, and possibly never interfere with the practice of the other contracting party; or law, without having a paying client; or he may run a steam-boat without a passenger; or an hotel without a guest; or carry on a newspaper without the least injury to any competitor. But the law will not enter upon an investigation as to the quantum of damages in such cases. This is the very matter settled by the agreement of the parties. If the act agreed not to be done is one from which, in the ordinary course of events, damages, incapable of ascertainment save by conjecture, are liable naturally to follow, sometimes more and sometimes less, according to the aggravation of the act, the court will not stop to investigate the extent of the grievance complained of as a total breach, but will accept the sum agreed on as a proper and just measurement, by way of liquidated damages, unless the real intention of the parties, under the rules above announced, designed it as a penalty. We may add, moreover, that no one can accurately estimate the physiological relation between private and public drunkenness, nor the causal connection between intoxication one time and a score of times. The latter, in each instance, may follow from the former, and the one may naturally lead to the other. There would seem to be nothing harsh or unreasonable in stipulating against the very source and beginning of the more aggravated evil sought to be avoided. The duty resting on the court, in all these cases, is to so apply the settled rules of construction as to ascertain the legally expressed and real intention of the parties. Courts are under no obligations, nor have they the power, to make a wiser or better contract for either of the parties than he may be supposed to have made for himself. The court below, in our judgment, did not err in holding, as it did, by its rulings, that the sum agreed to be paid the appellee's testator was liquidated damages, and not a penalty. Affirmed.

HEYDER et al. v. EXCELSIOR BUILDING
LOAN ASS'N NO. 2 OF CITY
OF NEWARK.

(8 Atl. 310, 42 N. J. Eq. 403.)

Court of Errors and Appeals of New Jersey.
March 5, 1887.

C. T. Glen, for appellants. Guild & Lum,
for respondents.

KNAPP, J. The learned master who decided this cause reached the conclusion on the evidence that the purchaser of the premises, and not the mortgagee, should bear the loss incident to the fraudulent cancellation of the mortgage made upon the record prior to the purchase, on the faith of which cancellation the buyer parted with the whole purchase money believing the property to be unincumbered. After a careful review of the case, I am led to an opposite result. I am fully impressed with the importance of securing due protection to the holders of mortgage securities, where, in pursuit of the provisions of the registry laws, the lien has been made apparent on the record. The security afforded by registry should remain undisturbed by a cancellation effected through mistake, accident, or fraud of third persons, even if by such cancellation subsequent mortgages or purchasers are made to suffer loss. Such after-acquired rights ought not to prevail against the just claims of an innocent non-negligent incumbrancer, because the record has been wrongly effaced. Cancellation of a mortgage on the record is only *prima facie* evidence of its discharge, and it is left to the owner making the allegation to prove the canceling to have been done by fraud, accident, or mistake. Such proof being made, the mortgage will be established, even against subsequent purchasers or mortgagees without notice. *Banking Co. v. Woodruff*, 2 N. J. Eq. 117; *Harrison v. Railroad Co.*, 19 N. J. Eq. 488.

Between a mortgagee whose mortgage has been discharged of record solely through the unauthorized act of another party, and a purchaser who buys the title in the belief, induced by such cancellation, that the mortgage is satisfied and discharged, the equities are balanced, and the rights in the order of time must prevail. The lien of the mortgage must remain despite the apparent discharge. But this is apart from any default attributable to the holder of the lien. If through his negligence the record is permitted to give notice to the world that his claim is satisfied, he cannot, in the face of his own carelessness, have his mortgage enforced against a bona fide purchaser taking his title on the faith that the registry is discharged. Where one gives to another the power to practice a fraud upon innocent parties, the court will not interfere in his protection at the expense of those who have been deceived and misled by such fraud. What circumstance shall be

sufficient to establish negligence, such as shall preclude a mortgagee from a decree establishing his canceled paper, must be determined as a question of fact in each particular case, tested by those rules of conduct which men of common prudence usually observe in the care and management of such securities. That it is negligence in the owner of a mortgage to permit it to be in the custody and control of the mortgagor or owner of the mortgaged premises, in view of the provisions of our statute of registry, will not admit of denial. Such an occurrence is so unusual, so imperils the owner, and therefore so unlikely to happen in business dealings, that it was regarded in *Harrison v. Railroad Co.* as ground for the gravest suspicion of the truthfulness of a witness who had testified to such custody by the assent of the owner of the security.

The minute of discharge of this mortgage made upon the record by the register expressed, in general form, the fact of cancellation. The entry was made upon evidence presented to the register such as the statute has declared to be sufficient authority for so doing. The mortgage was produced by the mortgagor, canceled, and there is no doubt that upon the faith of this cancellation the purchaser took title to the property, and paid the consideration. But it clearly appears that the mortgage was unpaid, and that the act of the mortgagor in procuring the entry of the discharge was fraudulent, and without the knowledge or assent of the mortgagee. If this were all of the case, and no default appeared on the part of the mortgagee, notwithstanding the forcible language of the act which declares such minute to be a full and absolute bar to and discharge of the said entry, registry, and mortgage, the right of the respondent to the lien of its security should be maintained; and it is solely upon the ground that the respondent is chargeable with negligence which tended to and actually did produce the injury that I think the decree should be reversed. The mortgage was in the possession and under the control of the mortgagor at the time when it was produced for cancellation on the record. How long he had such custody does not positively appear, but the strong inference from the testimony is that it was during the whole time between the registry of the mortgage and its cancellation. Neither the president of the association, nor its treasurer, who had charge of its securities, were able to say that they ever had the actual custody of this mortgage; and they further declare that the mortgagor, although an officer of the company, had no access whatever to the securities in the possession of the treasurer. It is therefore impossible that he should have obtained its possession by means resembling theft. His possession must, I think, be attributed either to the assent or to the negligence of the officers of the association responsible for its securities. If we regard the the-

ory that the mortgagor, at the conclusion of his transaction of the loan, fraudulently substituted a copy of the mortgage for the original paper, and delivered that to the association, I am still forced to the conclusion that the officers were culpably negligent in permitting themselves to be thus imposed upon. The fact that he was the law officer of this body would not justify so implicit a trust in him in the matter of a loan to himself. We must assume that these officers were men of business capacity and skill. The transaction was in the line of their ordinary duties. Indeed, they did not trust to him, but employed other counsel to make searches against his property. In their ordinary transactions their habit was to submit to counsel the securities received for loans for inspection and approval. The slightest examination of the paper received by them would have shown it to be but a copy. They submitted it to no legal adviser; they gave it no examination. If it were not intended to be, as was its purport, a mere copy, leaving the original in other hands, any degree of care, exceeding the blindest confidence, must have revealed the deception. The theory fails to lead us out of the difficulty. I do not

think that any circumstance presented in this case made it the appellant's duty, in order to avail himself of the rights of a bona fide purchaser, to institute personal inquiry of the mortgagee. Any rule placing him under this exaction would embrace every case of a purchase of lands that had ever been subject to mortgage which the record showed to be canceled. Such a rule, it is needless to say, would render this provision of the registry act entirely nugatory. A purchaser could then only buy with safety when the registry had been discharged, and an admission of payment obtained from the mortgagee. Doubtless circumstances may, and frequently do, arise to put the purchaser upon inquiry, and charge him with notice. It seems to me that nothing appears in this transaction which should have put this purchaser upon further inquiry. He was permitted to rely upon the record. He did so, purchasing upon the belief that it spoke the fact truly. It was false, but the deception was directly traceable to the culpable negligence of the mortgage owner, and the loss should fall upon the party chargeable with the fault.

The decree below should be reversed, and the bill of complainants be dismissed.

PHILLIPS v. PHILLIPS.

(4 De Gex, F. & J. 208.)

Court of Appeal in Chancery. Jan. 11, 1862.

F. O. Haynes, for plaintiff. Mr. Malins and John Pearson, for defendants.

The LORD CHANCELLOR.

When I reserved my judgment at the conclusion of the argument in this case, it was rather out of respect to that argument than from a feeling of any difficulty with regard to the question that had been so strenuously contested before me.

The case is a very simple one. The plaintiff claims as the grantee of an annuity granted by a deed dated in the month of February, 1820, to issue out of certain lands in the county of Monmouth, secured by powers of distress and entry. The annuity or rent charge was not to arise until the death of one Rebecca Phillips, who died in the month of December, 1839, and the first payment of the annuity became due on the 8th March, 1840.

The case was argued on both sides on the admitted basis that the legal estate was outstanding in certain incumbrancers, and is still outstanding. Subject to the annuity the grantor was entitled in fee simple in equity. In February, 1821, the grantor intermarried with one Mary Phillips. On the occasion of that marriage a settlement, dated in February, 1821, was executed, and under this deed the defendants claim, and claim, therefore, as purchasers for a valuable consideration. No payment has ever been made in respect of the annuity.

The bill was filed within twenty years, and seeks the ordinary relief applicable to the case. The defendants by their answer insist that the deed was voluntary, and therefore void, under the statute of Elizabeth, as against them in their character of purchasers for valuable consideration, and they also insist upon the statute of limitations. But in the answer the defense of purchase for valuable consideration without notice is not attempted to be raised.

At the hearing an affidavit of Mary Phillips and another person was produced, denying the fact of notice of the annuity at the time of the grant and at the time of the creation of the marriage settlement, and the contention at the bar was that the defense of purchase for valuable consideration without notice was available for the defendants under these circumstances, and ought to be allowed as a bar to the claim by the court. The vice chancellor in his judgment refused to admit the defense of purchase for valuable consideration without notice, and I entirely agree with him in the conclusion that such a defense requires to be pleaded by the answer, more especially where an answer has been put in.

But I do not mean to rest my decision upon that particular ground because I have permitted the argument to proceed with reference to the general proposition, which was maintained before me with great energy and learning, viz., that the doctrine of a court of equity was this, that it would give no relief whatever to any claimant against a purchaser for valuable consideration without notice. It was urged upon me that authority to this effect was to be found in some recent decisions of this court, and particularly in the case decided at the rolls of Attorney General v. Wilkins, 17 Beav. 285.

I undoubtedly was struck with the novelty and extent of the doctrine that was thus advanced, and in order to deal with the argument it becomes necessary to revert to elementary principles. I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to and no more. If, therefore, a person seised of an equitable estate (the legal estate being outstanding) makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz., the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities; and the maxim applies, "*Qui prior est tempore potior est jure.*" The first grantee is potior, that is potentior. He has a better and superior, because a prior, equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers, at the time when they took their securities and paid their money, had notice of the first incumbrance or not. These elementary rules are recognized in the case of *Brace v. Duchess of Marlborough*, 2 P. Wms. 491, and they are further illustrated by the familiar doctrine of the court as to tacking securities. It is well known that if there are three incumbrancers, and the third incumbrancer, at the time of his incumbrance and payment of his money, had no notice of the second incumbrance, then, if the first mortgagee or incumbrancer has the legal estate, and the third pays him off, and takes an assignment of his securities and a conveyance of the legal estate, he is entitled to tack his third mortgage to the first mortgage which he has acquired, and to exclude the intermediate incumbrancer; but this doctrine is limited to the case where the first mortgagee has the legal title, for, if the first mortgagee has not the legal title,

the third does not, by the transfer, obtain the legal title, and the third mortgagee, by payment off of the first, acquires no priority over the second. Now the defense of a purchaser for valuable consideration is the creature of a court of equity, and it can never be used in a manner at variance with the elementary rules which have already been stated. It seems at first to have been used as a shield against the claim in equity of persons having a legal title. *Bassett v. Nosworthy*, Finch, 102. 2 White & T. Lead. Cas. Eq. 1, is, if not the earliest, the best early reported case on the subject. There the plaintiff claimed under a legal title, and this circumstance, together with the maxim which I have referred to, probably gave rise to the notion that this defense was good only against the legal title; but there appear to be three cases in which the use of this defense is most familiar:

First, where an application is made to an auxiliary jurisdiction of the court by the possessor of a legal title, as by an heir at law (which was the case in *Bassett v. Nosworthy*, Finch, 102. 2 White & T. Lead. Cas. Eq. 1), or by a tenant for life for the delivery of title deeds (which was the case of *Wallwyn v. Lee*, 9 Ves. 24), and the defendant pleads that he is a bona fide purchaser for valuable consideration without notice. In such a case the defense is good, and the reason given is that, as against a purchaser for valuable consideration without notice, the court gives no assistance, that is, no assistance to the legal title. But this rule does not apply where the court exercises a legal jurisdiction concurrently with courts of law. Thus it was decided by Lord Thurlow in *Williams v. Lambe*, 3 Brown Ch. 264, that the defense could not be pleaded to a bill for dower, and by Sir J. Leach in *Collins v. Archer*, 1 Russ. & M. 284, that it was no answer to a bill for fines. In those cases the court of equity was not asked to give the plaintiff any equitable, as distinguished from legal, relief.

The second class of cases is the ordinary one of several purchasers or incumbrancers, each claiming in equity, and one who is later and last in time succeeds in obtaining an outstanding legal estate not held upon existing trusts or a judgment, or any other legal advantage the possession of which may be a protection to himself or an embarrassment to other claimants. He will not be deprived of this advantage by a court of equity. To a bill filed against him for this purpose, by a prior purchaser or incumbrancer, the defendant may maintain the plea of purchase for valuable consideration without notice, for the principle is that a court of equity will not disarm a purchaser, that is, will not take from him the shield of any legal advantage. This is the common doctrine of the *tabula in naufragio*.

Thirdly, where there are circumstances

that give rise to an equity as distinguished from an equitable estate,—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake,—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the court will not interfere.

Now these are the three cases in which the defense in question is most commonly found. None of them involve the case that is now before me.

It was indeed said at the bar that the defendants, being in possession, had a legal advantage in respect of the possession, of which they ought not to be deprived; but that is to confound the subject of adjudication with the means of determining it. The possession is the thing which is the subject of controversy, and is to be awarded by the court to one or to the other; but the subject of controversy and the means of determining the right to that subject are perfectly different. The argument, in fact, amounts to this, "I ought not to be deprived of possession, because I have possession." The purchaser will not be deprived of anything that gives him a legal right to the possession, but the possession itself must not be confounded with the right to it.

The case therefore that I have to decide is the ordinary case of a person claiming, under an innocent equitable conveyance, that interest which existed in the grantor at the time when that conveyance was made; but, as I have already said, that interest was diminished by the estate that had been previously granted to the annuitant, and, as there was no ground for pretending that the deed creating the annuity was a voluntary deed, so there is no ground whatever for contending that the estate of the person taking under the subsequent marriage settlement is not to be treated by this court, being an equitable estate, as subject to the antecedent annuity, just as effectually as if the annuity itself had been noticed and excepted out of the operation of the subsequent instrument.

I have no difficulty, therefore, in holding that the plea of purchase for valuable consideration is upon principle not at all applicable to the case before me, even if I could take notice of it as having been rightly and regularly raised.

We next come to examine the authorities upon which the defense relies. Now, undoubtedly, I cannot assent to some observations which I find attributed to the master of the rolls in the report of the case of Attorney General v. Wilkins, 17 Beav. 285, but to the decision of that case, as explained by his honor in the subsequent case of *Colyer v. Finch*, 19 Beav. 500, I see no reasonable objection, and the principles that I have here been referring to are fully explained and acted on by the master of the rolls in the case of *Colyer v. Finch*, 19 Beav. 500. It is impossible, therefore, to suppose that he in-

tended to lay down anything in the case of Attorney General v. Wilkins, 17 Beav. 285, which is at variance with the ordinary rules of the court as I have already explained them, or which could give countenance to the argument that has been raised before me at the bar.

I have consequently no difficulty in holding that the decree of his honor the vice chancellor is right upon the grounds on which he placed it in the court below, and that also it would have been right if he had considered the grounds which have been urged before me in support of this petition of rehearing. I therefore affirm the decree and dismiss the petition of rehearing; but, inasmuch as the

plaintiff sues in forma pauperis, of course it must be dismissed without costs.

Mr. Pearson, for appellant, asked for a return of the deposit.

The LORD CHANCELLOR.

I think that the respondent should have the benefit of the deposit. You purchase the liberty of coming here by the deposit. I do not think that I can give the appellant any further costs against you, but I can give him the benefit of the deposit which, according to the rules of the court, you have made. Therefore the deposit will be given to him, unless it exceeds the costs of the appeal.

KNAPP v. BAILEY.

(9 Atl. 122, 79 Me. 195.)

Supreme Judicial Court of Maine. March 1, 1887.

On appeal from decision of single justice at nisi prius, Penobscot county.

Bill in equity brought to remove a cloud from the complainant's title, and to redeem the land from an equitable mortgage. The judge at nisi prius rendered a decision in favor of the complainant, and the respondent appealed to the law court.

A. W. Paine and C. P. Stetson, for complainant. Davis & Bailey, for respondent.

PETERS, C. J. This bill seeks to remove a cloud overhanging the complainant's title to an undivided parcel of land,—in effect, to redeem the land from an equitable mortgage, the allegation being that the debt has been paid. We can have no reasonable doubt of the facts thus far alleged. The defendant's grantor was called as a witness by the complainant. The defendant contends that his testimony was inadmissible, and cites cases which sustain the ordinary principle that a grantor cannot dispute with his grantee the title which he has assumed to convey. The objection goes to the testimony, and not to the witness personally. The principle of estoppel, which is invoked, is aimed, not against the witness because he is a grantor, but against any oral testimony to contradict the terms of a deed. As said by Judge Curtis in answer to the same objection: "The facts to be proved were dehors the record, and one witness was as competent, in point of law, [to prove them,] as another." Where a grantor is allowed to prove a fact by another, he may do so by himself. *Holbrook v. Bank*, 2 Curt. 246.

It is true, as a general rule, that the effect of a deed cannot be controlled by oral evidence. But among the exceptions to the rule is that in equity, where the proof is clear and convincing, a deed absolute on its face may be construed to be an equitable mortgage. In *Rowell v. Jewett*, 69 Me. 293, this exceptional doctrine was first allowed to have operation in this state. It was fully accepted in *Stinchfield v. Milliken*, 71 Me. 567, where the opinion says: "But the transaction was in equity a mortgage,—an equitable mortgage. The criterion is the intention of the parties. In equity this intention may be ascertained from all pertinent facts, either within or without the written parts of the transaction. Where the intention is clear that an absolute conveyance is taken as a security for a debt, it is in equity a mortgage. The real intention governs." In *Lewis v. Small*, 71 Me. 552, the same doctrine is admitted. It has since been affirmed in other cases, receiving an able discussion in the late case of *Reed v. Reed*, 75 Me. 264.

The effect of many of the older cases in this state has been swept away by this new principle in our legal system,—a product of the growth of the law, very greatly promoted by legislative stimulation. The present case must be governed by the equitable rule declared in the later decisions.

Another question presented by the case is whether the statutory provision (Rev. St. c. 73, § 12) which declares that a title of a purchaser for a valuable consideration cannot be defeated by a trust, unless the purchaser had notice thereof, means actual or constructive notice. Section 8 of the same chapter requires "actual notice" of an unrecorded deed to defeat a subsequent purchaser's title from the same grantor. The two sections were incorporated in our statutory system at the same time,—in the Revision of 1841. One requires "notice," the other "actual notice." We think the difference in phraseology may be accounted for partly on the idea that section 8 would be applicable more to law cases, and section 12 more to questions in equity. We can have no doubt that there may be cases of constructive trusts where section 12 would apply. At the same time, where the facts present questions analogous to those ordinarily arising under the other section, we think actual notice would be required; that under either section, in cases generally, actual notice, as we understand the meaning of the term, would be the rule; and that actual notice applies in the present case.

There is a conflict in the cases and among writers as to what is actual notice. Much of the difference is said to be verbal only,—more apparent than real. Certain propositions, however, are quite well agreed upon by a majority of the authorities. Notice does not mean knowledge; actual knowledge is not required. Mr. Wade describes the modes of proving actual notice as of two kinds. One he denominates express notice, and the other implied. "Implied, which imputes knowledge to the party because he is shown to be anxious of having the means of knowledge, though he does not use them; in other words, where he chooses to remain voluntarily ignorant of the fact, or is grossly negligent in not following up the inquiry which the known facts suggest." Wade, *Notice* (2d Ed.) § 5. Some writers use the word "implied" as meaning constructive, and would regard what is here described to be implied actual notice as constructive notice merely. As applicable to actual notice, such as is required by the sections of the statute under consideration, we think the classification of the author whom we quote is satisfactory. The author further explains the distinction by adding that "notice by implication differs from constructive notice, with which it is frequently confounded, and which it greatly resembles, with respect to the character of the inference upon which it rests; constructive notice being the creature of positive

law, or resting upon strictly legal inference, while implied notice arises from inference of fact." It amounts substantially to this: that actual notice may be proved by direct evidence, or it may be inferred or implied (that is, proved) as a fact from indirect evidence,—by circumstantial evidence. A man may have notice or its legal equivalent. He may be so situated as to be estopped to deny that he had actual notice. We are speaking of the statutory notice required under the conveyances act. A higher grade of evidence may be necessary to prove actual notice appertaining to commercial paper. *Kellogg v. Curtis*, 69 Me. 212. The same facts may sometimes be such as to prove both constructive and actual notice; that is, a court might infer constructive notice, and a jury infer actual notice, from the facts. There may be cases where the facts show actual, when they do not warrant the inference of constructive, notice; as where a deed is not regularly recorded, and not giving constructive notice, but a second purchaser sees it on the records, thereby receiving actual notice. *Hastings v. Cutler*, 24 N. H. 481.

Mr. Pomeroy (2 Eq. Jur. 596, note) summarizes the effect of the American cases on the point under discussion in the following words: "In a few of the states the courts have interpreted the intention of the legislature as demanding that the personal information of the unrecorded instrument should be proved by the direct evidence, and as excluding all instances of actual notice established by circumstantial evidence. In most of the states, however, where this statutory clause is found, the courts have defined the 'actual notice' required by the legislature as embracing all instances of that species in contradistinction from constructive notice; that is, all kinds of actual notice, whether proved by direct evidence or inferred as a legitimate conclusion from circumstances."

The doctrine of actual notice implied by circumstances (actual notice in the second degree) necessarily involves the rule that a purchaser, before buying, should clear up the doubts which apparently hang upon the title, by making due inquiry and investigation. If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids the inquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained. He has no right to shut his eyes against the light before him. He does a wrong not to heed the "signs and signals" seen by him. It may be well concluded that he is avoiding notice of that which he in reality believes or knows. Actual notice of facts which to the mind of a prudent man indicate notice is proof of notice. 3 Washb. Real Prop. (3d Ed.) 335.

It must be admitted that our present views are not fully supported by the case of *Spofford v. Weston*, 29 Me. 140, a decision made

40 years ago. But the doctrine has grown liberally since that day, and the correctness of some things pronounced in that opinion is virtually denied in subsequent cases. *Porter v. Sevey*, 43 Me. 519; *Hull v. Noble*, 40 Me. 459; *Jones v. McNarrin*, 68 Me. 334. Many cases which affirm the doctrine contended for by the complainant, as well as many opposing cases, are cited by the text writers. *Wade*, Notice, §§ 10, 11, et seq., and cases in notes; 2 Pom. Eq. Jur. § 603, and notes. The decided preponderance of authority supports the position that the statutory "actual notice" is a conclusion of fact capable of being established by all grades of legitimate evidence.

As to what would be a sufficiency of facts to excite inquiry no rule can very well establish. Each case depends upon its own facts. There is a great inconsistency in the cases upon this point. But we are satisfied that in the case before us the defendant must be charged with notice that his grantor held title by what equity must declare to be an invalid deed. He saw the grantor was out of possession. He could have easily ascertained that he never had possession. He knew that others had controlled the property in many ways for many years. He examined the registry when he discovered the deed in question, and there must have seen evidence of other conveyances inconsistent with its full validity. He purchased the property for \$40, while worth, had the title been perfect, nearer \$1,000. He took a quitclaim deed; and it is held by some courts that such an instrument of conveyance does not make him a bona fide purchaser without notice (*Baker v. Humphrey*, 101 U. S. 494), although in our system it is a circumstance only bearing on the question (*Mansfield v. Dyer*, 131 Mass. 200). More than all else, perhaps, the defendant made no inquiry of the grantor whether he had any real title or not, asking no explanations, but insisting to him that he had no valuable title. It is impossible for us to say, in the light of these impressive illuminating proofs, that the defendant purchased without notice. He purchased on the basis of a merely nominal title. We would not say that he did not believe he could legally purchase, encouraged, as he was, by the doctrine of the earlier cases, now abrogated; nor do we impute more than a want of caution and of diligence. Men's interests spur their judgments to one-sided conclusions oftentimes. The great dramatist makes a character reluctant to acknowledge the situation say, "I cannot dare to know that which I know;" while another, more quick-sighted, because anxious to believe, exclaims, "Seems, Madam! Nay, it is. I know not seems." One rejects proof on the clearest facts; the other accepts it on the slightest. Judgment affirmed.

WALTON, DANFORTH, EMERY, FOSTER, and HASKELL, JJ., concurred.

KIRSCH et al. v. TOZIER et al.

(38 N. E. 375, 143 N. Y. 390.)

Court of Appeals of New York. Oct. 23, 1894.

Appeal from supreme court, general term, fifth department.

Action brought by Theodore Kirsch and another against Orange L. Tozier, the Buffalo Savings Bank, and others, to reinstate a mortgage executed by defendant Lester H. Tozier and wife to defendant Orange L. Tozier, in trust for plaintiffs, to set aside its discharge, and for its foreclosure. The bank held a subsequent mortgage. From a judgment of the general term (18 N. Y. Supp. 334) affirming a judgment for plaintiffs, defendants appeal. Affirmed.

This action was brought to reinstate a mortgage executed by the defendant Lester H. Tozier and his wife to the defendant Orange L. Tozier, which was made in trust for the plaintiffs, Michael Kirsch and Theodore Kirsch, and for Peter Kirsch, now deceased, minor children of John Kirsch, to set aside a discharge of such mortgage executed by Orange L. Tozier, and for foreclosure of the mortgage and sale of the mortgaged premises for the benefit of the persons named, as cestuis que trustent. The lands in question consist of 102 acres, situate in the town of Sheldon, Wyoming county, N. Y., of which John Kirsch died seised in the year 1872. On the 8th day of January, 1873, the defendant Orange L. Tozier was appointed general guardian of the infant children, Michael J., Theodore and Peter Kirsch. At the time of his death John Kirsch owed debts which, with the incumbrances upon his real estate, exceeded the value of both his personal and real property. Orange L. Tozier and Elizabeth Kirsch, the latter the widow of the deceased, were appointed administrators of the estate of John Kirsch. Subsequently to this it was agreed between them and Lester H. Tozier, a son of Orange L. Tozier, that they should purchase the mortgages then existing on the farm, foreclose them, and procure a title to the land, and convey the same to Elizabeth Kirsch, who should, in turn, by mortgage thereon, secure to Lester H. Tozier the amount paid by him, and give a mortgage upon the farm of \$1,000 to these three children. This arrangement was carried out, except that upon a sale of the lands, either by direct purchase at the sale or by deed coming immediately from the purchaser, Lester H. Tozier became the owner for the consideration, in all, of \$1,131.56. Thereupon it was further arranged between Orange L. Tozier and the widow, Elizabeth Kirsch, that the widow should convey to the then holder of the title, Lester H. Tozier, all her interest in the lands to which she was entitled as widow, and that a mortgage should be executed by Lester H. Tozier to Orange L. Tozier, in trust for the three children, in the sum of \$1,000, one-third thereof payable to each of the three children when

he should arrive at age, with interest in the meantime. Having received the deed from Mrs. Elizabeth Kirsch, Lester H. Tozier and his wife executed to Orange L. Tozier, in trust for Michael Kirsch, Peter Kirsch, and Theodore Kirsch, "minor children of John M. Kirsch, deceased," the mortgage in question, dated the 15th day of October, 1875, expressing a consideration of \$1,000 payable as follows: The sum of \$333.33 November 13, 1887; the sum of \$333.33 March 18, 1891, and the sum of \$333.33 October 6, 1892,—with interest, payable annually, from the 1st day of April, 1876. This instrument was delivered to Orange L. Tozier, who caused the same to be recorded in the proper clerk's office on the 23d day of October, 1875. The mortgagee and trustee paid the interest upon this mortgage to Elizabeth Kirsch, the mother of the children, in pursuance of a previous arrangement, until the spring of 1886, since which time no part of the principal or interest has been paid thereon by the trustee for the benefit of either of the children. On the 3d day of September, 1883, Lester H. Tozier and his wife executed and delivered a deed of the farm to Orange L. Tozier, at a consideration, as expressed in the deed, of \$4,000, and the record title of such farm has since been in Orange L. Tozier. After acquiring this title, and on the 19th day of February, 1886, Orange L. Tozier executed and acknowledged a discharge of the mortgage, and caused the same to be recorded in the proper clerk's office on the 9th day of March, 1886. On the 27th day of January, 1886, before the execution of such discharge, Orange L. Tozier applied to the defendant the Buffalo Savings Bank for a loan of \$2,000 upon his farm, which application was granted on the 1st day of February, 1886; and on an examination of the title of such farm, submitted to the officers of the bank, there was an abstract certified by the proper clerk of Wyoming county to the effect that Orange L. Tozier appeared to be the owner of the farm. On such abstract a memorandum of the mortgage sought by this action to be reinstated described the mortgage simply as being given for \$1,000 and interest, "in trust for Michael Kirsch, Theodore Kirsch, and Peter Kirsch, minor children of John M. Kirsch, deceased," having written across the face of the memorandum as follows: "Discharged March 9, 1886. E. M. Jennings, Clerk." The defendant the Buffalo Savings Bank, at the time of taking its mortgage and advancing the money thereon, had not, either through any of its officers or attorneys, any knowledge or notice of the existence of this mortgage now sought to be reinstated in this action, except the memorandum on the abstract of title of its discharge, and the constructive notice given by the record of such mortgage.

Adolph Rebadow, for appellants. F. C. Peck, for respondents.

ANDREWS, C. J. (after stating the facts). The only serious question presented on the record arises on the claim of the Buffalo Savings Bank that it was not chargeable with notice nor put upon inquiry to ascertain that the defendant Tozier had no authority to discharge the mortgage in question. The savings bank, when it took its mortgage, had constructive notice of every fact which could have been ascertained by an inspection of the deeds or mortgages or record in the chain of title. An inspection of the records of the title to the land upon which its mortgage was taken would have disclosed the mortgage given by Lester H. Tozier in October, 1875, and that it was given "in trust" for the three minor children of John M. Kirsch, deceased; that the lands covered by the mortgage were subsequently, in 1883, conveyed by Lester H. Tozier to Orange L. Tozier, the mortgagee named in the mortgage given in trust for the minor children of John M. Kirsch; that after such conveyance, and in March, 1886, Orange L. Tozier, then being the owner of the lands, and also the mortgagee "in trust" in that mortgage, himself executed and caused to be recorded a satisfaction of the mortgage, and that this occurred before any part of the sum secured by the mortgage had become due. There can be no doubt that the satisfaction of the mortgage was, as to the defendant Orange L. Tozier, a breach of trust. The satisfaction was without consideration. The question whether Tozier held the mortgage as trustee impressed with a trust in favor of the three children of John M. Kirsch admits of no doubt. The implication from the nature of the instrument, the character of the beneficiaries, and the division of the payments into three equal parts, payable at specified, but different, dates in the future, is that the instrument was intended to secure to the several beneficiaries as they became of age an equal share of the sum for which the mortgage was given. The acceptance by Orange L. Tozier of the mortgage containing the declaration of the trust was an acknowledgment of the trust on his part, and bound him to perform it. The trust was expressed in the instrument, although not fully set out in words, and any act thereafter done by him in contravention of the trust was by the common law and by the statute void. Statute of Uses and Trusts (1 Rev. St. 730, § 65). The discharge of the mortgage was not intended for the benefit of the infants, but to deprive them of the benefit of the security, and, as we have said, was a plain breach of trust. The bank knew, or must be presumed to have known, when it took its mortgage, because an examination of the records would have disclosed the facts, (1) that the mortgage was taken by Tozier in trust for infants; (2) that he satisfied it before it became due; (3) that his relation to the property had changed, so that when he executed the satisfaction he was himself the owner of the land, having an adverse interest to those beneficially inter-

ested in the security; and (4) that in satisfying the mortgage he was dealing with himself. Persons dealing with a trustee must take notice of the scope of his authority. An act within his authority will bind the trust estate or the beneficiaries as to third persons acting in good faith and without notice, although the trustee intended to defraud the estate, and actually did accomplish his purpose by means of the act in question. It has frequently been held that a person dealing with an executor, administrator, or trustee, who, from the nature of his office, or by the terms of the trust, has power to satisfy or transfer the securities of the estate, or to vary the instrument from time to time, is not bound to go further, and ascertain whether in fact the act of the executor or trustee is justified, and that no breach of trust was intended. It is sufficient for his protection that he acts in good faith, and, if the act of the executor or trustee is justified by the terms of the power, the party dealing with him is protected. *Field v. Schieffelin*, 7 Johns. Ch. 153. But circumstances were disclosed by the record when the bank took its mortgage which precluded the bank from relying upon the recorded satisfaction of the prior mortgage. There was no indication in the mortgage that any power was vested in the trustee, Tozier, to accept payment of the mortgage before it became due, or to vary the trust security. There was no such affirmative power conferred upon him in fact, and the case of *McPherson v. Rollins*, 107 N. Y. 316, 14 N. E. 411, seems to be a decisive authority that there is no implication of such a power in case of a trustee of a specified security for the benefit of minors, and no other evidence of his actual authority exists than may be implied from the fact that he is trustee of the security. The rule declared in that case operated with great severity upon one who, without any actual notice, bought the property upon an official certificate that no lien existed on the premises, paying full value therefor. There the mortgage was given to secure the payment of an annuity to the mortgagee, and also annuities to two minors until they should become of age. The mortgagee afterwards, and before the expiration of the minority of the two children, without consideration, assumed to discharge the mortgage, and the satisfaction was duly recorded. It was held that the trustee had no power to satisfy the mortgage before the termination of the trust, and that the purchaser was not protected. It is difficult to perceive any solid distinction between that case and the present. In *McPherson v. Rollins* there was no express direction that the mortgage security should remain unchanged during the term of the trust. It was given to secure annuities, presumably for maintenance. Here the mortgage was given to secure a gross sum, for the benefit of infants, the shares being payable, as was to be inferred, on their severally attaining full age. There is a very pregnant circumstance in the present case bearing up-

on the point of constructive notice. The bank relied upon a discharge by Tozier of a lien held by him as trustee on his own land. The transaction as disclosed by the record showed that in executing the satisfaction Tozier was dealing with himself, and that the act was in his own interest; and not only so, but that the mortgage was not due. Tozier was acting in the double capacity of owner of the land and trustee of a lien thereon for other persons. The transaction was unusual and special, and the savings bank, with knowledge of Tozier's relation to the land as owner and trustee, was, we think, bound to inquire by what authority he acted, and, if inquiry had been made, the invalidity of the transaction would or might have been disclosed. What circumstances will amount to constructive notice, or will put a party upon inquiry, is in many cases a question of much difficulty.

A purchaser is not required to use the utmost circumspection. He is bound to act as an ordinarily prudent and careful man would do under the circumstances. He cannot act in contravention to the dictates of reasonable prudence, or refuse to inquire when the propriety of inquiry is naturally suggested by circumstances known to him. The circumstances of this case made it, we think, the duty of the bank to inquire in respect to the authority of Tozier to discharge the prior mortgage, and, having failed to do so, it is not entitled to protection as a bona fide purchaser. *Baker v. Bliss*, 39 N. Y. 70, and cases cited; *Story*, Eq. Jur. § 400 et seq. The other questions are satisfactorily disposed of in the opinions of the referee and at general term, and do not require further elaboration. The judgment should be affirmed, with costs. All concur. Judgment affirmed.

KNOBLOCH v. MUELER.

(17 N. E. 696, 123 Ill. 554.)

Supreme Court of Illinois. Jan. 20, 1888.

Appeal from circuit court, St. Clair county; A. Watts, Judge.

George Christian Mueller died March 27, 1870. By his will, dated March 14, 1870, his real estate was devised to his sons, George and Solomon Mueller. The will was admitted to probate, but afterwards, at the January term, 1871, in the circuit court of St. Clair county, this instrument was, on bill filed for that purpose, set aside, and declared not to be the will of said deceased. This decree was affirmed by this court. *Mueller v. Rebhan*, 94 Ill. 142. On the 27th day of March, 1879, Catharine Rebhan, one of the heirs at law of said George C. Mueller, deceased, filed in the circuit court of St. Clair county her bill for partition of the W. $\frac{1}{2}$ N. W., and the N. E. N. W. $\frac{1}{4}$, of section 28, town 1 N., range 7 W.,—alleging the death of said George C. Mueller intestate; that at his death he left him surviving George Mueller and Solomon Mueller, Margarite Rhinehardt, and complainant, Catharine Rebhan, his children and only heirs at law, to whom descended in equal parts the said lands; that on the death of said ancestor, George and Solomon had taken possession of the land jointly, and received the rents thereof until February 29, 1875, when George died, leaving all his property to Solomon by his will duly probated, etc., since when said Solomon has received the rents and profits of said land. The bill alleged that Solomon was the owner in fee of the undivided one-half of said lands, and the complainant and Mrs. Rhinehardt were each the owner in fee of the undivided one-fourth part thereof, as tenants in common, and prayed for partition of the land, and that Solomon be required to account for the rents and profits, etc. At the February term, 1880, of said court, said bill was taken as confessed as to Mrs. Rhinehardt, and Solomon Mueller and his wife, who was also made a party, filed their answer, admitting the material allegations of the bill, and consenting to partition of said premises according to the prayer thereof. Subsequently an amended answer and cross-bill was filed, setting up that said Solomon had made lasting and valuable improvements on the land, etc. On hearing, said defendant Solomon admitted in open court the allegations of the bill in respect of the interest of the parties as tenants in common, the death and intestacy of the ancestor, and consented to a decree of partition; and a decree declaring the several interests of the parties as set up in the bill as heirs at law of said George C. Mueller, deceased, in and to said land, was entered by the court by consent, and commissioners were appointed to make partition accordingly. At the May term, 1880, of said court, on proof that defendant Solomon had pur-

chased the interest of his co-defendant, Margarite Rhinehardt, the decree was, on his motion, so changed as to require the commissioners theretofore appointed to set off to the said Solomon three-fourths, and to the complainant one-fourth, of said land. The issue as to rents and profits and improvements was referred to the master for proofs. At the same term the commissioners filed their report, setting off to the complainant, Mrs. Rebhan, as and for her one-fourth interest in said land, lot 10, as shown in their report, containing 48 acres of the land; and set off the residue of said tracts of land to the said Solomon. Exceptions to the report were filed, which were, at the May term, 1881, overruled by the court, and the report approved by decree duly entered. No writ of error was prosecuted or appeal taken from the decree of partition. At the February term, 1883, of said court, on hearing of the issues as to rents and profits, a decree was rendered in favor of complainant Rebhan for \$1,638.97, from which an appeal was prosecuted to the appellate court. On the 8th day of March, 1881, in consideration of \$5,050, Mrs. Rebhan, and Emil, her husband, by their warranty deed, conveyed the undivided one-fourth part of the premises of which her father died seized, and all their right, title, and interest in the whole of said land, to appellant, Thomas Knobloch; reserving, however, her rights to rents and profits theretofore accrued. This deed was filed for record March 10, 1881. At the February term, 1882, appellant brought an action of trespass against said Solomon for alleged trespasses upon said 48 acres of land set off to Mrs. Rebhan, and afterwards brought ejectment to recover the same. In March or April, 1883, appellee found a paper dated March 9, 1855, purporting to be the last will and testament of George Christian Mueller, deceased, in and by which the testator devised all his land to his two sons, George and Solomon, subject to the payment of \$1,500 to Catharine Rebhan. This will was duly admitted to probate. On July 6, 1883, Solomon Mueller, appellee here, filed in the St. Clair circuit court the present bill against appellant, Catharine Rebhan, Emil Rebhan, Margarite Rhinehardt, and Edward Abend, who, prior to the probate of the last will, had been appointed administrator of the estate of said George C. Mueller, deceased, substantially setting up the foregoing facts, and praying that said will (1855) stand as the last will and testament of the said George Christian Mueller; that the deed from Catharine and Emil Rebhan to said Knobloch be set aside as being a cloud upon complainant's title; that all proceedings in partition regarding said land, and the stating of an account of rents and profits now pending in the appellate court, and all actions commenced by said Edward Abend as aforesaid, and by said Knobloch, be no further prosecuted; and that the defendants, their attorneys,

agents, etc., be perpetually enjoined from taking any further steps in regard to said action. An injunction was granted as prayed in the bill of August 25, 1883. Appellant answered, setting up that he had purchased in good faith and paid \$5,050 for the interest of Mrs. Rebhau in said land, without any notice of any adverse claim or title, and also setting up that complainant, Solomon, is estopped, by the decree of partition rendered by his consent in open court, from disputing complainant's title. At the September term, 1885, of said circuit court, a decree was entered perpetually enjoining the prosecution of said suits, and setting aside the deed from Mrs. Rebhau and her husband to appellant as a cloud on complainant's title. From this decree appellant, Knobloch, alone appealed.

W. C. Kueffner and James M. Dill, for appellant. A. R. Halbert, for appellee.

SHOPE, J., (after stating the facts as above.) The bill in this case seeks to remove, as a cloud upon the title of appellee, Solomon Mueler, derived under the will of 1855, the deed of Catharine and Emil Rebhau to appellant; and restrain by injunction the prosecution of an action of ejectment brought by appellant to recover the land partitioned to Catharine Rebhau in the proceedings instituted by her for partition of the lands of which her father died seized, and to enjoin a certain trespass suit brought for alleged trespasses upon said land by appellee, and to restrain Mrs. Rebhau from collecting \$1,638.97, decreed as rents and profits in said partition proceeding. Mrs. Rebhau not having appealed from the decree against her, the latter branch of the case made by the bill is not before us. When the instrument dated March 14, 1870, purporting to be the last will and testament of George C. Mueler, who died March 20, 1870, was set aside upon bill filed for that purpose, it was supposed by all the parties in interest that his estate had descended to his heirs at law as intestate estate, and letters of administration were granted accordingly. All the parties acquiesced in this condition of affairs, and rested in the belief that the property had so descended until the discovery, in March or April, 1883, 13 years after the death of the ancestor, of the will of the 9th of March, 1855, by which the estate in question was devised to George and Solomon Mueler. The good faith of the parties is not questioned, no fraud or misconduct is alleged, or laches imputed or imputable to any one, on account of the delay in the production of this will, or in any of the proceedings had in respect to the real or personal estate prior to its discovery. When Catharine Rebhau, daughter and one of the heirs at law of said George C. Mueler, deceased, on the 22d day of March, 1879, filed her bill for partition of the real estate of which said George C. had died seized; and when Solomon Mueler filed his answer, admitting the intestacy of his

father and consenting to the partition to Mrs. Rebhau and Mrs. Rhinehardt, his sisters, each a one-fourth part or interest in the land of which their common ancestor died seized, and consented to the decree therefor, the several parties in good faith believed the facts alleged in her bill to be true, and that the land had descended to the four children of George C. Mueler, deceased, in equal parts in fee. It is also equally clear that when appellant, Thomas Knobloch, purchased the interest of Catharine Rebhau in said land, and paid her therefor \$5,050, that he did so in good faith, relying upon the title of said Catharine as found and declared by the circuit court of St. Clair county in said partition proceeding by the consent of appellee. Upon the production and probate of the will of 1855, in April, 1883, it became manifest that the title to said land had not in fact so descended to the heirs at law of said George Christian Mueler; but by virtue of that will the legal title thereto, at the death of the testator, vested in the devisees, George and Solomon Mueler, and that by the last will of said George Mueler, who died February 29, 1875, the legal title to the whole of said land became vested in appellee, Solomon Mueler. It is apparent that all parties, while acting in good faith, were mistaken, and that the decree of the circuit court, finding one-fourth interest of said land in fee in Catharine Rebhau, would not have been entered had the court or parties been aware of the true condition of the title to the land.

It is said by counsel for appellee that this bill may be maintained, if upon no other ground than as a bill in the nature of a bill of review. This is manifestly a misapprehension. In neither the frame of the bill, or in the prayer, has the pleader attempted a review of the decree rendered in the partition proceeding of Rebhau against Mueler et al. The bill sets out the filing of that bill, the decree of partition, and for rents and profits; but it nowhere seeks to reopen that decree, or reverse, impeach, or alter it, or to procure a rehearing of that cause upon the alleged newly-discovered matter. The prayer is to remove appellant's title, derived thereunder, as a cloud upon appellee's title, and to restrain proceedings under that decree without reopening it or setting it aside. The whole scope of the bill is to procure the relief sought upon the equitable ground of mistake of fact, as to the title at the time of the entry of that decree, without in any way interfering with it by seeking to enjoin proceedings under it. The two grounds upon which a bill of review, or bill in the nature of a bill of review, will lie, are: Errors of law, appearing on the face of the decree, without further examination of facts; and new fact or facts, discovered since the decree, which are material, and which it was impossible for the party to produce at the time the decree passed. 2 Daniell, Ch. Prac. 1576; 2 Smith, Ch. Prac. 50. Bills contain-

ing newly-discovered matter are in the nature of original bills, in so far as such new matter presents an issuable fact, and therefore admits an answer and the formation of an issue; but only so far as it relates to the truth and sufficiency of the alleged new matter, and its admissibility for the purpose of affecting and opening the original decree. Authorities *supra*; *Buffington v. Harvey*, 95 U. S. 99. The purpose of a bill of the character named is to procure a reversal, alteration, or explanation of the former decree. The bill should state the former bill, the proceedings thereon, and the decree rendered by the court, the grievance under the decree of the party presenting the bill, and the error of law or new matter discovered upon which it is sought to reverse, reopen, or impeach it. In bills of review, if the former decree has not been carried into execution, the prayer may simply be that the same may be reversed and set aside; if the former decree has been executed, that the decree be reversed, and the complainant be restored to his former condition or status, as if it had not been rendered. In bills in the nature of bills of review, instead of praying the reversal of the former decree, the prayer should be that the cause be reheard in respect to and considering the new matter at the same time it is reheard upon the original bill, etc. 2 Daniell, Ch. Prac. 1581, 1582.

The decree of partition rendered at the February term, 1880, and the subsequent decree approving the report of the commissioners rendered at the May term, 1881, of said court, remain unreversed and in full force and effect. The court had jurisdiction of the subject-matter and of the parties, and rendered its decree determining the several interests of the complainant Catharine Rebhau and appellee, by the consent of appellee, as appears by his answer filed in said cause, and by the recitals in said decree of partition. Decrees of courts of chancery, in respect of matters within their jurisdiction, are as binding and conclusive upon the parties and their privies as are judgments at law; and a decree by consent in an amicable suit has been held to have an additional claim to be considered final. *Allason v. Stark*, 9 Adol. & E. 255. Decree so entered by consent cannot be reversed, set aside, or impeached by bill of review or bill in the nature of a bill of review, except for fraud, unless it be shown that the consent was not in fact given, or something was inserted, as by consent, that was not consented to. 2 Daniell, Ch. Prac. 1576; *Webb v. Webb*, 3 Swanst. 658; *Thompson v. Maxwell*, 95 U. S. 391; *Armstrong v. Cooper*, 11 Ill. 540; *Cronk v. Trumble*, 66 Ill. 432; *Haas v. Society*, 80 Ill. 248; *Atkinson v. Manks*, 1 Cow. 693; *Winchester v. Winchester*, 121 Mass. 127; *Allason v. Stark*, 9 Adol. & E. 255; *Earl of Hopetoun v. Ramsay*, 5 Bell, App. Cas. 69. See, also, note to *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. *826 et seq. It is the general doctrine

that such a decree is not reversible upon appeal or writ of error, or by bill of review for error. *Armstrong v. Cooper*, 11 Ill. 540. No exceptions were taken to the decree of partition, or attempt made in the cause in which it is rendered to vacate or modify it. It is undoubtedly true that, as between the parties and those chargeable with notice, courts of equity will entertain jurisdiction and grant relief, on proper bill filed, from the injurious effects of admissions and confessions of material facts, made in course of judicial proceedings, in ignorance of the rights of the party making them, where he has been guilty of no negligence, either in the discovery of the fact, or in applying to the proper forum for relief; but such relief can only be granted upon such grounds and for such reasons as would authorize the court to set aside agreements or contracts entered into by the parties. *Attorney General v. Tomline*, 7 Ch. Div. 388; *Millsbaugh v. McBride*, 7 Paige, 509; *Furnival v. Bogle*, 4 Russ. 142; *The Hiram*, 1 Wheat. 440. But it is apparent that the decree in the partition proceedings can only be attacked, reversed, annulled, or set aside by direct proceedings in that case, or upon bill of review, or bill in the nature of a bill of review.

If this were not so, however, there is another ground upon which the decree must be reversed. It is the well-settled doctrine of this court that no relief will be granted in equity, in cases of this sort, injuriously affecting intervening rights acquired in good faith, after the rendition of a judgment or decree, and in reliance thereon. So it has been held that amendments may be made in judicial proceedings, but not so as to affect the intervening rights of third persons accruing prior to such amendment. *Shirley v. Phillips*, 17 Ill. 473; *Coughran v. Gutcheus*, 18 Ill. 390; *Sickmon v. Wood*, 69 Ill. 329; 1 Story, Eq. Jur. 165. Relief will not be granted to the prejudice of appellant, if he has an equal equity with appellee, and is equally entitled to the protection of the court. 1 Story, Eq. Jur. 165. As already seen, all the parties to the partition proceedings supposed in good faith that Mrs. Rebhau was the owner in fee of the undivided one-fourth of the lands of which her father died seized, and that on the 8th day of March, 1881, appellant purchased her interest in such lands for a full and adequate consideration, without notice, actual or constructive, of any defect in her title, and in good faith. All the elements to constitute him a bona fide purchaser are present; that is, a valuable consideration paid, absence of notice, and presence of good faith. 2 Pom. Eq. Jur. § 745. His grantor had, by a court of competent jurisdiction, in a proceeding instituted to find and declare her interests in these lands, been adjudged, by the consent and admission of appellee, to be the owner in fee of the undivided one-fourth part thereof, and there was nothing in the record or elsewhere ap-

parent to disclose that she, who was thus clothed with apparent legal title, was not the owner in fact of that interest in the land. Nor is it shown or claimed that further inquiry would then have disclosed anything to cast suspicion upon her title. The defense of a bona fide purchaser had its rise in equity, upon the doctrine that a court of equity acts upon the conscience of him against whom relief is sought; and if he has done no wrong, or it would be unconscionable or inequitable to grant the relief, the court will refuse to exercise its jurisdiction. If, in equity and good conscience, the complainant should not obtain what he seeks, or the defendant ought not to suffer what is demanded, then the court will withhold its power. In theory, it is said, the defense of a bona fide purchaser presupposes some defect in purchaser's title; but the court refuses to investigate the validity of the title of either party, upon the ground that good conscience does not dictate that he who has dealt honestly, in good faith, and without notice, should be deprived of the legal right he has thereby gained. *Id.* § 739. There was formerly much apparent conflict in the adjudged cases as to when the defense of a bona fide purchaser would be availing. In *Phillips v. Phillips*, 4 De Gex, F. & J. 208, Lord Westbury grouped the cases in which a bona fide purchaser will be protected into three general classes, and reduced the doctrine to a formula, which it is said by Pomeroy (2 Eq. Jur. § 742) has been accepted, by subsequent judges almost without exception. The doctrine thus formulated, so far as applicable here, is: "Thirdly, when there are circumstances which give rise to an equity, as distinguished from an equitable estate,—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake,—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the court will not interfere."

Without extended discussion, it is apparent that the bill here filed seeks relief ancillary to the legal estate of appellee. The purpose of the bill is to remove the deed to appellant as a cloud upon appellee's legal title, and to enjoin the assertion of rights by appellant thereunder. The right to the relief sought exists, if at all, upon the equity arising out of the alleged mistake as to the title to said land in the grantor of appellant. This brings the case directly within the rule above given, which is sustained by the weight of modern authority; and, if appellant has made out his defense as bona fide purchaser, he should have prevailed in the court below. The decree of partition, as seen, was rendered by a court of competent jurisdiction, having jurisdiction of the person and of the subject-matter, and by appellee's consent. Appellant without notice, for full value, and in perfect good faith, acquired the title, sought to be removed as a cloud upon appellee's title, from

the party found and declared by that decree to be the owner, and we can perceive no principle upon which a court of conscience can hold that appellant shall lose in consequence of the mutual mistake, rather than appellee. It cannot be said that the equities of appellee are superior to those of appellant in respect of the title thus acquired, and, the equities being equal, the court will give no assistance to the legal title, (2 Pom. Eq. Jur. § 742, and cases cited,) but will remit the complainant to his remedy at law.

It is said, however, that, at the time appellant purchased, the report of the commissioners had not been confirmed by the court, and that he purchased subject to having the interest of his grantor, as found by the commissioners, set aside. It is true that exceptions to the report of the commissioners were then pending, but none of the exceptions questioned the right or title of Catharine Rebhau to the undivided one-fourth part of the real estate of which her father died seized. Such exception related simply to the manner of partition, and the conduct of the commissioners in making the same. There was nothing therein to put appellant upon notice or inquiry as to the title of Mrs. Rebhau. He bought subject, as a matter of course, to having the amount set off to Mrs. Rebhau changed or diminished by subsequent action of the commissioners, or to have their report set aside by the court; but his purchase was of her interest in the land, which was conceded by appellant and declared by the court to be a one-fourth interest therein.

It is also said by counsel for appellee that appellant may rely upon the covenants of warranty in his deed from the Rebhaus, and therefore the equities are with appellee. It is not shown whether Mrs. Rebhau, and her husband, who joined in the execution of said deed, are solvent or insolvent, and we perceive no principle, nor is any suggested by counsel, upon which appellant should be driven to resort to his legal remedy against his grantor for indemnity from loss, especially in view of the fact that it is not shown that such remedy would be availing. It will not be proper for us to here discuss or determine the right of appellee to the money paid by appellant for the land in question, or as to whether he has any remedy in respect of the same.

We are of opinion that the defense of a bona fide purchaser has been maintained, and, upon both of the grounds indicated, the right of appellee to the relief sought should have been denied, as against appellant, Knobloch, and the bill dismissed as to him. For the error of the court in this regard, the decree, in so far as it affects the appellant, Knobloch, will be reversed, and the cause remanded to the circuit court of St. Clair county, with instructions to enter a decree in conformity with this opinion, dismissing the bill as to said appellant.

MAYOR, ETC., OF CITY OF BALTIMORE
et al. v. WHITTINGTON.

(27 Atl. 984, 78 Md. 231.)

Court of Appeals of Maryland. Nov. 16, 1893.

Appeal from circuit court of Baltimore city.

Suit by Jacob Craft Whittington against the mayor and city council of Baltimore and Clarence M. Ellinger for injunction. From a decree for complainant, defendants appeal. Affirmed.

Argued before ROBINSON, C. J., and BRISCOE, BRYAN, FOWLER, and McSHERRY, JJ.

Thos. G. Hayes, Jas. P. Gorter, Wm. S. Bryan, Jr., and F. W. Story, for appellants. F. C. Slingsluff and T. Wallis Blackiston, for appellee.

McSHERRY, J. By section 47, art. 49, of the Municipal Code of Baltimore City, it is enacted, in substance, that when any lots of ground are chargeable with the payment of taxes, and are subject to ground rents or leases for terms of years, renewable forever, the collector shall, in the sale of such lots for nonpayment of taxes, first sell only the leasehold interest, if it should sell for an amount sufficient to pay the taxes, but, if it should not, then that he shall sell the whole fee-simple estate, provided these provisions "shall not apply to cases where the books of the city do not disclose the fact that the lot or lots are on lease as aforesaid, or unless the collector shall have actual notice of such lease prior to the sale thereof." The city tax collector of Baltimore sold in March, 1891, for the nonpayment of state and city taxes, the fee-simple estate in a lot of ground on Druid Hill avenue, and the mayor and city council became the purchaser. The sale was reported to the circuit court of Baltimore city, and was ratified in May, 1892. In October following, the city, through and by its comptroller, sold the lot to Clarence M. Ellinger, to whom it was thereafter conveyed. When the sale was made by the collector, the lot was subject to a lease for 99 years, renewable forever, which was owned by J. Henry Weber, and the reversion or fee was owned by the appellee, Whittington. The unpaid taxes were due by the owner of the leasehold estate, but the collector sold the whole fee, without having first offered, or having attempted to sell, the leasehold, as required by the section of the City Code to which reference has been made. There was no entry on the books of the collector showing that the lot was subject to a lease, and the single question involved in the case is whether, when the collector made the sale, he had "actual notice" of the existence of the lease. If he had, the sale was irregular. If it was irregular, the decree of the circuit court of Baltimore city, restraining by injunction the mayor and city

council, and its grantee, Ellinger, from disturbing the possession of the owner of the reversion, must be affirmed.

It appears by the record that in 1883 proceedings were instituted in the circuit court of Baltimore city by Rebecca and Mary McKaen against J. Henry Weber for a sale of this same leasehold estate under a mortgage thereon executed by Weber in 1881. Mr. T. Wallis Blackiston was appointed trustee to make the sale. He took possession of the property, and collected the rents and profits, but, owing to a depreciation in its value, made no sale of it. In the meantime the ground rent was regularly paid to the appellee, up to July, 1892, but the state and city taxes for the eight years beginning with 1882 remained unpaid. On the 1st day of December, 1890, Lewis N. Hopkins, city collector, filed a petition in the foreclosure proceedings representing that taxes for the years just mentioned were in arrear upon the property "decreed to be sold." The petition further stated that the collector was unable to enforce the collection of those taxes by reason of the pendency of the foreclosure proceedings, and it prayed that the trustee might be required to pay the taxes out of the rents theretofore collected from the property, or that the collector might "be allowed to proceed to collect said taxes by sale of the property in the ordinary way." This petition was signed by the late Mr. W. A. Hammond, "city solicitor, attorney for petitioner," and was sworn to by the deputy city collector. Subsequently, an order was passed, requiring the trustee to pay the taxes within five days out of the funds previously collected by him "as rents from the property decreed to be sold," and directing, upon his failure to do so, that the property be sold in the ordinary way by the collector. The trustee did fail to pay the taxes, and the collector made, under authority of this order, the sale of March, 1891, already mentioned. It is upon these facts that the appellee relies to show that the collector had "actual notice" of the existence of the leasehold estate.

Notice is of two kinds,—actual and constructive. Actual notice may be either express or implied. If the one, it is established by direct evidence; if the other, by the proof of circumstances from which it is inferable as a fact. Constructive notice is, on the other hand, always a presumption of law. Express notice embraces, not only knowledge, but also that which is communicated by direct information, either written or oral, from those who are cognizant of the fact communicated. Wade, Notice, § 6. Implied notice, which is equally actual notice, arises where the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him, by the exercise of due diligence, to a knowledge of the principal fact. 16 Amer. & Eng. Enc. Law, 790. Or, as defined by the supreme court of Missouri in *Rhodes v. Outcalt*, 48

Mo. 370, "a notice is regarded in law as actual when the party sought to be affected by it knows of the particular fact, or is conscious of having the means of knowing it, although he may not employ the means in his possession for the purpose of gaining further information." It is simply circumstantial evidence from which notice may be inferred. It differs from constructive notice, with which it is frequently confounded, and which it greatly resembles, in respect to the character of the inference upon which it rests; constructive notice being the creature of positive law, resting upon strictly legal presumptions, which are not allowed to be controverted, (1 Story, Eq. Jur. § 399; *Townsend v. Little*, 109 U. S. 504, 3 Sup. Ct. 357,) while implied notice arises from inference of fact, (*Williamson v. Brown*, 15 N. Y. 354; *Wade, Notice*, § 3.) With constructive notice we are not now concerned, and it is not pretended that the city collector had express notice, or knowledge personally, of the existence of the leasehold estate. But he became a party to the equity proceeding, where in a decree had been passed directing a sale of the leasehold interest. He did more. He asked, notwithstanding the decree had been long before signed and enrolled, that he be permitted to sell for the nonpayment of taxes, under the summary process of distraint, the identical property previously decreed to be sold, and no other or different interest; and the property which had been thus previously decreed to be sold was not the fee simple, but only the leasehold interest in the lot in question. He obviously knew there was a proceeding pending in the circuit court of Baltimore city, having for its object the sale of some interest in the property. He knew, further, the equity proceeding interfered with the execution of his distraints, and he applied to the court for leave to proceed, in spite of the decree, to sell the same property which had been decreed to be sold. We say he knew these things, and we say so, not because the record shows that he was personally aware of them, as matters of actual knowledge, but because the deputy city collector and the collector's attorney, both of whom were his agents in this transaction, did have such knowledge; the one having sworn to the facts stated in the petition, and the other having signed the petition itself. So both the attorney and the deputy collector knew, or at least were in possession of facts which would necessarily lead, upon the exercise of the slightest diligence, to a knowledge or notice, of the existence of the lease. They must therefore be regarded as knowing that which, with ordi-

nary diligence, they might have known, or that which they were conscious of having the means of knowing. This result is not a legal presumption, but an inference of fact, and it seems to us an irresistible inference. It would be idle to say that the collector was ignorant of facts relating to the title to property which he was about to sell for the nonpayment of taxes, when his deputy, acting for him and in his name, was in full possession of them, or that he did not know the things which his attorney was aware of in that particular proceeding respecting the state of the title; and it would be equally idle to say that the deputy, when he swore to the petition, and the attorney, when he signed it, filed it, and procured a court's order upon it, were not apprised of the character of the estate previously decreed to be sold, or were not in a position where they were conscious of having the means of knowing precisely what property the decree affected. At all events, the exercise of ordinary diligence would most assuredly have informed both of these agents of the collector of every fact which the records in the equity case disclosed, and among those facts was the material and important one that the lot was subject to a lease for 99 years, renewable forever. It is consequently a legitimate inference of fact that both of these representatives of the collector knew what the record in the foreclosure case disclosed as to there being a leasehold estate in Weber, and not a fee, and this was implied actual notice. Notice to the attorney, as well as notice to the deputy, was notice to the collector, and was actual, and not merely constructive, notice to him, for the principal is bound by and affected with notice to his agent, and he is equally bound by notice received by his attorney in the same transaction. *Astor v. Wells*, 4 Wheat. 466; *Reed's Appeal*, 34 Pa. St. 209; *Houseman v. Association*, 81 Pa. St. 256; *Smith v. Ayer*, 101 U. S. 320. If this were not so, then, in every case where notice is necessary, it might be avoided by simply employing an agent. We are, for the reasons we have given, of opinion that the collector had, through the means we have indicated, such actual notice of the existence of the lease as to bring him within the proviso quoted from the City Code, and that he was therefore not authorized to sell the fee-simple estate until he had first offered the leasehold for sale. It results, then, that the sale made by him was irregular, and the decree granting the injunction applied for by the appellee must be affirmed. Decree affirmed, with costs in this court and in the court below.

WILLIAMSON v. BROWN.

(15 N. Y. 354.)

Court of Appeals of New York. 1857.

The plaintiff was the grantee of fifty acres of land on which there was no recorded incumbrance. His grantor purchased the land of the defendant, giving back a mortgage for a part of the purchase price.

The defendant commenced to foreclose his mortgage by advertisement, whereupon this action was brought to restrain the foreclosure. The other material facts appear in the opinion.

D. H. Marsh, for appellant. J. R. Lawrence, for respondent.

SELDEN, J. The referee's report is conclusive as to the facts. It states, in substance, that the plaintiff had sufficient information to put him upon inquiry as to the defendant's mortgage; but that, after making all the inquiry which upon such information it became his duty to make, he failed to discover that any such mortgage existed. This being, as I think, what the referee intended to state, is to be assumed as the true interpretation of his report.

The question in the case, therefore, is, as to the nature and effect of that kind of notice so frequently mentioned as notice sufficient to put a party upon inquiry. The counsel for the plaintiff contends that while such a notice may be all that is required in some cases of equitable cognizance, it is not sufficient, in cases arising under the registry acts, to charge the party claiming under a recorded title with knowledge of a prior unregistered conveyance. He cites several authorities in support of this position.

In the case of *Dey v. Dunham*, 2 Johns. Ch. 182, Chancellor Kent says, in regard to notice under the registry act: "If notice that is to put a party upon inquiry be sufficient to break in upon the policy and the express provisions of the act, then indeed the conclusion would be different; but I do not apprehend that the decisions go that length." Again, in his Commentaries, speaking on the same subject, he says: "Implied notice may be equally effectual with direct and positive notice; but then it must not be that notice which is barely sufficient to put a party upon inquiry."

So in *Jackson v. Van Valkenburgh*, 8 Cow. 260, Woodworth, J., says: "If these rules be applied to the present case, the notice was defective. It may have answered to put a person on inquiry, in a case where that species of notice is sufficient; but we have seen that to supply the place of registry, the law proceeds a step further."

A reference to some of the earlier decisions under the registry acts of England will tend, I think, to explain these remarks, which were probably suggested by those decisions. One of the earliest, if not the first of the English

recording acts was that of 7 Anne, chapter 20. That act differed from our general registry act in one important respect. It did not, in terms, require that the party to be protected by the act should be a bona fide purchaser. Its language was: "And that every such deed or conveyance, that shall at any time after, etc., be made and executed, shall be adjudged fraudulent and void, against any subsequent purchaser or mortgagee for valuable consideration, unless," etc.

The English judges found some difficulty at first in allowing any equity, however strong, to control the explicit terms of the statute. It was soon seen, however, that adhering to the strict letter of the act would open the door to the grossest frauds. Courts of equity, therefore, began, but with great caution, to give relief when the fraud was palpable. *Hine v. Dodd*, 2 Atk. 275, was a case in which the complainant sought relief against a mortgage having a preference under the registry act, on the ground that the mortgagee had notice. Lord Hardwicke dismissed the bill, but admitted that "apparent fraud, or clear and undoubted notice would be a proper ground of relief." Again, he said: "There may possibly have been cases of relief upon notice, divested of fraud, but then the proof must be extremely clear."

Jolland v. Stainbridge, 3 Ves. 478, is another case in which relief was denied. The master of the rolls, however, there says: "I must admit now that the registry is not conclusive evidence, but it is equally clear that it must be satisfactorily proved, that the person who registers the subsequent deed must have known exactly the situation of the persons having the prior deed, and knowing that, registered in order to defraud them of that title."

Chancellor Kent refers to these cases in *Dey v. Dunham* (supra) and his remarks in that case, as to the effect, under the registry acts, of notice sufficient to put a party upon inquiry, were evidently made under the influence of the language of Lord Hardwicke and the master of the rolls, above quoted.

But the English courts have since seen, that if they recognized any equity founded upon notice to the subsequent purchaser of the prior unregistered conveyance, it became necessarily a mere question of good faith on the part of such purchaser. They now apply, therefore, the same rules in regard to notice, to cases arising under the registry acts, as to all other cases.

It will be sufficient to refer to one only among the modern English cases on this subject, viz.: *Whitbread v. Jordan*, 1 Younge & C. 303. The plaintiff was a London brewer, and supplied Jordan, who was a publican, with beer. It was the common practice with brewers in London to lend money to publicans whom they supplied with beer, upon a deposit of their title deeds. Jordan had deposited certain deeds with the plaintiff, pur-

suant to this custom. He afterward gave to one Boulnois, a wine merchant, a mortgage upon the property covered by the deeds deposited, which was duly recorded. Boulnois had notice of Jordan's debt to the plaintiff, and of the existing customs between brewers and publicans, but he made no inquiry of the brewers. The suit was brought to enforce the equitable mortgage arising from the deposit. Baron Alderson held that the notice to Boulnois was sufficient to make it his duty to inquire as to the existence of the deposit; that his not doing so was evidence of bad faith; and the plaintiff's right, under his equitable mortgage, was sustained. No case could show more strongly that notice which puts the party upon inquiry is sufficient even under the registry act.

The cases in our own courts, since *Dey v. Dunham and Jackson v. Van Valkenburgh* (supra), hold substantially the same doctrine. (*Tuttle v. Jackson*, 6 Wend. 213; *Jackson v. Post*, 15 Wend. 588; *Grimstone v. Carter*, 3 Paige, 421.)

I can see no foundation in reason for a distinction between the evidence requisite to establish a want of good faith, in a case arising under the recording act, and in any other case, and the authorities here referred to are sufficient to show that no such distinction is recognized, at the present day, by the courts. The question, however, remains, whether this species of notice is absolutely conclusive upon the rights of the parties. The plaintiff's counsel contends, that knowledge sufficient to put the purchaser upon inquiry is only presumptive evidence of actual notice, and may be repelled by showing that the party did inquire with reasonable diligence, but failed to ascertain the existence of the unregistered conveyance; while, on the other hand, it is insisted that notice which makes it the duty of the party to inquire, amounts to constructive notice of the prior conveyance, the law presuming that due inquiry will necessarily lead to its discovery.

The counsel for the defendant cites several authorities in support of his position, and among others the cases of *Tuttle v. Jackson* and *Grimstone v. Carter* (supra). In the first of these cases, Walworth, chancellor, says: "If the subsequent purchaser knows of the unregistered conveyance at the time of his purchase, he cannot protect himself against that conveyance; and whatever is sufficient to make it his duty to inquire as to the rights of others is considered legal notice to him of those rights;" and in *Grimstone v. Carter*, the same judge says: "And if the person claiming the prior equity is in the actual possession of the estate, and the purchaser has notice of that fact, it is sufficient to put him on inquiry as to the actual rights of such possessor, and is good constructive notice of those rights."

It must be conceded that the language used by the learned chancellor in these cases, if strictly accurate, would go to sustain the

doctrine contended for by the defendant's counsel. Notice is of two kinds: actual and constructive. Actual notice embraces all degrees and grades of evidence, from the most direct and positive proof to the slightest circumstance from which a jury would be warranted in inferring notice. It is a mere question of fact, and is open to every species of legitimate evidence which may tend to strengthen or impair the conclusion. Constructive notice, on the other hand, is a legal inference from established facts; and like other legal presumptions, does not admit of dispute. "Constructive notice," says Judge Story, "is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted." (Story, Eq. Jur. § 399.)

A recorded deed is an instance of constructive notice. It is of no consequence whether the second purchaser has actual notice of the prior deed or not. He is bound to take, and is presumed to have, the requisite notice. So, too, notice to an agent is constructive notice to the principal; and it would not in the least avail the latter to show that the agent had neglected to communicate the fact. In such cases, the law imputes notice to the party whether he has it or not. Legal or implied notice, therefore, is the same as constructive notice, and cannot be controverted by proof.

But it will be found, on looking into the cases, that there is much want of precision in the use of these terms. They have been not unfrequently applied to degrees of evidence barely sufficient to warrant a jury in inferring actual notice and which the slightest opposing proof would repel, instead of being confined to those legal presumptions of notice which no proof can overthrow. The use of these terms by the chancellor, therefore, in *Tuttle v. Jackson*, and *Grimstone v. Carter*, is by no means conclusive.

The phraseology uniformly used, as descriptive of the kind of notice in question, "sufficient to put the party upon inquiry," would seem to imply that if the party is faithful in making inquiries, but fails to discover the conveyance, he will be protected. The import of the terms is, that it becomes the duty of the party to inquire. If, then, he performs that duty is he still to be bound, without any actual notice? The presumption of notice which arises from proof of that degree of knowledge which will put a party upon inquiry is, I apprehend, not a presumption of law, but of fact, and may, therefore, be controverted by evidence.

In *Whitbread v. Jordan* (supra), Baron Alderson laid down the rule as follows: "When a party having knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, does not make, but on the contrary studiously avoids making, such obvious inquiries, he must be taken to have notice of those facts,

which, if he had used such ordinary diligence, he would readily have ascertained." This very plainly implies that proof that the party has used due diligence, but without effect, would repel the presumption. In this case it is true the decision was against the party having the notice. But in *Jones v. Smith*, 1 Hare, 43, we have a case in which a party, who had knowledge sufficient to put him on inquiry, was nevertheless held not bound by the notice.

The defendant had loaned money upon the security of the estate of David Jones, the father of the plaintiff. At the time of the loan he was informed by David Jones and his wife, that a settlement was made previous to the marriage, but was at the same time assured that it only affected the property of the wife. He insisted upon seeing the settlement, but was told that it was in the hands of a relative, and that it could not be seen without giving offense to an aged aunt of the wife, from whom they had expectations. David Jones, however, after some further conversation, promised that he would try to procure it for exhibition to the defendant. This promise he failed to perform. It turned out that the settlement included the lands upon which the money was loaned. Here was certainly knowledge enough to put the party upon inquiry; for he was apprised of the existence of the very document which was the foundation of the complainant's claim. He did inquire, however, and made every reasonable effort to see the settlement itself, but was baffled by the plausible pretenses of David Smith. The vice-chancellor held the notice insufficient. He said: "The affairs of mankind cannot be carried on with ordinary security, if a doctrine like that of constructive notice is to be refined upon until it is extended to cases like the present."

Possession by a third person, under some previous title, has frequently but inaccurately been said to amount to constructive notice to a purchaser, of the nature and extent of such prior right. Such a possession puts the purchaser upon inquiry, and makes it his duty to pursue his inquiries with diligence, but is not absolutely conclusive upon him. In *Hanbury v. Litchfield*, 2 Mylne & K. 629, when the question arose, the master of the rolls said: "It is true that when a tenant is in possession of the premises, a purchaser has implied notice of the nature of his title; but, if, at the time of his purchase, the tenant in possession is not the original lessee, but merely holds under a derivative lease, and has no knowledge of the covenants contained in the original lease, it has never been considered that it was want of due diligence in the purchaser, which is to fix him with implied notice, if he does not pursue his inquiries through every derivative lessee until he arrives at the person entitled to the original lease, which can alone convey to him information of the covenants."

This doctrine is confirmed by the language of Judge Story in *Flagg v. Mann*, 2 Sumn. 554, Fed. Cas. No. 4,847. He says: "I admit that the rule in equity seems to be, that where a tenant or other person is in possession of the estate at the time of the purchase, the purchaser is put upon inquiry as to the title; and if he does not inquire, he is bound in the same manner as if he had inquired and had positive notice of the title of the party in possession."

It is still further confirmed by the case of *Rogers v. Jones*, 8 N. H. 264. The language of Parker, J., in that case is very emphatic. He says: "To say that he (the purchaser) was put upon inquiry, and that having made all due investigation without obtaining any knowledge of title, he was still chargeable with notice of a deed, if one did really exist, would be absurd."

If these authorities are to be relied upon, and I see no reason to doubt their correctness, the true doctrine on this subject is, that where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a bona fide purchaser. This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part.

The judgment should be reversed, and there should be a new trial, with costs to abide the event.

PAIGE, J. The question to be decided is, whether, under the finding of the referee, the plaintiff is to be deemed to have had at the time of his purchase legal notice of the prior unrecorded mortgage of the defendant. The referee finds that the plaintiff had sufficient information or belief of the existence of such mortgage to put him upon inquiry, but that upon pursuing such inquiry to the extent of such information and belief, he did not find that such mortgage existed or had been given. It seems to me that the two findings are inconsistent with each other. If the plaintiff, on pursuing an inquiry to the full extent of his information and belief as to the existence of the defendant's mortgage, was unable to find that it either then existed or had been given, the highest evidence is furnished that the information received or belief entertained by the plaintiff was not sufficient to put him on inquiry as to the existence of such mortgage. The last part of this finding effectually disproves the fact previously found of the sufficiency of notice to put the plaintiff on inquiry. The two facts are utterly inconsistent with each other, and cannot possibly co-exist.

The remarks of Parker, J., in *Rogers v. Jones*, 8 N. H. 264, 269, are directly apposite to the facts found by the referee. Judge Parker says: "To say that he (demandant) was put upon inquiry, and that having made all due investigation without obtaining any knowledge of title, he was still chargeable with notice of a deed, if one did really exist, would be absurd." The sound sense of these observations is clearly shown by the principle of the rule that information sufficient to put a party upon inquiry is equivalent to evidence of actual notice or to direct and positive notice. That principle is that such information will, if followed by an inquiry prosecuted with due diligence, lead to a knowledge of the fact with notice of which the party is sought to be charged. Hence, in all cases where the question of implied notice of a prior unrecorded mortgage or conveyance arises as a question of fact to be determined, the court must decide whether the information possessed by the party would, if it had been followed up by proper examination, have led to a discovery of such mortgage or conveyance. If the determination is that such an examination would have resulted in a discovery of the mortgage or conveyance, the conclusion of law necessarily results that the information possessed by the party amounted to implied notice of such instrument. But if the determination is the converse of the one stated, the information of the party cannot be held to be an implied notice of the deed or mortgage. These propositions will be found to be fully sustained by authority. (*Kennedy v. Green*, 3 Mylne & K. 699; 2 Sugd. Vend. 552 [Am. Ed. 1851] marg. p. 1052; 4 Kent, Comm. 172; *Insurance Co. v. Halsey*, 4 Sandf. 577, 578; *Id.*, 8 N. Y. 274, 275; 1 Story, Eq. Jur. §§ 398-400, 400a; *Jackson v. Burgott*, 10 Johns. 461; *Dunham v. Dey*, 15 Johns. 568, 569, in error; *Jackson v. Given*, 8 Johns. 137; *Jolland v. Stainbridge*, 3 Ves. 478; *Pendleton v. Fay*, 2 Paige, 205.) Where the information is sufficient to lead a party to a knowledge of a prior unrecorded conveyance, a neglect to make the necessary inquiry to acquire such knowledge will not excuse him, but he will be chargeable with a knowledge of its existence; the rule being that a party in possession of certain information will be chargeable with a knowledge of all facts which an inquiry,

suggested by such information, prosecuted with due diligence, would have disclosed to him. (4 Sandf. 578; 3 Mylne & K. 699.) In this case the fact being found by the referee that the plaintiff, after pursuing an inquiry to the extent of his information, failed to discover the existence of the defendant's mortgage, it seems to me that neither law nor justice will justify us in holding the plaintiff chargeable with implied notice of such mortgage. The doctrine of notice and its operation in favor of a prior unrecorded deed or mortgage rests upon a question of fraud, and on the evidence necessary to infer it. (4 Kent, Comm. 172.) Actual notice affects the conscience, and convicts the junior purchaser of a fraudulent intent to defeat the prior conveyance. His knowledge of facts and circumstances at the time of the second purchase sufficient to enable him, on due inquiry, to discover the existence of the prior conveyance, is evidence from which a fraudulent intent may be inferred. (15 Johns. 569; 2 Johns. Ch. 190; *Jackson v. Burgott*, 10 Johns. 462.) Now, if it is ascertained and found as a fact, that the facts and circumstances within the knowledge of the second purchaser, at the time of his purchase, were insufficient to lead him, on a diligent examination, to a discovery of the prior conveyance, how upon this finding can a fraudulent intent be inferred, and if not, how can he be charged with notice which implies a fraudulent intent? It is not in the nature of things, that a knowledge of the same facts and circumstances shall, at one and the same time, be held evidence of both innocence and guilt. I think the rule well established, that an inference of a fraudulent intent on the part of a junior purchaser or mortgagee must, in the absence of actual notice, be founded on clear and strong circumstances, and that such inference must be necessary and unquestionable. (*McMechan v. Griffing*, 3 Pick. 149, 154, 155; *Hine v. Dodd*, 2 Atk. 275; *Jackson v. Given*, 8 Johns. 137; 2 Mass. 509; 2 Johns. Ch. 189; 15 Johns. 569; 8 Cow. 264, 266.)

For the above reasons, both the judgment rendered on the report of the referee and the judgment of the general term affirming the same, should be reversed, and a new trial should be granted.

Judgment reversed.

THOMAS et al. v. BURNETT.

(21 N. E. 352, 128 Ill. 37.)

Supreme Court of Illinois. April 5, 1889.

Error to circuit court, Randolph county;
GEORGE W. WALL, Judge.*Charles W. Thomas, pro se. James A. Watts, for defendant in error.*

SHOPE, J. This was a bill filed by Martha J. Burnett against Charles W. Thomas and the sheriff of Randolph county, to set aside a certificate of purchase held by Thomas upon a 40-acre tract of land owned by the complainant, as a cloud on her title, and to enjoin the sheriff from making a deed under such certificate. Both parties claimed title under James Burnett, a son of the complainant. It is conceded that on the 29th day of March, 1882, James Burnett was the owner of the tract of land in controversy, which was inclosed and in cultivation, but upon which there was no house. On that day the complainant, as it is shown, bought the land in good faith from her son for the sum of \$1,600. No deed was made until in the month of April following, when James Burnett conveyed the land to complainant. No question arises in respect to the payment of the purchase money at the date of the purchase. The land had been fenced, and under cultivation for over 20 years. David C. Thompson had for some years acted as the agent of James Burnett, while he was owner, and had rented the land from year to year. The deed to complainant was not recorded until October 22, 1884, and the land stood on the assessment books in the name of James Burnett, until 1885. The complainant, after her purchase, retained Thompson as her agent in respect of this land, who, in August, 1882, rented the land as the complainant's to one Jordan for one year, who raised a crop thereon, and retained possession of the same until in August, 1883, when he surrendered possession to Thompson. In March, 1884, the agent rented the lands to Yagle. At each renting the agent informed the tenants that complainant was the owner of the premises, and that he was renting it for her. A crop was raised on the land each year after 1882 by the tenants of complainant, and the fences were kept in repair by her agent, who collected the rent, and paid the same to her. On the 10th day of October, 1883, Margaret Gilfillen sued out an attachment against James Burnett in the Randolph circuit court returnable to the March term thereof, then following, and this land was levied upon on that day as the property of James Burnett, and a certificate of levy duly filed. At the September term, 1884, of said court, said plaintiff in attachment recovered judgment for \$2,500 against said Burnett. Special execution was issued thereon, under which, on October 22, 1884, the tract in controversy was sold to defendant Thomas, attorney of the plaintiff in question, for \$1,900, and the sheriff delivered to Thomas a certi-

cate of purchase, which is the certificate now sought to be set aside.

Section 31 of the conveyance act declares that all deeds, etc., authorized by law to be recorded, "shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record." An attaching creditor, who levies his attachment without notice of a prior unrecorded deed of his debtor, either actual or constructive, acquires a lien, which, if perfected by judgment, execution, sale, and deed, will hold the legal estate as against the grantee in a prior unrecorded deed. Having acquired a lien as an innocent creditor without notice, he will have a right to enforce the same, notwithstanding he may have, subsequently to the levying of his attachment, received notice of the deed. *Martin v. Dryden*, 1 Gilman, 187; *Stribling v. Ross*, 16 Ill. 122; *Jones v. Jones*, Id. 117; *Henderson v. Downing*, 24 Miss. 106. Unless, therefore, the plaintiff in attachment had notice, either actual or constructive, of the unrecorded deed from James Burnett to Mrs. Burnett, the lien thereby acquired must prevail over the rights of the complainant under that deed. The statute makes her deed void as against the attaching creditor if a lien on the property was thereby secured in good faith, and without notice of her rights. Complainant's right to the relief sought depends, therefore, upon the fact whether the plaintiff in attachment, at the time of the levy of the writ, had notice of her rights. There is no pretense that she had actual notice of the unrecorded deed, but it is claimed that she had constructive notice, arising from the possession of the land by complainant. Complainant took possession after her purchase by her agent and tenants, as we have seen, long prior to the levy of the attachment, and which possession she has ever since retained. It is well settled that actual possession of land by a party under an unrecorded deed is constructive notice of the legal and equitable right of the party in possession. The possession by tenant is the same in all respects as if by the party himself. *Franz v. Orton*, 75 Ill. 100; *Whitaker v. Miller*, 83 Ill. 381; *Coari v. Olsen*, 91 Ill. 273. It is claimed by plaintiff in error that possession, to have the effect of notice, must be of that character which will arrest attention, and the case of *Loughridge v. Bowland*, 52 Miss. 546, is referred to as sustaining that position. In that case the grantor of the land at the time of the conveyance was in possession of the same by his tenant. After the sale the same tenant continued to hold possession under an agreement to pay rent to the grantees. There was then nothing more than a technical attornment by the tenant to the purchaser. And the court held that the mere attornment of the tenant, without any visible change in the

character of the holding, was not sufficient to put a creditor or subsequent purchaser on inquiry. It is not necessary to the decision of this case to express any opinion in respect of the doctrine there announced, for the reason that after the complainant's purchase she through her agent made a lease of the property to Jordan. This was in August, 1882, and for one year, and under it a crop was raised. The tenant was informed that his landlord was Mrs. Burnett, the complainant. The agent, as before stated, kept the place in repair as her agent, collected the rents, and paid them to her. Here were open, notorious acts of ownership asserted in an unequivocal manner by the complainant. Thompson, the agent, was not himself in possession of the property, but the tenants of complainant were, and it was their possession which constituted notice. It is, however, said that there was no tenant in actual possession at the time of the levy of the attachment, and therefore the plaintiff in error was not chargeable with notice of the unrecorded deed. The tenant's possession of land is that of his landlord. The Jordans occupied the land up to August, 1883, and this was notice to the world of Mrs. Burnett's title, to all intents as if she had occupied it. Actual residence is not essential to continuous possession. If the party is in actual possession of the land, and there are continuous acts of ownership, it is sufficient. *Coleman v. Billings*, 89 Ill. 183; *Ford v. Marcall*, 107 Ill. 136. The land here in con-

troversy was improved, and under fence. In such case, the owner will not lose his possession by failing to be continuously in the actual occupancy or use of the land by himself or tenant. The fact that a short time may have elapsed between the actual occupancy by one tenant, before another tenant takes possession, will not be a loss of possession by the owner. The improvements, the fact that a crop had been raised the previous season, will clearly indicate the possession, and will be sufficient to put others dealing with the property upon inquiry. The attachment here was levied October 10, 1883, a short time after the tenants had surrendered possession, to Thompson, complainant's agent, who still continued to act as such agent in taking care of the property, and the plaintiff should have made inquiry before levying her writ of attachment. It is apparent this could have been done, either of the outgoing tenants or of the agent. Any reasonable, prudent man, contemplating a purchase of the property, would have made such inquiry; and it is clear that an inquiry of the Jordans or of Thompson would have led to notice of the claim of complainant, and of the existence of the unrecorded deed. We think the circumstances are such as to charge the attaching creditor with notice of the deed from James Burnett to the complainant. This being so, the circuit court committed no error in granting the relief prayed, and its decree will be affirmed.

PRINGLE v. DUNN et al.

(37 Wis. 449.)

Supreme Court of Wisconsin. Jan. Term, 1875.

Appeal from circuit court, Milwaukee county.

Action by one Pringle against Andrew Dunn and wife and others to foreclose a mortgage given to the La Crosse & Milwaukee Railroad Company to secure a bond of said company for \$5,000, payable January 1, 1864, said mortgage bearing date April 11, 1854, and alleged to have been recorded on such date, and afterwards assigned to plaintiff, as a bona fide purchaser for value. There was no record of the assignment. The court found that the witnesses to the mortgage did not subscribe it at the time of its execution, but after it had been recorded; that, after such subscription, it was not again recorded; that the plaintiff was the bona fide holder of the bond and mortgage; that the defendants other than Andrew Dunn and wife had no actual knowledge of the mortgage, and the recording of the mortgage before it was subscribed was not constructive notice; and dismissed the complaint. Plaintiff appeals. Modified.

Mariner, Smith & Ordway, for appellant.
Guy C. Prentiss, J. P. C. Cottrill, and John W. Cary, for respondents.

COLE, J. Before approaching the legal questions involved in this case, it is necessary to determine a question of fact; and that is, does the evidence show that the mortgage sought to be foreclosed was properly attested when first left at the office of the register, so as to entitle it to record? There is considerable testimony in the case which tends strongly to prove that the mortgage had no witnesses when it was recorded. And the court found as a fact that the mortgage was not subscribed by the witnesses Baker and McFarlane at the time of its execution, and before it was transcribed upon the records and entered in the general index, but was subscribed by these witnesses after it was recorded, and that it was not again recorded. This finding affirms one important fact, which is much contested by the defendants, which is the genuineness of the signature of the witness A. J. McFarlane to the instrument. An attempt is made to prove, and it is argued that the evidence shows, that McFarlane never signed the mortgage as a witness, and that his signature thereto is a forgery. On this point we will only make the remark that we are satisfied from the evidence, and especially by an inspection of the writings themselves, of the authenticity of the signature. Whether the mortgage was subscribed by the witnesses at the time of its execution and before it was left at the office for registry is a question of more doubt upon the evidence. The testimony is quite

strong and positive that the mortgage had no subscribing witnesses when it was recorded. But this testimony is contradicted; and, considering the circumstances attending the execution and delivery of the mortgage, we think the probabilities favor the inference that the instrument was witnessed when it was left for record. According to this view, there was a mistake in transcribing the mortgage upon the record by omitting the names of the witnesses. The weight of the evidence, to our minds, supports this inference or conclusion. It is to be observed that the mortgage is perfect and fair on its face, showing two witnesses. A strong presumption fairly arises from the instrument itself that it was witnessed at the time of its execution. This presumption is not overcome nor repelled by the testimony offered to show that it was not witnessed at that time. In respect to the degree or quantity of evidence necessary to justify a finding that the subscribing witnesses signed the instrument after it was executed and recorded, the case would seem to come within the rule laid down in *Kercheval v. Doty*, 31 Wis. 478, where it is said: "The proposition being to set aside or invalidate a written contract by evidence of a far less certain and reliable character than the writing itself, the greatest clearness and certainty of proof should be required. It is like the cases where the object is to correct or reform a deed or other instrument on the ground of mistake, or to set aside or rescind it on the same ground; where the rule is that the fact must be established by clear and satisfactory evidence." The testimony offered to show that the mortgage was not witnessed when executed and before it was recorded falls short of this rule. The fact is not established by clear and conclusive proof that it was not witnessed when executed. It would serve no useful purpose to go into a detailed discussion of the evidence upon this point, and we shall not do so. It is sufficient to say that, giving to the testimony offered to show that the mortgage was not witnessed before it was received for record all the weight to which it is entitled, it fails to establish that fact in a clear, satisfactory manner.

Assuming, then, that the mortgage was witnessed when it was left at the office of the register to be recorded, the further important inquiry arises as to what effect must be given to the record as constructive notice to subsequent bona fide purchasers for value. This record was in this state. The entry of the mortgage was made in the general index book, but the full record of the instrument had no subscribing witnesses; and therefore the question is, would such a record operate as constructive notice to subsequent purchasers for value, independent of any actual notice? It is claimed by the counsel for the plaintiff that the record does and should so operate, notwithstanding the

mistake in the registration or recording of the instrument in extenso. This presents a question of no little difficulty, which must be solved by the application of general principles of law to the provisions of our statute.

It is a familiar rule that an instrument must be properly executed and acknowledged so as to entitle it to record, in order to make the registry thereof operate as constructive notice to a subsequent purchaser. Says Mr. Justice Story: "The doctrine as to the registration of deeds being constructive notice to all subsequent purchasers is not to be understood of all deeds and conveyances which may be de facto registered, but of such only as are authorized or required by law to be registered, and are duly registered in compliance with law. If they are not authorized or required to be registered, or the registry itself is not in compliance with the law, the act of registration is treated as a mere nullity; and then the subsequent purchaser is affected only by such actual notice as would amount to a fraud." 1 Eq. Jur. § 404. See, also *Ely v. Wilcox*, 20 Wis. 528; *Fallass v. Pierce*, 30 Wis. 444; *Lessee of Heister v. Fortner*, 2 Bin. 40; *Shove v. Larsen*, 22 Wis. 142, and cases cited on page 146. Under our statute, among other requisites, two witnesses are essential to a conveyance, to entitle it to record. The statute requires every register to keep a general index, each page of which shall be divided into eight columns, with heads to the respective columns as prescribed; and the duty is imposed upon the register to make correct entries in said index of every instrument received by him for record, under the respective and appropriate heads, and immediately to enter in the appropriate column, and in the order of time in which it was received, the day and hour of reception; and it is declared that the instrument "shall be considered as recorded at the time so noted." Rev. St. 1858, c. 13, §§ 142, 143. In *Shove v. Larsen*, supra, the effect of this index containing correct entries of matters required to be made therein was considered, and it was held that by force of the statute it operated as constructive notice to a subsequent purchaser. In that case the index contained an accurate description of the land mortgaged, but in transcribing the mortgage at large upon the records a mistake was made in the description; and it was claimed in behalf of the subsequent purchaser that it was the registration of the instrument at large which alone amounted to constructive notice. But this construction of the statute was not adopted, the court holding that a subsequent purchaser was bound to take notice of the entries in the index, which the law required the register to make. This result seemed to follow necessarily from the language of the statute, which declared that the instrument should

be considered as recorded at the time noted. Time might elapse before the instrument was transcribed at large on the record, or it might be lost, and not transcribed at all, leaving the index the only record of its contents. And the manifest intention of the statute seemed to be to make the index notice of all proper entries from its date, and also of the instrument itself until it was registered in full. The further consequence would seem necessarily to result from this view of the statute that the registration of the conveyance in extenso relates back to the registration in the index, and from thence there is constructive notice of the contents of the instrument. The doctrine of *Shove v. Larsen* was approved in *Hay v. Hill*, 24 Wis. 235, but the court refused to make the entry in the index in that case operate as constructive notice, because upon its very face it bore conclusive evidence that it was not made at its date; in other words, the rectitude and integrity of the index were successfully impeached by the index itself. See, also, *Insurance Co. v. Scales*, 27 Wis. 640. Where there is nothing upon the face of the index to impeach or throw suspicion upon its accuracy, there it would affect a subsequent purchaser with notice of those facts which the law required to appear therein. Doubtless, a still further consequence follows from this construction of the statute, namely, that where, by some mistake, there is a discrepancy between the proper index entries and the instrument as registered, there each supplies the defects of the other in the constructive notice thereby given; that is, it appears to be the intention of the statute to charge the subsequent purchaser constructively with such knowledge as the proper index entries afford, as well as with notice of those facts derived from the registration itself. He is presumed to have examined the whole record, and is affected with notice of what it contains. But when the instrument, as registered in full, appears defective in some material and essential parts, which are not supplied by the index entries, what effect, then, must be given the record as constructive notice? This is really the difficult question in this case. From the entries in the index it would not appear whether the mortgage was witnessed or not. The presumption from the mere entries themselves would be that it was witnessed and acknowledged, so as to entitle it to record; but when the mortgage, as registered in full, was examined, it would be found that it had no witnesses, and had no business on the records. As the record itself is only constructive notice of its contents, it is difficult to perceive how it can go beyond the facts appearing upon it, and charge a purchaser constructively with knowledge of a fact not in the record.

One of the counsel for the defendants states the argument on this point as follows: He

insists and claims that the entries in the index books, so far as they indicated that the mortgage had been filed for record, indicated also that the mortgage was so executed as to entitle these entries of it to be made; but that, when the full record was looked at for all the particulars of the mortgage, and perhaps for the express purpose of verifying the entries in the index, it is found that the apparent assertion by the index entries that the mortgage was properly executed was wholly untrue, and that the mortgage in fact was no incumbrance. The fact, as truly shown to exist by the full record, overcomes and destroys the false assertion as to the fact in the index. And, it appearing by the instrument registered that it was not entitled to record, both the registration and index itself cease to affect the purchaser with constructive notice.

It is not readily perceived wherein this argument as to the effect of our various provisions upon the subject of registration is unsound. The question mainly depends upon the construction of our own statutes. So far as we are aware, this is the first time the point has been presented in this court for adjudication. We have derived but little aid from the decisions in other states, for the reason that few of them have similar statutory provisions. We have been referred by the counsel for the plaintiff to two cases in Michigan,—*Brown v. McCormick*, 28 Mich. 215, and *Starkweather v. Martin*, Id. 472. In *Brown v. McCormick* the effect of the registry, as notice to subsequent purchasers, was made to turn upon the curative act of 1861, mentioned in the opinion. In *Starkweather v. Martin* the question was, how far the absence, on the registry of a deed, of any mark or device indicating a seal, or of any statement of the register that the original was sealed, affected the validity of the record entry as evidence of title. The record entry of the deed was made more than forty years before the cause was decided, by the proper officer, and in the appropriate place for the registry of deeds, under the law permitting the registry of only sealed instruments; and the instrument was in the form of a warranty deed, purporting to be acknowledged and dated at a time when it was the common and lawful course to seal conveyances, and contrary to official duty to take the acknowledgment unless the conveyance was sealed, and where the conclusion, attestation clause, and certificate of acknowledgment of the instrument all spoke of it as under seal. The court said that these facts and incidents, taken together, afforded a very strong presumption that the original was sealed.

The doctrine of this case does not seem to have a very strong bearing upon the question under consideration. It may be said that it was contrary to the duty of the reg-

ister to record the mortgage unless it was properly acknowledged and witnessed, and that a presumption arises that he would not have done so. But in answer to this it may also be said that the law made it the duty of the register to record the mortgage unless it was properly acknowledged and witnessed, and that a presumption arises that he would not have done so. But in answer to this it may also be said that the law made it the duty of the register to record, or cause to be recorded correctly, all instruments authorized by law to be recorded. Section 140, c. 13, Rev. St. 1858. And the presumption that he performed his duty in recording the mortgage correctly is as strong as the presumption that he would not have recorded it unless it was entitled to registry.

In *Shove v. Larsen*, a number of cases are referred to which hold that a mistake in recording a deed, or recording it out of its order, renders the registration ineffectual as notice to subsequent incumbrancers and purchasers. The doctrine of those cases would seem to be applicable to the case before us. The registration and index entries being incomplete, because showing that the mortgage had no subscribing witnesses, constructive notice could not be presumed of such a record; for the principle "that the registry is notice of the tenor and effect of the instrument recorded only as it appears upon that record" fully applies. *Shepherd v. Burkhalter*, 13 Ga. 443. See, in addition to the cases cited in *Shove v. Larsen*, *Brown v. Kirkman*, 1 Ohio St. 116; *Stevens v. Hampton*, 46 Mo. 404; *Bishop v. Schneider*, Id. 472; *Terrell v. Andrew Co.*, 44 Mo. 309; *Frost v. Beekman*, 1 Johns. Ch. 288.

The question, then, arises whether the evidence shows that any of the defendants were affected with actual notice of the mortgage. This question, we think, must be answered in the affirmative, so far as the defendants *Thomas Maloy* and *Stanislaus Bartosz* are concerned.

In the deposition taken on his own behalf, but read as a part of the plaintiff's case, *Thomas Maloy* distinctly admits that he had heard, when he purchased his lots, that there was a defective railroad mortgage upon them, but that he did not look for it, because his abstract did not show it. It is claimed by one of the counsel for the defendants that this related to the *Aiken* mortgage, and not to the one upon which this action is brought. It seems to us, however, that this is a totally inadmissible construction of the testimony. He most certainly refers to the mortgage in suit. And what he had heard about there being a defective railroad mortgage upon the property was sufficient to put him upon inquiry. *Parker v. Kane*, 4 Wis. 1. "What is sufficient to put a purchaser upon an inquiry is good notice; that is, where a man has sufficient information to lead him to a fact, he shall be deemed conusant of it."

Sugd. Vend. (9th London Ed.) p. 335. "In regard to the inquiry required of a party, it should be such as a prudent and careful man would exercise in his own business of equal importance. Accordingly, where the mortgagee is informed that there are charges affecting the estate, and is cognizant of two only, he cannot claim to be a purchaser without notice of other charges, because he believes that the two, which satisfy the word "charges," are all the charges upon it. He is bound to inquire whether there are any others. The rule with respect to the consequences of a purchaser abstaining from making inquiries does not depend exclusively upon a fraudulent motive. A man may abstain from mere heedlessness or stupidity, and be none the less responsible for the consequences; but, if he make reasonable inquiry, and is deterred by a false answer, he is excusable, if it be of a character to delude a prudent man." 1 Story, Eq. Jur. § 400b; Jackson v. Van Valkenburgh, 8 Cow. 260. Independently of the record, Maloy had notice of the existence of the mortgage, or had a knowledge of such facts as to call for further inquiry. He cannot, therefore, be protected as an innocent purchaser for value.

The defendant Bartosz must be charged with notice of the mortgage by the recitals in the deed from Tenney and wife to his immediate grantor. He was present when that deed was executed and delivered to his uncle. He testifies that he did not know whether anything was said about the railroad mortgage at that time or not; that he did not understand English very well. The purchase was really made by his uncle for him. And, whether he fully understood the conversation at the time about incumbrances, he must be chargeable with notice of what appears in his chain of title. This clause was in the deed to his uncle; "Said premises are free and clear from all incumbrances except a mortgage to the La Crosse Railroad Co., which I am to save said Bartosz harmless from." The general rule upon this subject is "that, where a purchaser cannot make out a title but by a deed which leads him to another fact, he will be presumed to have knowledge of that fact." The following authorities are very clear and decisive upon that point: Fitzhugh v. Barnard, 12 Mich. 105; Case v. Erwin, 18 Mich. 434; Baker v. Mather, 25 Mich. 51; Insurance Co. v. Halsey, 8 N. Y. 271; Frost v. Beekman, 1 Johns. Ch. 298; Gilbert v. Peteler, 38 N. Y. 165; Acer v. Westcott, 46 N. Y. 384; Coles v. Sims, 5 De Gex, M. & G. 1. The clause in the deed referred to the mortgage as an existing incumbrance, and he cannot now, in good faith, claim that it is not a lien upon his property.

The counsel for the plaintiff claims that the defendant McLindon had actual knowledge of the existence of the mortgage. It is true, he testified that when he purchased he knew by report that there was a railroad mortgage upon the property, but he says

that the report stated that the mortgage was void. Were he not protected by another principal, he could not certainly be regarded as a bona fide purchaser. But he purchased from S. S. Johnson, or claims through Johnson, in whom the title stood free from any taint. For the rule is well settled that a purchaser affected with notice may protect himself by purchasing of another who is a bona fide purchaser for a valuable consideration. For a similar reason, if a person who has notice sells to another who has no notice, and is a bona fide purchaser for a valuable consideration, the latter may protect his title, although it was affected with the equity arising from notice in the hands of the person from whom he derived it. Mr. Justice Story says this doctrine, in both of its branches, has been settled for nearly a century and a half in England. 1 Eq. Jur. § 410. He states an exception to the rule, which was recognized and enforced in Ely v. Wilcox, 26 Wis. 91, where the estate became revested in the original fraudulent grantee, when the original equity was held to reattach to it. There is no pretense that McLindon comes within the exception; and, as a bona fide purchase of an estate for a valuable consideration purges away the equity from the estate in the hands of all persons who derive title under it, he is protected. It is said that it does not appear that Johnson's title was derived from the common source. As we understand the bill of exceptions, an abstract was offered in evidence to show title from Bunn, by various intermediate conveyances, to the defendant, which was ruled out on the plaintiff's objection. But perhaps it is a better answer to the objection to say that the plaintiff has made the defendants parties under the general allegation that they claim some interest in or title to the mortgaged premises, which was subject to the mortgage. This allegation implies that this interest was not adverse, but was derived from Dunn, though subsequent in date, and inferior in right, to the plaintiff's mortgage.

It was further insisted that the evidence showed that the defendant Mary Maloy had actual notice of the mortgage. We do not think this position is sustained by the testimony. It is attempted to charge her with the same actual knowledge her husband had, because he aided her when she made her purchase of Martin Maloy. It does not appear that anything was said at this time about the railroad mortgage, or that she ever had any notice of it. It does not appear, even, that he was acting as her agent in any legal sense; and, besides, if he were, his knowledge, acquired at another time, when not engaged in her business, ought not to be imputed to her. Notice, to bind the principal, should be brought home to the agent while engaged in the business or negotiation of the principal, and when it would be a breach of trust in the former not to communicate the knowledge to the latter. 1 Story, Eq. Jur. § 408,

and cases cited in note 1. The evidence fails to bring her within that rule.

A number of other questions were discussed upon the argument; but we believe these observations dispose of all the more important ones.

The judgment of the circuit court as to the defendants Thomas Maloy and Stanislaus Bartosz must be reversed, and the cause remanded for further proceedings in accordance with this decision.

It is so ordered.

DEASON et al. v. TAYLOR.

(53 Miss. 697.)

Supreme Court of Mississippi. Oct., 1876.

Appeal from chancery court, Lincoln county; Thomas Y. Berry, Chancellor.

Bill in equity by Bentonville Taylor against J. B. Deason, M. W. Hoskins, and G. W. Hoskins, her husband, Ellen McClendon and A. D. McClendon, her husband, to recover the balance of the purchase money of certain land, and to subject land to the payment of the same.

The bill showed that on February 16, 1872, the complainant sold and conveyed the land in question to J. B. Deason; the deed, which was duly recorded on February 19, 1872, reciting a consideration of "the sum of \$700, to be paid to the party of the first part on or before the first day of July, 1872, by the party of the second part." For the purchase money Deason gave his note, of even date with the deed, as follows: "On or before the first day of July next, I promise to pay Bentonville Taylor, or bearer, the sum of \$700, for town lots conveyed by him to me this day. This sum is to be paid in Mississippi state certificates of indebtedness at par." After maturity of the note, Deason sold and conveyed the lots to the defendant M. W. Hoskins, and the latter and her husband sold and conveyed the same to the defendant Ellen McClendon. When Deason sold and conveyed the lots to the defendant Hoskins, he informed her agent that he had paid Taylor all the purchase money.

The defendants demurred to the bill, on the ground that the complainant had no vendor's lien, it appearing on the face of the bill that the consideration for the sale of the lands was not money or United States currency; and because the recital in the deed was not notice to the defendants Hoskins and McClendon of the complainant's equity.

The demurrer was overruled, and an answer filed, and upon final hearing a decree was rendered for the complainant for the balance of the purchase money due him, and foreclosing his vendor's lien on the land. The defendants appeal.

Sessions & Cassedy, for appellants. Chrisman & Thompson, for appellee. Bentonville Taylor, pro se.

CHALMERS, J. We are content with the finding of the chancellor on the facts. If any injustice was done in fixing the amount due, it was to the appellee, and not to the appellants. The fact that the note was dischargeable in Mississippi certificates of indebtedness (known as Alcorn money) did not deprive it of the protection of the vendor's equitable lien. *Harvey v. Kelly*, 41 Miss. 490.

In the face of the deed which Taylor exe-

cuted to Deason was this recital: "The party of the first part (the vendor), for and in consideration of the sum of \$700, to be paid on or before the first day of July, 1872, by the party of the second part" (the vendee), &c. For this sum of \$700, Deason, the vendee, executed his note to Taylor, due 1st of July, 1872. The deed was recorded at once, and Deason took possession of the premises. Without having completed payment in full of the note, Deason sold the premises in 1874 to Hoskins, who subsequently sold to Mrs. McClendon. Both Hoskins and Mrs. McClendon deny actual knowledge, at and before their purchases, that any thing remained due to Taylor.

Did the law give them constructive notice of Taylor's rights? Nothing is better settled than that the purchaser of real estate is bound to take notice of all recitals in the chain of title through which his own title is derived. Not only is he bound by everything stated in the several conveyances constituting that chain, but he is bound fully to investigate and explore everything to which his attention is thereby directed. Where, therefore, he is informed by any of the preceding conveyances, upon which his own deed rests, that the land has been sold on a credit, he is bound to inform himself as to whether the purchase money has been paid since the execution of the deed. *Wiseman v. Hutchinson*, 20 Ind. 40; *Croskey v. Chapman*, 26 Ind. 333; *Johnston v. Gwathmey*, 4 Litt. (Ky.) 317.

It is argued, however, that this principle only applies before the maturity of the notes, as shown by the recitals of the deed, and that it will not apply where, as in the case at bar, subsequent purchasers have bought after the notes were past due. It is said that, in such case, the subsequent purchasers may rely upon a presumption that the original debt has been paid. We know of no principle which would justify a reliance upon such a presumption, and it is expressly negatived by the cases of *Honore v. Bakewell*, 6 B. Mon. 67, and *Thornton v. Knox*, Id. 74. They may rely upon such presumption after sufficient time has elapsed to bar the notes, although, in fact, they may have been renewed. *Avent v. McCorkle*, 45 Miss. 221.

It appears in the case at bar that the subsequent purchasers knew that Deason had bought the realty on a credit, because they asked him at the time of their purchase if he had paid all the money due Taylor. It was their own folly if they relied upon his assurances, instead of applying for information to Taylor, who lived in an adjoining county, and is shown by the bill to be a practising lawyer, well known in Brookhaven, where the lots were situated and all the defendants resided.

Decree affirmed.

HOUSTON v. TIMMERMAN.¹

(21 Pac. 1037, 15 Or. 499.)

Supreme Court of Oregon. May 3, 1889.

Appeal from circuit court, Linn county.

Hewitt & Bryant and Tilman Ford, for appellant. *J. K. Weatherford and D. R. N. Blackburn*, for respondent.

LORD, J. This was a suit to partition certain lands described herein. The defendant denied that the respondent had any interest in said lands, and alleged that she was the owner in fee-simple, and entitled to the possession of the whole of said premises. The plaintiff, in reply, denied this, and alleged affirmatively that some time in July, 1884, she commenced a suit against A. J. Houston for a divorce and alimony, and for an equal undivided one-third of the real property then owned by said Houston, and that he was the owner in fee of said real property, which was duly described therein. That the summons in said divorce suit was served on ———, 1884, and that prior to that time and prior to the 26th day of September, 1884, the defendant Timmerman had notice that the complaint for divorce and one-third of said real property had been filed by the plaintiff against her husband. That on the 5th day of February, 1886, a decree was entered, granting a divorce in favor of the plaintiff, and adjudging her to be the owner of the undivided one-third of said real property, etc. The court below, after a trial of said cause, rendered a decree therein, granting the prayer of plaintiff for partition, except as to the 160 acres of land mentioned therein, and partition was ordered and made on June 26, 1888, and confirmed by the court. The defendant Timmerman derived her title to the premises in dispute in this wise: On the 15th day of March, 1880, the plaintiff's husband, A. J. Houston, for value, made and delivered his promissory note to the defendant Timmerman for the sum of \$3,400, with interest at the rate of 10 per cent. per annum from date; that, the said A. J. Houston failing to pay said note, the defendant Timmerman commenced suit on the 26th day of September, 1884, and caused service of summons to be made upon him on that day, and that on October 27, 1884, the defendant Timmerman recovered judgment against the said A. J. Houston for the sum of \$5,463.87, which, on the same day, was duly docketed in the judgment lien docket, and thereupon became a lien upon all the real property mentioned in the complaint in this suit. It further appears that on March 19, 1883, said A. J. Houston made and delivered his promissory note to J. T. Williams for \$1,000, with interest from date at the rate of 10 per cent. per annum, payable six months after date, and to secure the payment of the same executed a mortgage, which was duly recorded, upon the 160 acres of land set out in the complaint. The said Houston

failing to pay said note, the mortgage was foreclosed against the said Houston and the plaintiff herein. The defendant Timmerman, however, answered, setting up her judgment, and asked, if the property be sold to foreclose said mortgage, that the overplus, if any, should be applied in payment of her judgment, and a decree was accordingly so entered, etc.; that execution was issued upon said decree, and said 160 acres was sold to the defendant Timmerman for \$2,500; that thereafter, on May 13, 1885, execution was issued upon said judgment, and the remainder of the premises described herein was sold to the defendant Timmerman, and said sale confirmed, and deeds were duly executed by the sheriff to said defendant.

It will be noticed that the suit of the defendant Timmerman to recover the amount due on the note against A. J. Houston, who was then the husband of the plaintiff herein, was commenced after the suit of the plaintiff for divorce against her husband, and that a judgment was recovered and docketed before a decree in the divorce suit was rendered, and in which one-third of the real estate then owned by the husband was decreed the plaintiff. It is true, there was no direct proof of the date of the service of the summons in the divorce suit; but, as this will not affect the result reached, it is immaterial. The contention is that the defendant Timmerman was a purchaser *pendente lite*. There is, however, a preliminary question to be first disposed of, namely, that the appeal was not taken within six months as allowed by law. The answer to this is that the objection relates to the interlocutory or first decree, and not to the final decree, and that, as our own Code does not authorize an appeal from interlocutory judgments or decrees, but only from such as are final, and, the appeal from the final decree being within six months, there was a right of appeal, and the objection, therefore, is unavailing.

An examination of the statutes of the two states from which the authorities were read, to the effect that an appeal might be taken before a final judgment or decree was entered shows that appeals in those states may be taken from interlocutory judgments or decrees, which, not being the case under our Code, they fail on application. See *Freem. Co-tenancy*, §§ 519, 527. But to return. Among the ordinances or rules adopted by Lord Chancellor BACON "for the better and more regular administration of justice" was one which provided that, where a person "comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance, or privy of the court there regularly, the decree bindeth." Chancellor KENT said that a "*lis pendens* duly prosecuted and not conclusive is notice to a purchaser so as to affect and bind his interest by the decree." Strictly speaking, however, the doctrine of *lis pendens* is not founded upon notice, but upon reasons of public policy, founded upon necessity. "It affects him," said Lord Chancellor CRANWORTH, "not be-

¹ Upon the subject of *lis pendens* generally, see note to *Newman v. Chapman*, 14 Am. Dec. 774-779.

cause it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. * * * The necessities of mankind require that the decision of the court shall be binding, not only on the litigant parties, but also on those who derive title under them by alienation made pending the suit, whether such alienees had or had not notice pending proceedings. If this were not so, there could be no certainty that litigation would ever come to an end." *Belamy v. Sabine*, 1 De Gex & J. 566. The main purpose of the rule is to keep the subject-matter of the litigation within the power of the court until the judgment or decree shall be entered; otherwise, by successive alienations, its judgment or decree could be rendered abortive, and thus make it impossible for the court to execute its judgments or decree. Hence the general proposition that one who purchases of either party to the suit the subject-matter of the litigation, after the court has acquired jurisdiction, is bound by the judgment or decree, whether he purchased for a valuable consideration or not, and without any express or implied notice in point of fact, is sustained by many authorities, and disputed by none. *Eyster v. Gaff*, 91 U. S. 521; *Grant v. Bennett*, 96 Ill. 513; *Randall v. Lower*, 98 Ind. 261; *Daniels v. Henderson*, 49 Cal. 242; *Blanchard v. Ware*, 43 Iowa, 530; *Carr v. Lewis*, 15 Mo. App. 551; *Currie v. Fowler*, 5 J. J. Marsh. 145; *Hiern v. Mill*, 13 Ves. 120; 1 Story, Eq. Jur. § 405. The doctrine of *lis pendens* was introduced in analogy to the rule at common law in a real action "where if the defendant aliens after pendency of the writ, the judgment in the action will overreach such alienation." *Sorrell v. Carpenter*, 2 P. Wms. 482. And this may account for the leaning in some of the courts to restrict the application of the rule of *lis pendens* to actions or suits affecting title to real property. *McLaurine v. Monroe*, 30 Mo. 469; *Winston v. Westfeldt*, 22 Ala. 760; *Baldwin v. Love*, 2 J. J. Marsh. 489; *Murray v. Lylburn*, 2 Johns. Ch. 441. But it is hardly considered well settled that it may not with equal propriety be applied to the sales of chattels. Two things, however, seem indispensable to give it effect: (1) That the litigation must be about some specific thing, which must necessarily be affected by the termination of the suit; and (2) that the particular property involved in the suit "must be so pointed out by the proceeding as to warn the whole world that they intermeddle at their peril." *Freem. Judgm.* §§ 196, 197. Now, the divorce suit of the plaintiff was not brought specifically to recover the one-third of the real estate of her husband, as was decreed in the divorce proceeding. The land was not the subject-matter of the litigation, and the subject of the suit was not to recover title that belonged to the plaintiff. It was incidental and collateral to the divorce proceeding. The court has no

jurisdiction to affect the title of the husband to his lands, or decree that one-third of them shall be set apart for her in her own right and title, independent of a decree for divorce. Nor has the plaintiff any title on which to base a suit to recover any portion of the same, except as it comes by force of the statute upon a decree for divorce. A proceeding in divorce is partly *in personam* and partly *in rem*, and, in so far as it is to affect the marriage status, it is to change a thing independent of the parties, and is a proceeding not against the parties *in personam*, but against their status *in rem*. 5 Amer. & Eng. Cyclop. Law, "Divorce," 751. The matter upon which the jurisdiction acts is the status. The marriage is the thing which the suit is brought to dissolve. It is the subject of the litigation; but, as incidental to it, the court may grant temporary alimony *pendente lite*, or permanent alimony, when a decree for divorce is rendered. And the general rule is that bills for alimony do not bind the property of the defendant with *lis pendens*. 1 Story, Eq. Jur. § 196; *Brightman v. Brightman*, 1 R. I. 112; *Isler v. Brown*, 66 N. C. 556; *Almond v. Almond*, 4 Rand. (Va.) 662. But the court cannot affect the title of the real property of the defendant in a divorce proceeding until the point is reached that a decree of divorce is to be rendered. Temporary alimony may be granted *pendente lite*, but the title of the real estate of the defendant remains intact, and cannot be affected during the pendency of the proceeding, but only when the proceeding for a divorce has terminated, and a decree rendered that the marriage is dissolved, and then only by force of the statute.

Our statute provides: "Whenever a marriage shall be declared void or dissolved the party at whose prayer such decree shall be made shall in all cases be entitled to the undivided one-third part in his or her undivided right in fee of the whole of the real estate owned by the other at the time of such decree; and it * * * shall be the duty of the court to enter a decree in accordance with this provision." Code Or. § 499. It is "whenever a marriage shall be declared dissolved" that the statute operates, not before, or *pendente lite*; and the court then becomes authorized, and it is its "duty," "to enter a decree" for the undivided one-third part in fee of the whole of the real estate "owned by the defendant at the time of such decree" for a divorce. It must be manifest, then, that the primary object of the suit is to affect the marriage relation,—its status; that it is the specific matter in controversy to be affected; and that it is only when the status is changed by a decree of divorce that the statute operates to divest title "owned" by the defendants, and that it then becomes the duty of the court to enter a decree in accordance with its provisions. Nor do the cases cited by counsel sustain his contention. In *Tolerton v. Williard*, 30 Ohio St. 586, the suit was of "double aspect," as said

by the court, and was brought to protect her equitable right in property which was the subject of dispute. This property was bought with the wife's money, and she sought a restoration of her rights. The court says: "It is evident that the court in coming to its conclusion did take these equities into consideration, so that the decree may fairly be considered an equitable one in her favor." And again: "In a proceeding like the one under consideration where the wife claims rights in her husband's property other than those arising from the marital relation, and insists upon them in connection with her claim for alimony, the court is fully authorized to pass upon them." In *Daniel v. Hodges*, 87 N. C. 97, the proceeding was for alimony, and the only property which the husband owned was a lot that the wife sought to have subjected to her claim, and was in actual possession of it by order of the court when her husband, pending the litigation, conveyed it to another, and the court held, under the exceptional circumstances of the case, that the doctrine of *lis pendens* applied. There the proceeding was to subject the specific thing to her claim, which the husband attempted to defeat by conveying away the property, and the court, while admitting the general doctrine that a *lis pendens* was not applicable in such cases, said: "We are of the opinion the petition for alimony under the particular circumstances of the case constituted such a *lis pendens* as affected the purchaser with notice, independent of the actual notice had, and rendered the deeds void." But this has no relevancy to the case at bar. There she sought to subject the property to her claim for alimony, and the suit was directed specifically against it, and she was put in actual possession by order of the court, and then it was only "under the peculiar circumstances of the case" that the court thought the purchaser from the husband pending the litigation was affected with the rule of *lis pendens*. Here there was no alienation of the property, which was only incidentally involved, or any charge of any act on the part of the defendant Houston to defeat any right whatever which might accrue to the plaintiff, if the marriage should be dissolved. If the defendant Houston had conveyed away the property to another with the object of defeating her right, upon a decree for divorce, to any interest in his lands, such purchaser may be affected with the rule of *lis pendens* in such case; but that is not the question here, and which it will be time enough to decide when properly presented for our consideration. The debt which the defendant Houston owed the defendant Timmerman was contracted long before the suit for divorce was commenced, or the cause or ground of the divorce existed, and doubtless the credit

was given on the faith of the property, a part of which included the property in dispute, then owned by Houston. There is no pretense of any fraud or collusion, or that the debt is not an honest obligation which Houston ought to have paid long before the divorce proceeding was instituted. Although the commencement of the divorce suit might result in a decree which would affect the property of the defendant, the property was not the subject specifically of the litigation, and by reason thereof was not withdrawn from such burdens as might be legally imposed upon it for just claims upon judgments recovered and docketed against its owner, prior to divesting him of his title by force of the statute under the decree. The defendant Timmerman had the legal right to commence her action to recover the money due on the note of Houston, and the fact that the wife of Houston had instituted proceedings for a divorce did not affect that right, but when judgment was recovered thereon, and docketed, by force of law, the lands then owned by him in that county, including the land in dispute, became subject to the lien of such judgment; and, as the facts show that this was before any decree was rendered in the divorce whereby title to such lands could be divested, it follows that whoever took title from him subsequently, either by contract or by operation of law, took said title *cum onere*, or subject to the lien of such judgment. It results, as a purchaser of said lands at an execution sale upon such judgment, the defendant Timmerman was not affected by or subject to the rule of *lis pendens*, and her deed thereby rendered invalid. It is true, in the divorce suit the property was described in the complaint and decree, which, since the decision in *Bamford v. Bamford*, 4 Or. 30, has been deemed essential to reach the property of the guilty party, but it is apprehended that neither allegation or proof concerning the lands is necessary, but that it is enough and a sufficient compliance with the latter clause of section 499, Code Or., to say in effect that the party obtaining the divorce is hereby entitled to one-third of the real property owned by the other, whatever it may be. In this view, if any question arises as to what property was so owned by him, it can be determined by appropriate proceedings for that purpose between the parties interested, much better than in a divorce suit, in which it is neither proper nor convenient that third parties, in order to protect their rights, should be compelled to intervene and become parties to a controversy between husband and wife in a divorce proceeding. *Barrett v. Failing*, 6 Sawy. 475, 3 Fed. Rep. 471. So that, however we look at the facts of this record, our conclusion is that the decree of the lower court must be reversed, and it is so ordered.

HORN v. COLE et al.

(51 N. H. 287.)

Supreme Judicial Court of New Hampshire.
July Term, 1868.

Mr. Fletcher, for plaintiff. Mr. Ray, for defendants.

PERLEY, C. J. There is no complaint that the rulings and instructions of the court on the trial were erroneous or improper, provided the evidence warranted the jury in returning a verdict for the defendants; and the verdict must stand, if the evidence was competent to prove such representations by the plaintiff as would estop him to set up his title to the goods attached to the property of Charles E. Horn.

The evidence reported in the case was competent to prove that the plaintiff made the representations on the occasion and in the circumstances testified to by Cole; that the plaintiff, though not indebted to Cole, was in debt to others; that Cole, believing the representations to be true, and relying on them as true, caused the goods to be attached as the property of Charles E. Horn; and, also, that the plaintiff made these representations knowing them to be false, with the intention that all persons who were interested in the subject should take them to be true, and act on them as such, and with the intention to mislead and deceive all to whom the representations were communicated, and induce them to act on them as true; that his intention was to deceive his own creditors, and prevent them from taking the goods as his for the debts which he owed to them. These facts must be taken to have been established by the verdict.

But, as there was no evidence that the plaintiff knew Cole had any demand against Charles E. Horn, we cannot infer that the plaintiff had Cole in his mind as an individual whom he meant to deceive by his false representations, or that he had an intent to prevent Cole from taking the goods for a debt which he owed to Cole, as he owed no such debt; and, on the evidence reported, the jury were not at liberty to find that the plaintiff had Cole in his mind as an individual whom he meant to deceive and defraud by inducing him to take the goods for his demand against Charles E. Horn. This raises the point, which the counsel for the plaintiff takes, whether, to estop a party from showing that his representations were false, it is necessary that the false representations should have been intended to deceive and defraud the individual party who trusted to them and acted on them, provided there was a general intention to deceive and defraud all persons who were interested in the subject-matter of the false representations.

The ground on which a party is precluded from proving that his representations on which another has acted were false is, that

to permit it would be contrary to equity and good conscience. This has been sometimes called an "equitable estoppel," because the jurisdiction of enforcing this equity belonged originally and peculiarly to courts of equity, and does not appear to have been familiarly exercised at law until within a comparatively recent date; and, so far as relates to suits at law affecting the title to land, I understand that in England and in some of the United States the jurisdiction is still confined to courts of equity. *Storrs v. Barker*, 6 Johns. Ch. 166, 168; *Evans v. Bicknell*, 6 Ves. 174, 178; *Pickard v. Sears*, 6 Adol. & E. 469. The doctrine, however, is a very old head of equity, and is recognized and applied in a great number of the early cases. *Dyer v. Dyer*, 2 Ch. Cas. 108; *Teasdale v. Teasdale*, 13 Vin. Abr. 539; *Hobbs v. Norton*, 1 Vern. 136; *Gale v. Lindo*, Id. 475; *Hunsden v. Cheyney*, 2 Vern. 150; *Lamlee v. Hanman*, Id. 499; *Raw v. Pote*, Id. 239; *Blanchet v. Foster*, 2 Ves. Sr. 264; *East India Co. v. Vincent*, 2 Atk. 83; *Stiles v. Cowper*, 3 Atk. 693; *Webber v. Farmer*, 13 Vin. Abr. 525; 2 *Brown*, Parl. Cas. 88; 2 *Eq. Cas. Abr.* 481; *Neville v. Wilkinson*, 1 *Brown*, Ch. 543; *Storrs v. Barker*, 6 Johns. Ch. 166; *Strong v. Ellsworth*, 26 Vt. 366.

Many of these cases related to underhand agreements in fraud of marriage settlements; but the principle is of general application. 1 *Fonbl. Eq.* 267, note x. Relief was given according to the circumstances of the case, —sometimes by enjoining suits at law, in which the legal title was set up, and sometimes by decreeing conveyances and the cancelling of deeds and other instruments; but in all these cases relief was given in equity contrary to the strict legal rights of the defendants.

Thus, in the case of an equitable estoppel, a party is not allowed to assert his strict legal right because, in the circumstances of the individual case, it would be contrary to equity and good conscience. Take the present case for an illustration. In *trover*, following the legal definition of the action, if the plaintiff proves property in himself and a conversion by the defendant, he has maintained his action, and is entitled to a verdict and judgment. It is conceded that the plaintiff owned the goods, and that the defendants converted them. The defense here set up appeals from the strict rule at law to the equitable doctrine that a party shall not be allowed to exercise his legal right of proving the facts, if, on account of his previous declarations or conduct, it would be contrary to equity and good conscience. So in a writ of entry; by the technical rules at law, if the demandant proves seisin in himself and a disseisin by the tenant within the time of limitation, he is entitled to judgment; but if the demandant, having a dormant title to the land demanded, concealed his title, and encouraged the tenant to purchase from another, he is not allowed, in our

practice, to set up his legal title, because it would be contrary to equity and good conscience.

It thus appears that what has been called an "equitable estoppel," and sometimes, with less propriety, an "estoppel in pais," is properly and peculiarly a doctrine of equity, originally introduced there to prevent a party from taking a dishonest and unconscientious advantage of his strict legal rights,—though now with us, like many other doctrines of equity, habitually administered at law. But formerly the practice was different, and suits at law, the courts being incapable of giving effect to this equity, were often enjoined where the party insisted on his rights at law contrary to the equitable doctrine, as in *Raw v. Pote*, *Stiles v. Cowper*, and *Webber v. Farmer*, *qua supra*.

It would have a tendency to mislead us in the present inquiry, as there is reason to suspect that it has sometimes misled others, if we should confound this doctrine of equity with the legal estoppel by matter in pais. The equitable estoppel and legal estoppel agree indeed in this, that they both preclude from showing the truth in the individual case. The grounds, however, on which they do it are not only different, but directly opposite. The legal estoppel shuts out the truth, and also the equity and justice of the individual case on account of the supposed paramount importance of rigorously enforcing a certain and unvarying maxim of the law. For reasons of general policy, a record is held to import incontrovertible verity, and for the same reason a party is not permitted to contradict his solemn admission by deed. And the same is equally true of legal estoppels by matter in pais. Certain acts done out of court and without deed were, by a technical and unyielding rule of law, upheld on like grounds of public policy, and followed always by certain legal consequences. The legal effect of such acts was not permitted to be controverted by proof.

Thus, if one accepts a lease and enters under it, he is estopped to claim any other estate in the land during the term; he cannot show that he owned the land when the lease was made. Estoppels by matter in pais were few in number, and all of this general and well defined character; and they all enforced some technical rule of the law against the truth, and also against the justice and equity of the individual case. Coke, in his examination of the different kinds of estoppel by matter in pais, enumerates the following: "By livery, by entry, by acceptance of rent, by partition, and by acceptance of an estate." *Co. Litt.* 352a. In *Lyon v. Reed*, 13 Mees. & W. 309, Parke, B., speaking of legal estoppels by matter in pais, says: "They are but few, and are pointed out by Lord Coke, *Co. Litt.* 352a. They are all cases which anciently really were, and in contemplation of law have always

continued to be, acts of notoriety no less solemn than the execution of a deed, such as livery, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed."

In the authorities which contain the most complete enumeration of the different kinds of legal estoppels and the fullest discussion of the law on the subject, I find no allusion to the equitable estoppel which we are now considering. All legal estoppels, whether by record, by deed, or by matter in pais, depended on strict legal rules, and shut out proof of the truth and justice of the individual case. *Viner, Abr.*, "Estoppel," *passim*; *Lyon v. Reed*, 13 Mees. & W. 309; *Freeman v. Cooke*, 2 Exch. 658.

For this reason, because legal estoppels, whether by record, deed, or matter in pais, shut out proof of the truth and justice of individual cases, they have been called odious, and have been construed with much strictness against parties that set them up. They were formerly required, like other defences regarded as inequitable, to be pleaded with certainty to a certain intent in every particular. If they were relied on by way of averment, and tried by the jury, the jury might find, and according to some authorities were bound by their oath *veritatem dicere* to find, according to the truth of the case, regardless of the estoppel. *Trials Per Pais*, 284; *Co. Litt.* 227a; *Com. Dig.* "Estoppel," E, 10. The practice is now different, and legal estoppels may be relied on, when given in evidence, without being specially pleaded. Legal estoppels exclude evidence of the truth and the equity of the particular case to support a strict rule of law, on grounds of public policy.

Equitable estoppels are admitted on the exactly opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. The facts upon which equitable estoppels depend are usually proved by oral evidence; and the evidence should doubtless be carefully scrutinized, and be full and satisfactory, before it should be admitted to estop the party from showing the truth, especially in cases affecting the title to land. But where the facts are clearly proved, the maxim that estoppels are odious—which was used in reference to legal estoppels, because they shut out the truth and justice of the case—ought not to be applied to these equitable estoppels, as it has sometimes been, inadvertently, as I think, from a supposed analogy with the legal estoppel by matter in pais, to which they have, in this respect, no resemblance whatever. *Lord Campbell*, in *Howard v. Hudson*, 2 El. & Bl. 10; *Andrews v. Lyons*, 11 Allen, 349, 351. In other cases, where

more attention has been paid to the real nature of this equitable doctrine, it has been held that such estoppels are not odious, and to be construed strictly, but are entitled to a fair and liberal application, like other equitable doctrines which are admitted to suppress fraud and promote honesty and fair dealing. *Mellor and Compton, JJ., in Ashpitel v. Bryan*, 3 Best & S. 474; *Cowen, J., in Dezell v. Odell*, 3 Hill, 220; *Com. v. Moltz*, 10 Pa. St. 530, 531; *Buckingham v. Hanna*, 2 Ohio St. 557; *Van-Rensselaer v. Kearney*, 11 How. 326; *Preston v. Mann*, 25 Conn. 118, 128.

In this equitable estoppel, the party is forbidden to set up his legal title because he has so conducted himself that to do it would be contrary to equity and good conscience. As in other cases of fraud and dishonesty, the circumstances out of which the question may arise are of infinite variety; and, unless courts at law are willing to abdicate the duty of administering the equitable doctrine effectually in suppression of fraud and dishonesty, the application of it cannot be confined within the limit of any narrow technical definition, such as will relieve courts from looking, as in other cases depending on fraud and dishonesty, to the circumstances of each individual case. Certain general rules will doubtless apply, as in other cases where relief is sought on such grounds. But I find myself unable to agree with the authorities where the old maxim that legal estoppels are odious has been applied to this equitable estoppel, and where attempts have been made to lay down strict definitions, such as would defeat the remedy in a large proportion of the cases that fall within the principle on which the doctrine is founded.

The doctrine having been borrowed from equity, courts at law that have adopted it should obviously look to the practice in equity for their guide in the application of it; and in equity, the doctrine has been liberally applied to suppress fraud and enforce honesty and fair dealing, without any attempt to confine the doctrine within the limits of a strict definition. For instance, the doctrine has not in equity been limited to cases where there was an actual intention to deceive. The cases are numerous where the party who was estopped by his declarations or his conduct to set up his legal title, was ignorant of it at the time, and of course could have had no actual intention to deceive by concealing his title. Yet, if the circumstances were such that he ought to have informed himself, it has been held to be contrary to equity and good conscience to set up his title, though he was in fact ignorant of it when he made the representations. *Hobbs v. Norton*, *Hunsden v. Cheyney*, *Teasdale v. Teasdale*, *qua supra*; and *Burrowes v. Lock*, 10 Ves. 470. So, if the party knew the facts, but mistook the law. *Storrs v. Barker*, 6 Johns. Ch. 166. Nor is it necessary in equity that the intention should be to deceive any particular individual or individuals. If the representations are such, and made in such circumstances, that all persons interested in

the subject have the right to rely on them as true, their truth cannot be denied by the party that has made them against any one who has trusted to them and acted on them. *Gale v. Lindo*, *Webber v. Farmer*, *qua supra*.

In the much and well considered case of *Preston v. Mann*, 25 Conn. 118, 128, *Storrs, J.*, delivering the opinion of the court, says: "The doctrine of estoppel in pais, notwithstanding the great number of cases which have turned upon it and are reported in the books, cannot be said even yet to rest upon any determinate legal test which will reconcile the decisions, or will embrace all transactions to which the general principles of equitable necessity wherein it originated demand that it should be applied. In fact, it is because it is so peculiarly a doctrine of practical equity, that its technical application is so difficult, and its reduction to the form of abstract formulas is still unaccomplished." This was said in 1856, and little has since been done towards extricating the doctrine from the confusion and conflict of authority with which it was then embarrassed. This, as I think, has been caused by the fact that courts have continued to exercise their ingenuity in the vain attempt to compress a broad doctrine of equity within the narrow limits of a technical definition.

The case of *Pickard v. Sears*, 6 Adol. & E. 469, decided as late as 1837, appears to have been regarded, both in England and in this country, as the leading case at law on this subject. It was trover by the mortgagee of personal goods against the defendants, who were purchasers at a sheriff's sale on execution against the mortgagor. The facts set up in defence were, that the plaintiff was present at the sale, did not disclose his title as mortgagee, and encouraged the defendants to purchase. The question on trial was as to the property of the plaintiff in the goods, and Lord Denman directed a verdict for the plaintiff. A rule to show cause why the verdict should not be set aside was made absolute.

In delivering the judgment of the court, Lord Denman said: "His [the plaintiff's] title having been established, the property could only be divested by gift or sale, of which no specific act was even surmised. But the rule of law is clear that where one, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring a different state of things as existing at the same time; and the plaintiff might have parted with his interest in the property by a verbal gift or sale, without any other formalities that threw technical difficulties in the way of legal evidence. And we think his conduct in standing by and giving a kind of sanction to the proceedings under the execution was a fact of such a nature that the opinion of the jury ought to have been taken whether he had not, in point of fact, ceased to be the owner."

It is worthy of note that in this suit at law

the court, so late as 1837, after stating the general equitable doctrine, did not venture to put the defence directly on the ground that the plaintiff was estopped by his conduct to prove the truth of the case, but allowed the facts to go to the jury as evidence that the plaintiff, in some undefined and mysterious way, had parted with his property in the goods. So late and so reluctant were the courts to admit in suits at law this defence, which depended on fraud and dishonesty, and which belonged, originally and appropriately, to the jurisdiction in equity.

It can hardly be supposed that Lord Denman, in the statement which he made of this equitable doctrine in reference to the facts of that case, understood that he was laying down a technical definition fixing the limits of the doctrine, and excluding all cases that did not come clearly within the terms which he used on that occasion. Nevertheless, the remarks of Lord Denman have often been treated as a sort of authoritative text covering the whole ground, which it was the business of courts in later cases to expound and explain. And it is curious to observe what different and contradictory interpretations have been put on his statement of the equitable doctrine. It has been cited in Massachusetts as authority for decisions in which it has been held that the representations, to estop the party from showing they were not true, must have been made with the intent to deceive, and the intent to deceive the party who sets up the defence. *Plumer v. Lord*, 9 Allen, 455; *Andrews v. Lyons*, 11 Allen, 349. And in California the same case has been relied on for the rule that where a representation comes in any way to the ears of a party, who acts on it, the party making the representation is estopped to deny its truth, unless it had the character of a confidential communication. *Mitchell v. Reed*, 9 Cal. 204. In England it has been treated as a statement of the equitable doctrine made in reference to the circumstances of that case, and not intended as a formal and complete definition. *Freeman v. Cooke*, 2 Exch. 654; *Gregg v. Wells*, 10 Adol. & E. 90; *Jorden v. Money*, 5 H. L. Cas. 212.

It would be a laborious and not a profitable task to attempt an analysis of all the recent decisions on this subject. I will briefly advert to some of those which appear to be the most important.

In *Plumer v. Lord*, 9 Allen, 455, it was held that to create an estoppel in pais, the declarations or acts must have been accompanied with a design to mislead; and *Langdon v. Doud*, 10 Allen, 433, is to the same point. In *Andrews v. Lyons*, 11 Allen, 349, the court went one step further, and decided that the declarations or acts must have been accompanied with a design to deceive the party who sets up the estoppel, and induce him to act on them; and in this last case it is said that such an estoppel shuts out the truth, and is odious, and must be strictly proved. In *Hawes v. Marchant*, 1 Curt. 144,

Fed. Cas. No. 6,240, the rule is laid down that to be estopped the party must have designedly made admissions inconsistent with the defense or claim which he proposes to set up, and another, with his knowledge and consent, so acted on this admission, that he will be injured by allowing the admission to be disputed; and this rule is cited and apparently approved in *Audenried v. Betteley*, 5 Allen, 382.

In these cases, it is to be observed, the court have not been content with saying, in reference to the facts before them, that, if certain things concurred in the case, it would fall within the equitable doctrine, and the party would be estopped, but they have undertaken to lay down a strict legal definition of general application, excluding from the operation of the doctrine all cases that do not fall within the terms of the definition. Applying the rule as laid down in *Hawes v. Marchant* to the present case, if Horn had known that Cole had a demand against Charles E. Horn, had falsely represented to Cole that the goods belonged to Charles, with the design to deceive him and induce him to attach the goods as the property of Charles, and Cole, relying on the representation, had taken the goods as the property of Charles, and as Horn intended, yet if, after he had made the false representation, he did not know that the goods were taken as the property of Charles, and assent that they should be so taken, he would not be estopped to set up his own title in the goods. The statement that another party must have acted on the false statement with his knowledge and assent must mean this, or it can mean nothing; for he could not know that he had acted on it at all until the act was done and accomplished.

The remark of Lord Campbell in *Howard v. Hudson*, *qua supra*, though not called for by the case, is to the effect that the representation must have been intended to deceive.

These authorities would seem to sustain the plaintiff's counsel fully in his position that the false representation must not only be intended to deceive but also to deceive the identical party that acted on them.

There are, however, authorities of equal respectability, and in greater numbers, which maintain a different doctrine.

In England, the case of *Pickard v. Sears* does not appear to have been understood as intended to lay down a complete definition of the equitable doctrine excluding all cases that could not be brought within the terms of the remarks made by Lord Denman. In *Freeman v. Cooke*, 2 Exch. 654, it was held that the term "willfully," used in *Pickard v. Sears*, was not to be understood in the sense of "maliciously"; and that, whatever a man's real meaning may be, if he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant he should act on it, and

he did act on it as true, the party making the representation would be equally precluded from contesting its truth. This is wholly inconsistent with the notion that an intention to deceive is an essential ingredient of the representation, which precludes the party making it from showing that it was false. So in *Jorden v. Money*, 5 H. L. Cas. 212; it was held not to be necessary that the party making the representations should know that they were false; that no fraud need have been intended at the time; but, if the party unwittingly misled another, you must add that he has misled him under such circumstances that he had reasonable ground for supposing that the person whom he was misleading would act upon what he was saying.

In *Gregg v. Wells*, 10 Adol. & E. 90, Lord Denman says: "*Pickard v. Sears* was in my mind at the time of the trial, and the principle of that case may be stated even more broadly than it is there laid down. A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in the action against the person whom he has himself assisted in deceiving." This shows that Lord Denman did not himself understand that his remarks in *Pickard v. Sears* were to be taken as a definition and limitation of the equitable doctrine, for he says the principle of the case might be stated more broadly than it is laid down there, and may include the case of a culpable negligence. So *Hobbs v. Norton*, 1 Vern. 136; *Hunsden v. Cheyney*, 2 Vern. 150; *Teasdale v. Teasdale*, 13 Vin. Abr. 539; *Burrowes v. Lock*, 10 Ves. 475,—before cited, show that the practice in equity does not require that there should in all cases be an intention to deceive, or even a knowledge that the representation was false.

We come now to the decisions in this country, which give a broader application to this doctrine than those before cited.

In *Dezell v. Odell*, 3 Hill, 221, the general doctrine is said to be that when a party, either by his declarations or his conduct, has influenced a third person to act in a particular manner, he will not be afterwards permitted to deny the truth of the admission if the consequence would be to work an injury to such third person, and that in such case it must appear—First, that he made an admission which is clearly inconsistent with the evidence he proposes to give, or the claim which he proposes to set up; second, that the party has acted on the admission; third, that he will be injured by allowing the truth of the admission to be disputed. According to this interpretation of the equitable doctrine, it would seem not to be necessary that the representation should be intended to deceive, or that the party making it should know it to be false, or that it should be intended the party should act on

it, who does so in fact, and is deceived by it. The rule of this case has been adopted and followed in *Newman v. Hook*, 37 Mo. 207; *Carpenter v. Stillwell*, 12 Barb. 135; and *Eldred v. Hazlett*, 33 Pa. St. 316.

In *Roe v. Jerome*, 18 Conn. 138, the general doctrine is stated to be that where one person, by his words or conduct causes another to believe in a certain state of things, and thus induces him to act on that belief, so as injuriously to affect his previous position, he is concluded from averring a different state of things as existing at the time; and this rule was followed in the later cases of *Cowles v. Bacon*, 21 Conn. 451, and *Dyer v. Cady*, 20 Conn. 563; and in *Preston v. Mann*, 25 Conn. 118, before cited, it is said that the doctrine did not then rest on any determinate, legal test which will embrace all transactions to which the general principles of equity, in which it originated, demand that it should be applied.

Buchanan v. Moore, 13 Serg. & R. 304, 306, is to the point that, though the party believed his representation to be true, and made it under a mistake, he is estopped to show that he made the representation innocently believing it to be true, provided the other party acted on it, and had reason to act on it, as true. So in *Strong v. Ellsworth*, 26 Vt. 366, it is said by Redfield, C. J., that he who by his words or actions, or his silence even, intentionally or carelessly induces another to do an act which he would not otherwise have done, and which will prove injurious to him if he is not allowed to insist on the fulfillment, may insist on such fulfillment; and that the doctrine of equitable estoppels lies at the foundation of morals. In *Mitchell v. Reed*, 9 Cal. 204, it was held that where a statement made to a third person is not confidential, but general, and is acted on by others, the party making the declaration is estopped to deny its truth; that the intention with which the declaration is made is not material, except, perhaps, where it is confidential. This case and *Quirk v. Thomas*, 6 Mich. 76, are authorities that to work the estoppel it is not necessary the declaration should be made to the party who acts on it, nor in his presence, nor that the declaration should be intended to come to the knowledge of any particular person.

In a suit at law to recover damages for a false affirmation that the signer of a note was of age, it was decided, in *Lobdell v. Baker*, 1 Metc. (Mass.) 193, that it was not necessary to allege or prove that the defendant knew the signer was an infant. Wiide, J., in delivering the opinion of the court, said: "A party may render himself liable in an action for damages to a party prejudiced by a false affirmation, though not made with any fraudulent intention." This, it may be said, is not directly in point, but the only difference is in the form of the remedy. The principle involved is the same, whether the

question is raised in a suit to recover damages for the false representation, or redress is sought by estopping the party to prove the falsehood of the representation. Both cases go on the same general ground that the party is responsible for the consequences of his false representation.

There are numerous authorities that it is not necessary to the estoppel that the declarations or conduct should be intended to deceive any particular person or persons; that, if they were intended to deceive generally, or were of such a character, and made in such circumstances, that it must have been understood they were likely to deceive, and any person using due diligence was in fact deceived by them, it is enough. *Gregg v. Wells*, 10 *Adol. & E.* 90; *Wendell v. Van Rensselaer*, 1 *Johns. Ch.* 353; *Adams v. Brown*, 16 *Ohio St.* 78; *Dezell v. Odell*, 3 *Hill*, 221; *Quirk v. Thomas*, 6 *Mich.* 76; *Mitchell v. Reed*, 9 *Cal.* 204.

It has been declared in many cases that this equitable estoppel involves a question of legal ethics, and applies wherever a party has made a representation, by words or conduct, which he cannot in equity and good conscience prove to be false; and that this kind of estoppel, being a broad doctrine of equity, cannot be limited in application by the terms of any narrow legal definition. In *Canal Co. v. Hathaway*, 8 *Wend.* 483, it is said by *Sutherland, J.*, that the party is estopped when in good conscience and equity he ought not to be permitted to gainsay his admission; and in the same case, by *Nelson, J.*: "From the means in which the party must avail himself of these estoppels, it is obvious there can be no fixed and settled rules of universal application." And in *Dezell v. Odell*, 3 *Hill*, 225, *Bronson, J.*, adopting the language of *Nelson, J.*, in *Canal Co. v. Hathaway*, adds, "It is a question of ethics." In *Strong v. Ellsworth*, 26 *Vt.* 366, *Redfield, J.*, says the doctrine lies at the foundation of morals. In *Lucas v. Hart*, 5 *Iowa*, 415, the court holds that: "In these estoppels there can be no fixed and settled rules of universal application to regulate them as in technical legal estoppels; that in many, and probably in most, instances, whether the act or admission shall operate as an estoppel or not must depend on the circumstances of the case, though there are some general rules which may materially assist in the examination of such cases." In the application of these general rules to that case the court decided that the acts and admissions of the respondent estopped him from asserting his title to the property in question; that to permit him to do it would be "unconscionable, and contrary to that fairness and honest dealing which courts of equity seek ever to promote and encourage."

In *Frost v. Saratoga Ins. Co.*, 5 *Denio*, 154, it is said by *Beardsley, C. J.*, that such an estoppel is a question of ethics, and is allowed to prevent fraud and injustice, and

exists wherever a party cannot in good conscience gainsay his own acts or assertions.

The case of *Preston v. Mann*, 25 *Conn.* 118, is strong to the point that this estoppel, depending on a broad doctrine of equity, cannot be governed in application by narrow and strict rules of construction, such as have prevailed in legal estoppels.

In some, if not in most, of the cases, in which it is said that if a party makes representations intending to deceive the party that acts on them, the equitable estoppel applies, it was not intended, as I think, to lay down a rule excluding all cases that did not fall within the statement made in reference to the facts of the case then under consideration; that what is said is not to be taken as a rule to limit and define the doctrine and exclude all other cases. They say, if such and such things concur, "this case will fall within the doctrine"; but they do not intend to say no other cases are within it. For example, in *Kinney v. Farnsworth*, 17 *Conn.* 361, *Storrs, J.*, says that "admissions which have been the means, designedly, of leading others to a particular course of conduct, cannot afterwards be conscientiously retracted by one who has made them." He could not have intended to lay down the rule that one would in no case be estopped by a representation not designed to deceive, because the same judge, in *Preston v. Mann*, says: "The doctrine is not reduced to the limits of any formula," and, "whatever the motive may be, if one so acts or speaks that the natural consequence of his words or conduct will be to influence another to change his condition, he is legally charged with the intent to induce the other to believe and to act on that belief, if such proves to be the result." So *Lord Denman*, speaking, in *Gregg v. Wells*, 10 *Adol. & E.* 90, of his judgment in *Pickard v. Sears*, says: "The principle of that case may be stated even more broadly than it is there laid down."

In this state we have several cases where the general question has been more or less considered. In *Wells v. Pierce*, 27 *N. H.* 503, the doctrine of equitable estoppel was traced to its origin in equity, and it was held that if the owner actively encourages the purchase of his property from another, he will be precluded from claiming it, though he was not aware of his interest at the time; which is clearly in conflict with the notion that the representation must be accompanied with an intention to deceive. In *Davis v. Handy*, 37 *N. H.* 65, the doctrine of *Wells v. Pierce* was approved and applied. In the recent case of *Drew v. Kimball*, 43 *N. H.* 285, one point directly involved was whether it was necessary that the party to be estopped should intend to deceive and defraud the individual to whom the representation was made, and who set up the defence; and it was held that it was not necessary. Indeed it seems to me that it would be trifling with a doctrine depending on equity and good con-

science to hold otherwise. So, if a representation was intended to deceive one man, and it in fact deceived and defrauded another. Then, again, if the representation were intended to have one operation, and, as it turned out, deceived and defrauded by another method not contemplated by the party at the time, but still the natural consequence of the representation, it would be quibbling with a doctrine depending for its application on the morality of the act to hold that the party would not be answerable for the consequences of his false and fraudulent representation as much as if it had taken effect on the party and in the manner intended. In a case depending on a question of "legal ethics," it would bring down the morality of the law to a very low standard to hold that a party was not liable for the wrong caused by his fraud to one man, because the fraud was contrived against another man.

In *Drew v. Kimball* the case did not raise the precise point taken in this case. But, on a full discussion of the general doctrine, and a review of the authorities, the court, adopting the hypothetical case put by Parke, B., in *Freeman v. Cooke*, say: "If, whatever a man's intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant he should act upon it, and he did act upon it, as true, the party making the representation would be equally precluded from contesting its truth. In short, the representations are to be regarded as willful when the person making them means them to be acted on, or if, without regard to intention, he so conducts himself that a reasonable man would take the representation to be true, and believe it was meant he should act on it."

There have been several other cases in this state where this equitable doctrine has been considered and applied. *Thompson v. Sanborn*, 11 N. H. 201; *Simons v. Steele*, 36 N.

H. 73; *McMahon v. Portsmouth Mut. Fire Ins. Co.*, 22 N. H. 15; *Odlin v. Gove*, 41 N. H. 473; *Corbett v. Norcross*, 35 N. H. 99, 115; *Richardson v. Chickering*, 41 N. H. 380, 385. Though I do not find that the precise point taken here for the plaintiff has been directly decided in any of our cases, yet the general current of our decisions on the subject tends to a liberal application of the doctrine for the suppression of fraud and dishonesty, and the promotion of justice and fair dealing. No disposition has been shown in the courts of this state to treat this equitable estoppel as odious, and embarrass its application by attempts to confine it within the limits of a narrow technical definition. We are content to follow where the spirit and general tone of these decisions lead; and they lead plainly to the conclusion that, where a man makes a statement disclaiming his title to property, in a manner and under circumstances such as he must understand those who heard the statement would believe to be true, and, if they had an interest in the subject, would act on as true, and one, using his own means of knowledge with due diligence, acts on the statement as true, the party who makes the statement cannot show that his representation was false, to the injury of the party who believed it to be true, and acted on it as such; that he will be liable for the natural consequences of his representation, and cannot be heard to say that the party actually injured was not the one he meant to deceive, or that his fraud did not take effect in the manner he intended.

Our conclusion is that, on the facts which the verdict has established, the plaintiff was estopped to show his representation that the goods belonged to Charles E. Horn to be false, though he did not know that the defendant Cole had any demand against Charles E. Horn, and though he had not Cole in his mind as the party whom he meant to deceive.

Judgment on the verdict.

DICKERSON v. COLGROVE.

(100 U. S. 578.)

Supreme Court of the United States. Oct., 1879.

Error to the Circuit Court of the United States for the Western District of Michigan.

George W. Lawton, for plaintiff in error.
M. J. Smiley, for defendant in error.

Mr. Justice SWAYNE delivered the opinion of the court.

This is an action of ejectment brought by Dickerson and Wheeler. The latter died during the progress of the suit. The parties agreed in writing to submit the case to the court without the intervention of a jury. The court found the facts. So far as it is necessary to state them, they may be thus summarized: Micajah Chauncey owned the land in controversy. He died on the — day of February, 1853, leaving two children, Edmund Chauncey and Sarah Kline. They were his only heirs at law. He is the common source of title of all the parties in this litigation. On the 3d of March, 1853, John Kline and Sarah, his wife, conveyed by warranty deed the entire premises to Lowell Morton. The deed was duly recorded on the 6th of March, 1854, and on the 1st of April, 1854, Lowell Morton entered into possession of the premises. He and the defendants have ever since been in actual possession, claiming to own and hold the property as tenants in common. The latter were in possession at the commencement of this suit, claiming title through conveyances from Lowell Morton. Prior to the 1st of April, 1856, Lowell Morton learned that Edmund Chauncey was one of the children of Micajah Chauncey, and that he lived in California. Whereupon Lowell Morton procured Eleazer Morton to write to Edmund Chauncey to learn whether he made any claim to the premises. On the 1st of April, 1856, Edmund Chauncey, still living in California, addressed a letter to his sister, Sarah Kline, then living in Michigan, wherein he disavowed, in strong terms, the intention ever to assert such a claim.

The contents of this letter subsequently came to the knowledge of Lowell Morton, who thereafter conveyed to the defendants by warranty deeds. Under these deeds they have since held and claimed title, and have occupied and improved the property. On the 9th of July, 1865, Edmund Chauncey conveyed the undivided half of the premises, by quitclaim deed, to Orlando B. Dickerson and James Witherell. On the 1st of May, 1868, Witherell conveyed all his right, title, and interest to William W. Wheeler, one of the original plaintiffs. The suit was instituted on the 6th of March, 1873. Lowell Morton and the defendants had then been in possession eighteen years and eleven months. The court below held as conclusions of law that the action was barred by the statute of lim-

itations of Michigan of 1863, and by an estoppel in pais, and gave judgment accordingly. The plaintiff thereupon sued out this writ of error.

Both the conclusions of law are relied upon as errors for the reversal of the judgment. Our remarks will be confined to the point of estoppel.

This defence is founded upon the letter of Edmund Chauncey. The contents of the letter of Morton, to which it refers, are not given in the finding of facts, but the subject of that letter and the inquiry which it made appear clearly in the letter of Chauncey. He said: "Mr. Morton wrote me a letter. He wanted to know if I intended to claim any of the Conger farm" (meaning the premises in controversy). "You can tell Mr. Morton for me, he need not fear any thing from me. Thank God, I am well off here, and you can claim all there. This letter will be enough for him. I intended to give you and yours all my property there, and more if you need it." The phrase, "I intended to give," etc., implies that he knew his half of the farm had already been sold to Morton, and that he could not, therefore, give his sister, to whom the letter was addressed, any part of that property. It does not appear that there was any other property held by them as coparceners. He says further, that he intended to give her more if she needed it. All this was communicated to Lowell Morton. What was the effect upon him? He was lulled into security. He took no measures to perfect his title, nor to procure any redress from the Klines, who had conveyed and been paid for the whole of the property while they owned but the half. On the contrary, he gave thereafter deeds of warranty to all the defendants,—who are sixty-two in number,—and he and they occupied and improved the premises down to the commencement of this suit. Between that time and the date of the letter was a period of nearly seventeen years. What improvements were made and how far the property had risen in value are not disclosed, nor does it appear what stimulated Chauncey to violate his promise and commence this attack on the defendants.

The estoppel here relied upon is known as an equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. It is akin to the principle involved in the limitation of ac-

tions, and does its work of justice and repose where the statute cannot be invoked. Here, according to the finding of the court, the time of adverse possession lacked but a year and a month of being twenty years,—when it is conceded the statutory bar would have been complete.

In *Faxon v. Faxon*, 28 Mich. 159, a mortgagee holding several mortgages prevailed on a son of the deceased mortgagor, then intending to remove to a distance, to remain on the premises and support the family, by assuring him that the mortgages should never be enforced. The son supported the family, and the property grew in value under his tillage. After the lapse of several years the mortgagee proceeded to foreclose. He was held to be estopped by his assurances upon which the son had acted. The court said: "The complainant may have estopped himself without any positive agreement, if he intentionally led the defendants to do or abstain from doing any thing involving labor or expenditure to any considerable amount, by giving them to understand they should be relieved from the burden of the mortgages. In *Harkness v. Toulmin*, 25 Mich. 80, and *Truesdale v. Ward*, 24 Mich. 117, this principle was applied, in the former case, to the extent of destroying a chattel mortgage, and in the latter, of forfeiting rights under a land contract, where parties were led to believe they were abandoned. There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect." *Cooley, J.*, was inclined to doubt the sufficiency of the proof, but said, finally: "His" (the mortgagee's) "assurances have undoubtedly been relied upon and acted upon by the defendants, and, considering the great lapse of time without any claim under the mortgages on the part of the complainant, I am not disposed to dissent from the conclusion of my Brethren." The case before us arose also in Michigan. In *Evans v. Snyder*, 64 Mo. 516, the heirs assailed an administrator's sale. No order of sale could be found. This was held to be a fatal defect. But the supreme court of the state held that where they stood silently by for years, while the occupant was making valuable and lasting improvements on the property, and redeeming it from the lien of the ancestor's debts, they would be estopped from afterwards asserting their claim. Here, as by Judge Cooley, stress is laid upon the lapse of time. This is also a feature of the case in hand.

Other authorities to the same effect are very numerous. They may be readily found.

It is unnecessary to extend this opinion by referring to them.

We think the facts disclosed in the record make a complete case of estoppel in pais.

But it is said this objection to the plaintiff's claim is not available at law, and must be set up in equity.

"This is certainly not the common law. Littleton says: 'And so a man can see one thing in this case, that a man shall be estopped by matter of fact, though there be no writing, by deed or otherwise.' Lord Coke, commenting hereon, gives an instance of estoppel by matter in fact,—this very case of partition. Co. Litt. 356, § 667. And such an award has been held sufficient to estop a party against whom ejectment was brought. *Morris v. Rosser*, 3 East, 15." *Brown v. Wheeler*, 17 Conn. 345, 353.

In *City of Cincinnati v. White's Lessee*, 6 Pet. 431, the proprietors of the city plat, in 1789, dedicated the ground between Front street and the Ohio river to the public for commercial and other purposes. The legal title had not then emanated from the government of the United States. In this state of things the statute of limitations does not run. White long subsequently acquired the legal title and brought ejectment for the premises. This court said (page 441): "This is a possessory action, and the plaintiff, to entitle himself to recover, must have the right of possession; and whatever takes away this right of possession will deprive him of the remedy by ejectment. *Adams, Ej. 32; Starkie*, part 4, 505-507." This is the rule laid down by Lord Mansfield, in *Atkyns v. Hoarde*, 1 Burr. 119. "Ejectment," says he, "is a possessory remedy, and only competent where the lessor of the plaintiff may enter, and every plaintiff in ejectment must show a right of possession as well as of property." If the plaintiff in the present case was not entitled to possession, how, according to this authority, could he recover? If he had recovered, and a court of equity would have enjoined him from executing the judgment by a writ of possession, we ask, again, how could he recover in this action? Is not the concession that relief could be had in equity fatal to the proposition we are considering? In *Stoddard v. Chambers*, 2 How. 284, it was said by this court: "On a title by estoppel, an action of ejectment can be maintained." We do not overlook the fact that a land claim had been conveyed before it was confirmed by an act of congress to the assignor and his legal representatives. It was held that on such confirmation the legal title became vested in the former, "and inured, by way of estoppel, to his grantee and those who claimed by deed under him." In that case, as in this, there was no formal transfer of the title. The transfer was made, as under a statute of limitations, when the bar is complete, by operation of law. *Leffingwell v. Warren*, 2 Black, 599. Why may not a like transfer be held to have been made in this case? The reason

given for the rule of inurement and estoppel by virtue of conveyances is, that it avoids circuitry of action. Does not the same consideration apply, with equal force, in cases of estoppel in pais? Why is it necessary to go into equity in one case and not in the other?

It has never been held that the statute of frauds applies to cases of inurement, and it has been conceded that it does not affect cases of dedication. Where is the difference in principle in this respect between those cases and the one before us? But here this point cannot arise, because the promise relied upon was in writing. In *City of Cincinnati v. White's Lessee*, supra, this court, speaking of the dedication there in question, said, "The law considers it in the nature of an estoppel in pais, which precludes the original owner from revoking such dedication," and that a grant might have been presumed, "if that had been necessary, and the fee might be considered in abeyance until a competent grantee appeared to receive it; which was as early as the year 1802, when the city was incorporated." Here there was a grantee capable of taking the fee all the time from the date of the letter. The common law is reason dealing by the light of experience with hu-

man affairs. One of its merits is that it has the capacity to reach the ends of justice by the shortest paths.

The passage of a title by inurement and estoppel is its work without the help of legislation. We think no sound reason can be given why the same thing should not follow in cases of estoppel in pais where land is concerned.

This subject has been carefully examined in *Bigelow*, *Estop.* pp. 533, 537. The learned author comes to no final conclusion whether in cases like this the defence may be made at law, or whether a resort to equity is necessary. The former is our view. Whether the title passed or not, the fact that the plaintiff was not entitled to possession of the premises was fatal to the action.

Chauncey conveyed to the plaintiff in error by deed of quitclaim. He is not, therefore, a bona fide purchaser. *Piatt v. Oliver*, 3 How. 333; *May v. Le Claire*, 11 Wall. 217. Morton and the defendants were in possession. For both these reasons, he took whatever title he acquired subject to all the rights, legal and equitable, of Morton and of the defendants, who deraigned their titles from the latter.

Judgment affirmed.

CONTINENTAL NAT. BANK v. NATIONAL BANK OF COMMONWEALTH.

(50 N. Y. 575.)

Court of Appeals of New York. 1872.

Action to recover \$63,062.50 paid by plaintiff upon a check dated May 1, 1866, drawn upon plaintiff by John Ross to the order of J. S. Cronise & Co. The headnote states the facts. Judgment for plaintiff.

Luther R. Marsh, for appellant. James Emott, for respondent.

FOLGER, J. The jury have found to be a forgery, the writing on the check, which purports to be a certification thereof by the plaintiff's teller. They have also found that the teller, when resorted to, in effect pronounced it genuine.

That the plaintiff would be bound by the act of its teller, had he in fact certified the check, is settled. *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125, 69 Am. Dec. 678; 14 N. Y. 623. Nor do we doubt that an admission by him that it was genuine, made on the presentation to him of the counterfeited certification and inquiry put, also binds the plaintiff. We can see no difference in result, and effect upon others dealing with the check on the strength of that admission, between writing "Timpson, teller," signifying good, upon a worthless check, and declaring that the words "Timpson, teller," already there, were written there by him. In the one case they are his own, and signify good. In the other he adopts them as his own, and so makes them his own, and they signify good. This was the effect of his admission. And see 53 Me. 103, and *Bank v. Crafts*, 4 Allen, 447.

There seems to be no dispute but that the defendant takes the place of Cronise & Co., and may avail itself of any defense to the action of the plaintiff which that firm of brokers could have made.

The question then arises, is the plaintiff, by the other facts presented, estopped from maintaining that in truth the certification was a forgery, and the admission of its teller an innocent mistake?

There is no disagreement as to the general definition of an estoppel in pais. It is agreed that there must have been some act or declaration of the plaintiff or of its agent to the defendant's assignors, which so affected the conduct of the latter to their injury, as that it would be unjust now to permit the plaintiff to set up the truth of the case to the contrary of its mistaken act or declaration.

But the plaintiff insists that there are certain limitations to be put upon this generality.

1st. The plaintiff claims that it is necessary that its act or declaration must have been made to mislead.

To this proposition the plaintiff cites *Pickard v. Sears*, 6 Adol. & E. 469; 33 Eng. Com. Law, 115, where the court say: "Where one by his words or conduct willfully causes another," etc. But this word "willfully," used in the decision in that case, has subsequently received judicial comment and limitation. Thus in *Freeman v. Cooke*, 2 Exch. 654, the court say: "By the term 'willfully,' however, in that rule, we must understand, if, whatever a man's real intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and he did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon any person by usage of trade or otherwise to disclose the truth, may often have the same effect."

So in *Cornish v. Abington*, 4 Hurl. & N. 549, Pollock, C. B., says: "The jury having found that the defendant, whether intentionally or not, led the plaintiff to form an opinion that he was dealing with the defendant and induced him to furnish goods to the defendant, the defendant must pay him for them." And referring to *Freeman v. Cooke*, and *Pickard v. Sears*, supra, the learned chief baron remarks to the effect that the word "willfully" means nothing more than "voluntarily," and he holds that if the representation was made voluntarily, though the effect upon the hearer was produced unintentionally, the same result would follow; and that if a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he cannot afterward say that he is not bound, if another so understanding it has acted upon it. Of course, this general language here extracted should be read in connection with the facts of that case to prevent carrying the force of these words too far. But it is shown that "willfully" and "voluntarily," as used in the definition of an estoppel, are convertible.

In *Manufacturers' & Traders' Bank v. Hazard*, 30 N. Y. 226, it is said that it is not necessary to an equitable estoppel that the party should design to mislead. Be this dictum or rule, we do not find that it has been in this state disputed or questioned.

In *In re Bahia & S. P. Ry. Co.*, L. R., 3 Q. B. 584, it is held that if a representation is made with the intention that it shall be acted upon by another, and he does so, there is an estoppel from denying the truth of what was represented to be the fact, and that the case is within the principle of *Pickard v. Sears*, as explained by *Freeman v. Cooke*, both supra.

The word "willful" does not mean *malus animo*, but so far willfully that the party, making the representation acted upon, means

that it shall be acted upon in that way. Per Compton, J., in *Howard v. Hudson*, 2 Ell. & Bl. 1.

And we hold that there need not be, upon the part of the person making a declaration or doing an act, an intention to mislead the one who is induced to rely upon it. There are cases in which parties have been estopped where their acts or declarations have been done or made in ignorance of their own rights, not knowing that the law of the land gave them such rights. Here, certainly, there could be no purpose to mislead others, for there was not the knowledge to inform the purpose, and both parties were equally and innocently misled. *Storrs v. Barker*, 6 Johns. Ch. 166, 10 Am. Dec. 316. Indeed, it would limit the rule much within the reason of it, if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who was estopped. And it has long been held, that where it is a breach of good faith to allow the truth to be shown, there an admission will estop. *Gaylor v. Van Loan*, 15 Wend. 308. There are decisions where the rule has been stated as the plaintiff claims it. We have looked at those cited by it. It was not necessary to the conclusions of the court in those, that such restriction should be put upon the rule, and we do not think that the language employed was used with the intention of making such a limitation, for the facts of the case did not require it.

2d. The plaintiff further claims that Cronise & Co. parted with the gold and took the check before the declaration of the teller was made known to them, and that before an estoppel can be insisted upon, it must appear that they acted in reliance thereupon, or altered their position in consequence thereof, or parted with some value on the faith therein.

The fair result of the testimony is, that Ross left the office of Cronise & Co. before the return of their messenger to it from the bank, and Cronise & Co. had then delivered the gold checks. They did not act, after his return, relying upon the declaration of the teller which the messenger brought to them.

Assuming, for the present, that they did in reliance upon that declaration refrain from action and left untaken any measures for the arrest of Ross or the stoppage of payment on the checks he had received; assuming that it is reasonably probable, that if they had been told by the plaintiff the reverse of what they were told, they would have acted and would have taken those measures; assuming that it is reasonably probable that action and such measures would have prevented the whole or some part of the damage which befell, can it be held that the conduct of Cronise & Co. was so affected to their injury by the declaration of the plaintiff as that the defendant

may set up the declaration in estoppel of the plaintiff? The proposition contained in this query we understand the plaintiff to resist. And this, because the act, the affirmative act, had been done which changed the position of Cronise & Co. toward Ross and the transaction before the declaration was made known to them, and had not been done in reliance upon it. And this is a denial, that after a declaration is made and is relied upon, an omission thereby induced to act and to take such measures as will arrest an impending evil, and an injury resulting from such omission, can be made available as an estoppel.

In *Howard v. Hudson*, supra, Lord Campbell, Ch. J., recognizes the existence of the principle, that doing an act and omission to act are the same. And see *Helme v. Insurance Co.*, 61 Pa. 107, 100 Am. Dec. 621. In *Knights v. Wiffin*, L. R., 5 Q. B. 660, the person who relied upon the declaration had before it was made and not in reliance upon it, paid his money for property not delivered, but after it was made, relying upon it, took no active course of conduct, remaining content and passive. Had the declaration been the reverse of what it was, which would then have been true, he might have taken active measures tending to retrieve his position. He rested satisfied in the belief, as a reasonable man, that the property had been passed to him as agreed. And he was damaged. The right of estoppel was there upheld, and it was maintained upon the ground of the plaintiff relying upon the statement and taking no steps further, and of his abstaining from active measures of recovery in consequence of the statement. It was there held, that acquiescent reliance upon the defendant's statement was an alteration of the plaintiff's position.

In *Bank v. Keene*, 53 Me. 103, the question was presented. The plaintiff there held a note purporting to have been signed by the defendant. Hearing that the same was forged, the plaintiff asked the defendant, who, looking at the note, admitted the signature to be genuine. The plaintiff, in reliance on that admission, refrained from taking any proceedings against him who passed the note to it, so as to secure payment from him. The instructions to the jury were: That if the plaintiff, relying upon the defendant's admission, was induced to refrain from obtaining security by arrest of the one passing the note upon it, or by attachment of his property, and thereby sustained an injury, the defendant would be estopped from denying his signature. This instruction was declared by the court on review to be in harmony with the principles applicable to estoppels in pais. And see 15 Wend. 308, and *Brown v. Sprague*, 5 Denio, 545.

These cases appear to us to lay down a sound rule. It must be that the conduct of men, which may be influenced by the declarations of those with whom they deal, is

not confined to that which is shown by affirmative and positive acts following upon and induced by those declarations. Conduct is not alone that which is active, positive and affirmative. Conduct, as limited to this inquiry, is the reserve of one's own powers of person and property, and of those means of help which can be summoned from friendly or accommodating sources and from the tribunals and officers of justice, and is as often forbearance of their use and quiescence and contentment with affairs as they are, as action designed to change affairs. And such quiescence and content, induced by false or erroneous statement, may be quite as damaging as any result from action. It is as bad to fail to recover property gone, when with the knowledge of an existing fact it might have been retrieved, as it is to lose it. And so it is as damaging to rely in quiet upon an untrue statement, to the neglect of using the means of recovery, as it is to rely upon an untrue statement, and by action thereon meet with loss irreparable. To hold otherwise, would be to assert that the law makes a difference between damage received by action and omission to act, in circumstances precisely similar, save in these elements. When an act produces conduct from which flows injury, it cannot matter whether that conduct be affirmative or negative, active or quiescent.

We assumed, for the purpose of the previous consideration of one branch of the subject, that Cronise & Co. did, in reliance upon the declaration of the plaintiff, refrain from action and leave untaken any measures. The jury have so found the fact, and the finding is sustained by the testimony. We also assumed that it was reasonably probable that if they had been told the truth by the plaintiff they would have acted, and have taken measures which would have prevented the whole or some of the injury which befell. The jury have found that this assumption is well founded.

Though, as is conceded herein, Ross left the office of the brokers before their messenger returned, he had left but a very short time; a time so short that had the plaintiff declared the certification a forgery and the check worthless, there was ground for the jury to find that there was time for the broker's clerk, with his speed of foot, to have gone from the bank of plaintiff to the office of Speyers, there have learned the falsity of Ross' assertion of a delivery of gold to Speyer, and thence to the office of Cronise & Co., and have delivered his message soon enough for measures to have been decided upon and taken for the stoppage of the payment of the checks at the Bank of New York. We leave out of view for the present the checks upon the sub-treasury.

Nor was it a strained, unnatural nor unjustified inference for the jury to make that the clerk would so have done, and that Cronise

& Co. would have taken such measures and made stoppage of payment. It was but applying to the facts of the case and to the position of the parties in this transaction, the common knowledge of human nature and its workings under powerful incentives, and at a particular spot in the state and a particular hour of the day when those incentives are pressed in their greatest strength.

And from these findings thus authorized, it was a legitimate conclusion that Cronise & Co. suffered injury by the declaration to them of the plaintiff.

And if there is nothing else in the case the verdict and judgment are to be sustained.

The plaintiff insists however that the learned judge at circuit made several errors in his refusals to charge as requested, and in the charge which he delivered to the jury.

We will notice all of these instances which are indicated upon the points handed up, alluding to the requests by the numbers given to them in the points.

The second, third and fifth requests are already covered by what we have said.

The seventh request is: "That the jury cannot speculate upon what might have been done or attempted by Cronise & Co. after the delivery by them of the gold certificates or gold checks to the person calling himself John Ross, had they been apprised that the certificate was a forgery after such delivery."

If by the word "speculate," which is the word of controlling meaning in the request, was meant to guess, or to reason to practical results from unproven premises, doubtless the jury had no right so to do. And there would have been no error in the learned judge if he had so told the jury. But it would have been in the nature of an abstract proposition not necessarily involved in not growing out of the particular case. Hence it was not error for him to decline to charge, except as he did thereafter charge. He did charge them that Cronise & Co. to set up an estoppel must have had time to stop payment of the gold; that the circumstances must have been such as that they could have done it; that they must have occupied such a relation to the transaction as that they could with reasonable diligence have arrested the crime in its consummation and have secured the gold; that they must have still stood in a position where they could have corrected any act and could have saved the gold. This put the jury upon the proper inquiry. Nor can we concede that at the close of the trial the question of estoppel had become one of law only and for the court, as is claimed by the learned counsel for the plaintiff. He admits that there were two questions yet for the jury; whether the certification was forged or not, and whether its genuineness was admitted. And surely it was still a question of fact how much rela-

tive time had been spent by the respective actors from the moment Ross left the office of Cronise & Co. until the payment of the checks at the Bank of New York, and considering the relative positions of the different business places, whether in that lapse of time Cronise & Co. under all the circumstances could have made effectual interposition to stop payment of the checks delivered to him, or have made any successful effort at recaption of the gold if he had received it.

It is claimed that the learned judge erred in charging the jury that the delivery of the gold checks was not in law a delivery of the gold.

The points call our attention to that part of the charge in which the language of the judge is: "The delivery of these gold checks on the part of Mr. Cronise, it is insisted upon, is in law a delivery of the gold. I think that it was not."

It is proper to see in what connection this was said. For standing alone or applied to any and every case of a delivery of checks, it might be in some of them erroneous. What was the practical application of it for the minds of the jury? The topic then under the learned judge's and the jury's attention was whether Cronise & Co. could, under the facts of the case, in any proper view of them, be considered as injured by the plaintiff's declaration; and the judge precedes the remark excepted to by saying: "If Cronise, in point of fact, had done all that could be done on his part at that time, and had put himself in such a position that this admission could not affect his action to his prejudice, then the principle of estoppel would have no application to the case so far as he is concerned." Then he tells them, in the remark excepted to, in effect: It is insisted that the delivery of these checks was a delivery of the gold, in law, so that he could not reclaim it; and if he could not reclaim it then he was not injured by the declaration, for there was nothing he could do after such delivery. We may infer, properly, from the words "it is insisted," that all this had passed before the jury in the argument of counsel, either to the jury or to the court, and was a reference thereto. If it should be admitted to be technically inaccurate as a statement of law, applicable to all cases, it did not tend to mislead on this occasion; and for the purpose for which it was uttered, it was correct. Doubtless the handing over of the checks was a delivery of the gold to fulfill the contract for the sale of it, in accordance with the rules of the brokers' board under which the original parties to the transaction acted. But it was not such a delivery as prevented Cronise & Co. from intercepting the checks at the counter of the Bank of New York, and there forbidding and stopping payment of them.

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And this is true, whether the gold be dollars, in which to make payment of a debt payable, or a commodity to be transferred in satisfaction of a contract for the sale and delivery of a chattel. The scope of the remarks of the court to the jury was that notwithstanding Cronise & Co. had put these checks into the hands of Ross, still they could stop payment of them at the place of payment. And, so considered, it did not mislead the jury from the question at issue, or give them an erroneous rule of law by which to dispose of it.

The plaintiff claims that even if it should be held that it is estopped to show the truth, as to so much of the gold as was paid to Ross over the counter of the Bank of New York, it should not be as to so much of it as was represented by the checks on the sub-treasury. And if these checks were alone concerned in the transaction, it might be said with force that Ross could have as soon got payment on them and clear escaped, as Harmon, the clerk, could have made his errand and returned. But these checks are connected with those on the Bank of New York; and Ross did not depart with the avails of the one until he had got the avails of the other. If Ross first went to the sub-treasury and obtained payment, then he afterward went to the Bank of New York; and he was there, or to and from there, from ten to fifteen minutes; and this opportunity for stopping payment of the checks at the Bank of New York was also opportunity for arrest of his person, and obtaining from him the gold got at the sub-treasury. And if it be said that he may have passed away the checks on the sub-treasury in the street to a confederate, still he was at the Bank of New York to be seized, and the coercion of arrest to be used upon him. In 53 Me. 103, arrest is named as one of the means of obtaining security which the plaintiff had let slip; and in L. R., 5 Q. B. 660, Blackburn, J., goes so far as to say that it needs not that it should appear that any benefit would result from the attempt to secure payment, but that the injured party had the right to make that attempt; and losing the exercise of the right by his reliance on the declaration, the declarant was estopped. We need not go so far here. Arrest and detention of the swindler is a powerful means in coercing restoration; and arrest and detention were as probably in the power of Cronise & Co. as the stoppage of the payment of the checks at the Bank of New York.

The judgment appealed from should be affirmed, with costs to the respondent.

All concur except RAPALLO, J., who concurs as to all but the sub-treasury gold.

Judgment affirmed.

GALBRAITH et al. v. LUNSFORD.¹

(9 S. W. 365, 87 Tenn. 89.)

Supreme Court of Tennessee. Oct. 18, 1888.

Appeal from chancery court, Knox county; Henry R. Gibson, Chancellor.

Ejectment by J. P. Galbraith and others against B. F. Lunsford; the controversy being as to the location of a division line. In the plot referred to by the arbitrator the line from F to E represents the original boundary, and the one which complainant now seeks to have established as the true one. The line from O to P represents the boundary as recognized for many years, and alleged by defendants to have become the boundary by estoppel. Defendant had judgment and complainant appealed.

Luckey & Yoe and Pickle & Turner, for complainants. Jesse L. Rogers, for respondent.

FOLKES, J. This is an ejectment bill, the disposition of which was dependent upon a question of boundary. After answer and proof, the cause was submitted to Mr. Jerome Templeton, a solicitor of this court, as an arbitrator, who was "to hear and decide the same according to the law and the evidence." The award was to be in writing, and was to be made the decree of the court. The arbitrator presented his award, wherein was stated his findings of fact and of law, adjudging that the bill should be dismissed. Complainants excepted to the award, upon the ground that the arbitrator manifestly undertook, as he was required by the submission, to decide the case according to law; but that he had misconceived the law, and determined the case contrary thereto, upon the facts as found by him. The chancellor overruled the exceptions, and entered a final decree, making the award the judgment of the court. Complainants have appealed, assigning as error the action of the court in refusing to set aside the award, and in entering decree thereon. Under the submission the arbitrator was judge of the facts and the law, and was not required to give the grounds of his decision; in which event it would have been presumed that he had decided according to law. But, having stated his findings of fact, it was proper for the court to determine, on the exceptions presented, whether the conclusions of law announced by the arbitrator were warranted by the facts as found in a case where, by the terms of the submission, the award was to be in accord with the law. *Powell v. Riley*, 15 Lea, 153. The proof is not in the record, having properly been omitted, inasmuch as no question was made—if, indeed, any could have been made—as to the correctness of the conclusions of fact reached by the arbitrator.

¹ Upon the subject of equitable estoppel generally, see note to this case in 1 L. R. A. 522-524.

We are therefore to consider only the question propounded in the exception to the award, to wit, that the deductions of law upon the facts as found are contrary to law.

The complainants, in support of their exceptions in the court below, now advance the following propositions in their assignments of error in this court: (1) "A line which could be easily ascertained by survey, and which had been known, and was lost or overlooked by mutual mistake, was and is not a doubtful line, that could be agreed upon or fixed, or become the true line, and binding by recognition, because void under the statute of frauds." (2) "Recognition of a line under a mistake of fact, where it was mutual, and either could have discovered the mistake by survey or otherwise, is not binding on either party, and neither party can set up the mistake against the other, by way of estoppel or otherwise; as mistake is as much that of one as the other, and fault, if any, is equal; and, besides, one's admission, made under mistake, will be relieved against in equity, more especially when mistake is mutual." (3) "Recognition of a line, not the true one, will not divest title to land out of a married woman nor minor, by estoppel or otherwise, as a married woman cannot be divested or part with title to land in that way; but more especially when it was by mistake of fact, as well upon the part of her adversary as that of her own, and when either could have easily discovered the mistake; nor is such married woman or descendant estopped to set up the truth, and recover accordingly; and more especially in a court of equity."

Robbed of their verbiage, the assignments of error are to the effect (1) that the line or boundary, under the facts as found by the arbitrator,—there being, as assumed by the assignments, no bona fide doubt, as to the true line, entertained by both parties,—was not such a doubtful boundary as could be established by parol or acquiescence. (2) That the doctrine of equitable estoppel does not apply at all to the facts as found. (3) And, if applicable, it cannot be effectual, as against married women.

Before disposing of these propositions, let us see what are the findings of the arbitrator, as shown by the award itself. We quote:

"Without going into the details of the proof, I find as follows:

"(1) The south boundary line of grant No. 18,417, to Wm. Cox, issued October 3, 1833, is the line from F to E in plot (Exhibit A) to the deposition of F. W. Galbraith. I further find that, as an original proposition, the north boundary line of the 250-acre tract—Wm. Cox to Jacob Pate, September 22, 1814—was the line from I to T, on same plot; and in 1833, when said grant was issued, the two tracts adjoined the lines here above described,—being the same as far as the latter extended, and being the dividing line of the

tracts. I add that, if I am mistaken as to the true south boundary of said grant, the result would be the same, because the deed—Geo. M. Combs to Wm. Cox, February 10, 1814—covered both tracts, and both parties to this suit derive title from Wm. Cox; and I am convinced the north boundary line of the 250-acre tract is the line I to T; that is, if not under said grant, certainly under the Combs deed, so far as these parties are concerned, Wm. Cox owned the land in controversy.

"(2) I find that somewhere between August 11, 1846, and March 28, 1857,—that is, while Presley S. Cheshier owned the 250-acre tract, or prior to August 11, 1846,—said dividing line was lost, or at least its location became doubtful. As a consequence, Cheshier, between the point, I, and the New Market road, on said plot, cleared and inclosed the land up to and along the line from O to P on said plot, being the disputed line, as defendants claim it. Cheshier did this under a claim of right, which, I infer from the circumstances, he thought that was his line. There is a marked line there, not as old as the line from F to E, but still an old line. Further, B. F. McFarland and wife, Sarah M. L. McFarland, a daughter, and the vendee of Wm. Cox, made the same mistake. They either forgot or never knew where the true dividing line was, and they clearly recognized the line from O to P as the dividing line between them and Cheshier. I find no evidence that Mrs. McFarland ever recognized said last-named line before her marriage. The deed to her from her father, containing the boundaries of said grant, is dated April 16, 1841, and conveys to her by her maiden name. Her marriage was subsequent, but the date does not appear. On one occasion, while John E. Hopkins owned the 82-acre tract, being the northern portion of the 250 acres,—that is, after November 3, 1866, and prior to 1869, when Mrs. McFarland died,—she and John E. Hopkins went along the Cheshier fence, along the line from O to P, talking about a trade as to Mrs. McFarland's land north of said line. She then recognized said line as the dividing line between her and Hopkins. This is cited as showing the recognition of said line, as defendants claim it, was not by B. F. McFarland only, but also by his wife. This recognition extends as far back as 40 years ago, or to 1848. In 1870 the heirs at law of Sarah M. L. McFarland, deceased, recognized the same line, O to P, when they partitioned among themselves the lands inherited from their mother. When John Neal bought the 82-acre tract from B. F. McFarland, November 3, 1863, and when Hopkins bought the same from Neal, in 1866, said line, O to P, was the dividing line, being lived up to and recognized by McFarland and wife; and we may assume that both Hopkins and Neal bought with that understanding, well justified by the conduct of McFarland and wife.

In 1870 the commissioners making partition did the locating of lines; but that only shows the mistake about the division line had become the understanding of the neighborhood. By accepting the partition, the heirs showed themselves ignorant of any mistake, so long had it (the line) been recognized. In 1873, John E. Hopkins, desiring to build a new dwelling-house, procured the division line to be run by J. P. Galbraith, the husband of one of the McFarland heirs, who showed him where to build. Several other of the McFarland heirs were then at home in the neighborhood, and must have known of the building of the house, which was on their land, as they claim it now; but was on Hopkins' land, and just south of the division line, as they must have known Hopkins claimed it. To say the least of it, they were silent when they should have spoken. In 1877, R. M. Barton, Jr., and wife, Jennie M. Barton, the latter being one of the McFarland heirs, by deed called for the Hopkins division line from O to P. In July, 1877, Barton and wife sold the residue of the land partitioned to the latter to Wm. Galbraith; and some time afterwards, and prior to June, 1882, when Wm. Galbraith filed his bill against John E. Hopkins, the discovery was made that the line, so long recognized and lived up to on both sides as the true division line,—that is, the line from O to P,—was a mistake, and that the true line was from F to E or from 3 to J on said plot. The line from O to P never was consistent with the 2d call, 'thence north 10 poles to a stake,' or with the fourth call, 'thence north 44 poles to a stake,' in the deed from McFarland to John Neal, made in 1863. Nor was the same consistent with the calls of the deed from Wm. Cox to Jacob Pate, made September 22, 1814; nor was the same consistent with the oldest marked line on the ground. An accurate survey, at any time, ought to have discovered the true line. But so it was, the parties on both sides the line made a mutual mistake, without taking the trouble of a survey, on which they acted from some time prior to 1848 to some time after 1877. After so long a public acquiescence, and so many public acts, some by solemn deeds of record on the part of Sarah M. L. McFarland, her husband, and her heirs, under the influence and with the knowledge of which strangers have bought the adjoining land, and built a valuable house thereon worth many more times the value of land involved, can the McFarland heirs now be heard to complain of said mistake, and be allowed to correct the same? "Where the true locality of the line is doubtful, such acts are regarded as furnishing evidence that the line so recognized is the true line; nor are either of the parties at liberty afterwards to abandon such line, although the line should afterwards be ascertained at a different place. *Gilchrist v. McGee*, 9 Yerg. 458, 459, Green, J. See, also,

Merriwether v. Larmon, 3 Sneed, 446, 448. In the application of the principle of equitable estoppel, there is no exception in the case of married women. 2 Herm. Estop. 1232. See, also, *Howell v. Hale*, 5 Lea, 405; 2 Pom. Eq. Jur. §§ 814-818; *Crittenden v. Posey*, 1 Head, 320; *Stephenson v. Walker*, 8 Baxt. 289. And the doctrine applies to infants having such intelligence as to enable them to comprehend the import of their conduct. *Barham v. Turbeville*, 1 Swan, 438. If this authority is doubted, still the only infant affected is *Mrs. Barton*; who with her husband, after her majority, ratified her former recognition of the line so long lived up to. I do not think the case of *Wm. Galbraith v. John E. Hopkins*, is *res adjudicata*, because (1) complainants in this cause (except *Barton's* wife) were not parties to that suit; (2) the land involved here was not involved in that suit. The subject-matter was not the same. Being clear in my convictions above expressed, without discussing the question of the statute of limitations, I decide, having considered the case as arbitrator, according to the submission made in the case, that complainants' bill be dismissed, with costs. [Signed] Jerome Templeton."

We have given the entire award, so that it may be seen what were the findings of fact and of law. The award must be taken as a whole, and not in detached sentences. It will not do to cull out words here and there, and from them argue that the parties knew where the true line was. The mutuality of the mistake, and the ease with which the parties might have discovered the same, had they taken the old deeds and procured the services of a competent surveyor, does not render it any the less a mistake. The fact still remains that there was an honest ignorance of the whereabouts of the true line, and a bona fide recognition of the line indicated on the plot as O to P. If, with full knowledge of the true line, another be fixed by verbal agreement, such agreement is within the statute of frauds, and consequently void; but, where there is doubt or ignorance as to the true locality of the line, a parol agreement, fixing the line between adjoining owners, is not within the statute; and, where satisfactorily established, will be enforced by the courts, notwithstanding it may afterwards be demonstrated that the agreed line was erroneously fixed. And such adjustment may be shown, as well by circumstances and recognition, as by direct evidence of a formal agreement, when parties have acted thereon. *Houston v. Matthews*, 1 Yerg. 116; *Gilchrist v. McGee*, 9 Yerg. 458; *Merriwether v. Larmon*, 3 Sneed, 451; *Lewallen v. Overton*, 9 Humph. 76; *Rogers v. White*, 1 Sneed, 69; *Riggs v. Parker*, Meigs, 49; *Yarborough v. Abernathy*, Id. 420.

The cases on this subject are numerous in this state, and citations might be multiplied; but they clearly make the distinction, and establish the principles as stated above.

This being so, it is not difficult to apply them to the findings of fact made by the arbitrator in the case at bar. We have admissions and declarations, we have conveyances made, and partitions had, calling for the line O to P. We have long acquiescence on the part of complainants, and those under whom they claim, coupled with the expenditure of money by defendant in building improvements upon the property in dispute, largely in excess of the value of the land itself, induced not only by what had long been the understanding of the parties as to the location of the line, but by positive pointing out of the line, with knowledge that the improvements were then about to be made. And during all this time we have absolute ignorance on the part of the adjoining owner as to the true line; ignorance none the less absolute by reason of the fact that, in the opinion of the arbitrator, it might have easily been removed by a survey. There was no survey, and the honest ignorance remained, until shortly before the filing of the bill in this cause. This is not a case of silence, but of numerous affirmative acts and admissions that were calculated to and did influence the conduct of defendants, and which acts and admissions are inconsistent with the claim of title now sought to be set up. The facts as found would seem to make out a case of estoppel, unless the disability of coverture prevents the application of this doctrine, as is strenuously insisted upon by the learned counsel for complainants. Let us see how this is. The contention is that, as a married woman cannot, in reference to her lands, bind herself by title-bond, power of attorney, contract of sale, or even a deed, without privy examination, and certificate of acknowledgment in a prescribed form showing that it was done freely, voluntarily, and understandingly, it would be an anomaly in the law to hold that she might part with her title indirectly, when she had no purpose to do so, and when, instead of doing so freely, voluntarily, and understandingly, she was actually in ignorance, or laboring under a mistake of fact. And cases are cited which seem to sustain the contention. It must be admitted that the cases on this subject are to a certain extent conflicting. But much of the difficulty and confusion is due to a failure to observe the distinction between the cases which seek, by the doctrine of estoppel, to validate those contracts of a married woman which by law are declared void, and the cases where, in the absence of any contract, and independent of any contract or agreement, her conduct has been held to prevent her from asserting what would otherwise be a right. To the former class belongs the case of *Dodd v. Benthall*, 4 Heisk. 601. And the language of the judge delivering the opinion in that case, at page 607, where he says: "The complainant being both an infant and feme covert at the time of the execution of the deed in ques-

tion, no act of affirmance or disaffirmance in pais on her part during coverture could be binding upon her," etc.,—is correct when confined to a contract of a person under disability, which by law is void in consequence of such disability. To the latter class, above referred to, belongs the case of *Howell v. Hale*, 5 Lea, 405. Here the conduct of the married woman, independent of any contract, operates to estop her in the same manner and to the same extent as if she were a feme sole. So in the case at bar, while there are facts and circumstances upon which a contract might be implied that would be binding upon a person *sui juris*, yet there are also such admissions, statements, and conduct on the part of the complainants and their ancestor as are amply sufficient to create an estoppel entirely independent of, and altogether outside of, any idea or claim of a contract. Mr. Pomeroy says "that while, upon the question how far the doctrine of equitable estoppel by conduct applies to married women, there is some conflict among the decisions, the tendency of modern authority, however, is strongly towards the enforcement of the estoppel against married women, as against persons *sui juris*, with little or no limitation on account of their disability;" and that the decisions to the contrary seem to be in opposition to the general current of authority. Modern English cases, as well as American, are cited to sustain the text. Section 814, and notes. The case of *Morrison v. Wilson*, 13 Cal. 495, relied on so confidently by counsel for complainants, seems to not only deny the application of an estoppel in pais to a married woman, but goes so far as to hold that affirmative fraud on her part will not effect that result. It is sufficient to say of this case that it not only loses sight of the distinction referred to as to the defective execution of a contract, but is directly opposed to our own adjudged cases, so far as the element of fraud is concerned. The doctrine of estoppel has, by courts of this state, been applied to married women and infants. Thus in *Howell v. Hale*, 5 Lea, 405, she was held estopped by matter in pais. She had by her conduct induced Thornhill to purchase the mortgage debt on her land, leading him to believe that the land should stand liable therefor. This court held her estopped by her conduct to make defense to said mortgage, whether she might have done so or not, as against the original mortgagee. In *Cooley v. Steele*, 2 Head, 606, we have a clear case of estoppel in pais applied to a married woman. She had, in a deposition, made a statement, as to title to certain shares, contrary to what she there asserted in the case before the court. This court said: "Complainant would be clearly entitled, upon well-established principles, to the relief sought, but for the estoppel created by her oath in the before-mentioned deposition." To the same effect is *Pilcher v. Smith*, Id.

208, where it is said: "The legal disability of coverture carries with it no license or privilege to practice fraud or deception on other persons." Estoppel in pais has also been applied to infants by this court. *Barham v. Turbeville*, 1 Swan, 437; *Adams v. Fite*, 3 Baxt. 69. In the latter case the court, after finding the weight of the proof in favor of the complainant having been of age at time of the execution of the deed, continuing, said: "Both on the ground of long acquiescence, and of the concealment of the fact that he was not of age, when complainant had good reason to know that Ewing was trading with him as *sui juris*, complainant is repelled, even if he was in fact only twenty years of age when he made the deed." It is true that in the case of *Barham v. Turbeville* the infant was not merely silent, but actively proclaimed his father's title to the property he subsequently sued for; and the court puts the estoppel upon the ground of actual and purposed fraud, which was right and proper, under the facts of that case. But, so far as the opinion in this case undertakes to hold that actual and positive fraud, at the time of the act set up as constituting the estoppel, is essential to the application of the doctrine of estoppel, it is obiter and unsound, as we shall presently undertake to show.

It is also urged that actual fraud must exist before an estoppel can be maintained against one *sui juris*; and a fortiori before it can be applied to a married woman, if against the latter it can be invoked at all. It is true that there is a theory which makes the essence of equitable estoppel to consist of fraud; but this theory is not sustained by principle nor authority. There are many well-settled cases of estoppel familiar to courts of equity, which do not rest upon fraud; and instances are admitted, even by the courts, which maintain this theory, which cannot be said to involve any element of fraud, unless by a complete perversion of language and misuse of terms. The confusion to be found in some of the books on this subject is due doubtless to the fact that the fraud referred to has its origin in the effort afterwards to set up rights contrary to the conduct of the party, although at the time of the act constituting the estoppel there was the most perfect good faith. The term, as used in such cases, is, as Mr. Pomeroy expresses it, virtually synonymous with "unconscientious" or "inequitable." It is in this sense that it may be said that it is a fraud or fraudulent to attempt to repudiate the conduct which has induced the other party to act, and upon which the estoppel is predicated; but it is entirely another thing to say that the conduct itself—the acts, words, or silence of the party—constituting the estoppel must be an actual fraud, done with the intention of deceiving. It may therefore be safely said that although fraud may be, and often is, an ingredient in the conduct of the

party estopped, it is not an essential element, if the word is used in its commonly accepted sense; and the use of the term is unnecessary, and often improper, unless applied to the effort of the party estopped to repudiate his conduct, and to assert a right or claim in contravention thereof. The best-considered cases are in accord with the views above expressed. *Bank v. Bank*, 50 N. Y. 575; *Waring v. Somborn*, 82 N. Y. 604. And although the earlier Pennsylvania decisions generally leaned strongly in favor of the theory that an actual fraud is of the essence of every such estoppel by conduct, it is worthy of note that in the late case in that state of *Bidwell v. Pittsburgh*, 85 Pa. 412, it is said: "It is not necessary that the party against whom an estoppel is alleged should have intended to deceive. It is sufficient if he intended that his conduct should induce another to act upon it, and the other, relying on it, did so act." 2 Pom. Eq. Jur. §§ 804, 805, et seq. The case of *Brant v. Coal Co.*, 93 U. S. 326, pressed upon us by counsel for complainant as establishing the contention that fraud is an essential element in the application of the doctrine of estoppel, and that it is essential that the party invoking the estoppel was himself not only destitute of the knowledge of the true state of the title, but also of any convenient or available means of acquiring such knowledge, merits special mention. In addition to what we have already said as to the first proposition, we will be content to adopt Mr. Pomeroy's note upon this case, where, after quoting freely of the opinion, he says: "With great deference to the opinion of so able a judge, I think his error in this passage is evident. It consists in taking a special rule, established from motives of policy for a particular condition of fact, and raising it to the position of a universal rule. Where an estoppel by conduct is alleged to prevent a legal owner of land from asserting his legal title, courts of equity, in order to avoid the literal requirements of the statute of frauds, were driven to the element of fraud in the conduct as essential. See the text, sections 805-807. The passage quoted from Judge Story is dealing with this long-settled rule of equity, and not with the subject of equitable estoppel in general. When this special rule is made universal, its inconsistency with many familiar instances of equitable estoppel becomes apparent, and Judge Field is forced to escape from the antagonism by denying that these instances do in fact belong to the doctrine. If this conclusion be

correct, then some of the most important and well-settled species of the estoppel, uniformly regarded as such by text writers and courts, must be abandoned, and the beneficent doctrine itself must be curtailed in its operation to one particular class of cases. This result is in direct opposition to the tendency of judicial decisions, and of the discussion of text writers." See note 1 to section 806, Pom. Eq. Jur., and cases there cited. It is worthy of notice, also, that, in the opinion referred to, Judge Field quotes approvingly from the Pennsylvania case of *Hill v. Epley*, 31 Pa. 334, language which is practically, to all intents, an abandonment of the extreme position supposed to be maintained in the *Brant Case*. The language referred to is: "The primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted." The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up; so that at last the difficulty seems to be in the use of terms, rather than in the true principles controlling the doctrine under consideration. As to the second proposition for which the *Brant Case* is cited, it is sufficient to say that it does not sustain the position that the mutuality of the mistake, or the possibility of having discovered it, prevents the application of the doctrine of estoppel. It merely asserts the familiar rule that where the party setting up the estoppel knew the true condition of the title, either in fact or in contemplation of law, the doctrine will not avail him; the fact being in that case, as shown in the opinion, that "he knew he was obtaining only a life-estate by his purchase."

This opinion is already too long to allow further elaboration on the question of estoppel under the facts of this case. It will, however, not be out of place to add that I find nothing in the numerous reported cases in this state, from *Patton v. McClure*, Mart. & Y. 339, down to *Allen v. Westbrook*, 16 Lea, 251, that makes willful fraud on the part of the party sought to be estopped, in the act constituting the grounds of the estoppel, essential to the application of the doctrine. We hold, therefore, that there is, in the case at bar, on the facts as found by the arbitrator, every element of an equitable estoppel, and complainants must be repelled. The disability of coverture is not sufficient to defeat this result. Let the decree of the chancellor be affirmed, with costs.

STARRY v. KORAB.

(21 N. W. 600, 65 Iowa, 267.)

Supreme Court of Iowa. Dec. 8, 1884.

Appeal from superior court of Cedar Rapids.

This is an appeal from an order in a garnishment proceeding discharging the garnishee. Plaintiff obtained judgment against one Joseph Lustick, on which execution issued, and appellee was garnished as a supposed debtor of the defendant in execution. At the proper time he appeared, and answered that he was not indebted to said Lustick in any sum, and that he did not have any property in his possession belonging to him. Plaintiff filed a pleading controverting this answer, in which it is alleged that in a conversation had between plaintiff and garnishee before the execution was issued, garnishee stated that he was indebted to Lustick in a certain sum, and that he would not pay the same to Lustick until plaintiff had an opportunity to procure the issuance of an execution on said judgment and serve notice of garnishment on him thereunder; and that, relying on this representation, and believing it to be true, plaintiff, at great expense and trouble to himself, procured said execution to issue, and caused the garnishee to be served with notice of garnishment thereunder, and that the garnishee is now estopped by his representation and conduct from denying that he was indebted to Lustick at the time he was served with the notice. The garnishee demurred to this pleading on the ground that it did not show that he was in fact indebted to Lustick when the notice of garnishment was served, and the facts averred in the pleading did not create an estoppel. The demurrer was sustained, and, plaintiff declining to plead further, judgment was entered discharging the garnishee. Plaintiff appeals.

Blake & Hormel, for appellant. Bowman & Swisher, for appellee.

REED, J. The purpose of the pleader was undoubtedly to set up in the pleading controverting the answer of the garnishee what is denominated an equitable estoppel. The effect of such estoppel is to preclude the party from asserting a strict legal right, on the ground that his assertion of such right, under the circumstances of the case, would be against equity and good conscience. The pleading assumes that at the time the notice of garnishment was served on the garnishee he was not in fact indebted to Lustick, and that on strict legal grounds he was entitled to be discharged. But the claim is that, having induced plaintiff, by the representation that he was indebted to Lustick, to institute the garnishment proceeding and incur the expense and trouble incident thereto, it would be manifestly unjust and inequitable in him to assert his exemption from liability thereon. And the question presented by the record is whether, under the facts stated in the

pleading, the garnishee is estopped to deny that he is indebted to Lustick.

It will be observed that the representation on which plaintiff claims to have acted in instituting the garnishment proceedings consisted (1) in the statement of a matter of fact, viz., that the garnishee was at that time indebted to Lustick in a certain amount; and (2) in a promise or agreement as to his conduct in the future, viz., that he would withhold the amount and not pay it over to Lustick until plaintiff would have an opportunity to procure an execution to issue, and notice of garnishment to be served upon him. But it does not appear from the averments of the pleading that the statement as to the matter of fact was not true when it was made; that is, it is not averred that the garnishee was not indebted to Lustick at the time the representation was made. Some time elapsed between the making of the representation and the service of the garnishment notice, and for anything that appears in the pleading the garnishee may have been indebted to Lustick at the time of the representation, and have paid the amount to him before the notice was served upon him. If those are the facts, the injury and damages which would result to plaintiff in case of the garnishee's discharge would be occasioned, not by his denial of the truth of his statement that he was indebted to Lustick, but by his failure to perform the agreement to retain in his hands the amount of the indebtedness until the notice of garnishment should be served upon him. But an estoppel does not arise from the mere failure of a party to perform an executory agreement.

The doctrine of estoppel is applied to prevent the injustice which would result if one who has once asserted the existence of a fact, and thereby induced another to act in the belief of the truth of that statement so as to change his previous position, were permitted afterwards to deny its truth. Under such circumstances, and as against the one who made the statement, the law is that it shall be conclusively presumed to be true. *Pickard v. Sears*, 6 Adol. & E. 469. But it is difficult to conceive a case in which one who is sued for the mere failure to perform an executory agreement would be precluded by the law from making any defense against the claims. It may be that plaintiff has a cause of action against the garnishee on the agreement; but if so he clearly cannot enforce it in this proceeding. His remedy in that case must be sought in an original action against the party as defendant. In this proceeding, if he can recover at all, he can do so only by showing either that the garnishee was indebted to the defendant in execution when the notice of garnishment was served on him, or that such a state of facts existed as that he is estopped to deny that he was so indebted. The pleading in question, in our opinion, does not show either of these states of fact. Affirmed.

PENN et al. v. GUGGENHEIMER et al.
(76 Va. 839.)

Supreme Court of Appeals of Virginia. Oct. 16, 1882.

Appeal from circuit court, Botetourt county.

Bill by Max Guggenheimer and others against William J. Penn, as administrator of Stuart B. Penn and in his own right, Ann S. Penn, and others, to ascertain the interest of William J. Penn in the estate of S. B. Penn, deceased, and to subject the same to judgments of plaintiff against said William J. Penn. Under the will of Charles B. Penn certain lands were given to his children. He owned a third interest in certain land on James river, known as the "Home Place," the other two-thirds of which belonged to his wife by descent from her father. Under said will he expressed a wish that his wife should retain the "home place," and at her death it should be the property of her son Stuart B. Penn. The widow, in 1850, received the personal estate given to her under the will of her husband, and gave a receipt reciting that she received it "agreeably to the provisions of his said last will and testament." At the same time the "home place" was put on the land book of the county and assessed for taxes in her name as tenant for life and devisee of her husband. She never renounced the will, nor had dower assigned, but she filed an answer in 1867 to the plaintiff's bill, in which answer she denied that she had done anything to divest herself of her two-thirds in the "home place." The circuit court entered a decree that the widow had elected to accept the provision in the will of her husband, and that the remainder of the "home place" passed on the death of the said Stuart B. Penn, childless, among others, to the said William J. Penn, who was entitled to an interest of one-fourth, subject to his mother's life estate, which interest was liable to be subjected by his creditors to the satisfaction of their judgment liens. From this judgment Ann S. Penn appealed, and, pending the appeal, died. Affirmed.

Edmund Pendleton, for Mrs. Ann S. Penn. J. H. H. Figgatt and John J. Allen, for Max Guggenheimer. G. W. & L. C. Hansbrough, for George Skillen Penn and Mrs. Frances L. Mayo.

STAPLES, J. The main question in this case turns upon the construction to be given to the will of Charles B. Penn which was admitted to probate at the September term of the county court of Botetourt, in the year 1849. The testator, at the time of his death, was possessed of a valuable real and personal estate, which he devised and bequeathed to his wife, Mrs. Ann Penn, and to his four children. To his two sons George S. Penn and William Penn he gave severally a tract of land. To Mrs. Mayo, his married daughter, he gave certain real estate and a sum of

\$10,000 in bank stock. To his wife he bequeathed all his slaves, with the full confidence that she would make such disposition of them among his children as should be just and equitable, after retaining such of them as she might desire for her own use during her lifetime. His other personal estate he directed to be sold, and the balance remaining, after the payment of his debts, together with the proceeds of any real estate not specifically devised, he bequeathed to his wife, with the full confidence that she would divide it among his children as she might deem just and proper.

The third clause of the will, which gives rise to this controversy, is as follows:

"It is my will and desire that my wife shall retain the home place, and at her death it shall be the property of my son Stuart B. Penn, which I hereby give to him, his heirs, and assigns forever."

The home place, thus mentioned by the testator, is a tract of about 820 acres, one-half of which, known as the "lower half," was the property of Mrs. Penn, devised to her by her father. She was also the owner of one-third of the upper half of the tract, derived by descent from her sisters.

The testator was entitled to two undivided thirds acquired by purchase in the upper half of the tract. So that his interest at the time of his death did not exceed one-third of the entire tract.

The first question arising under the clause already quoted is whether the testator intended to dispose of the entire tract, or whether the will is to be construed as disposing merely of his undivided third.

If the former interpretation be the true one, it is conceded that it was incumbent upon Mrs. Penn, the widow, to make her election, and that she cannot claim both her own estate and the provision made for her by the will.

Before entering into a discussion of that question it will be proper briefly to advert to some of the principles of law governing in such cases.

The doctrine of election is said to rest upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who asserts an interest under an instrument is bound to give full effect, as far as he can, to that instrument. Or, as it is sometimes expressed, he who accepts a benefit under a deed or will must adopt the contents of the whole instrument, conforming to all its provisions, and relinquishing every right inconsistent with it.

In the terse language of Lord Rosslyn in *Wilson v. Lord Townsend*, 2 Ves. Jr. 697: "You cannot act. You cannot come forth to a court of justice claiming in repugnant rights. When you claim under a deed, you must claim under the whole deed together. You cannot take one clause, and advise the court to shut their eyes against the rest.

Suppose, in a will, a legacy is given to you by one clause; by another, an estate of which you are in the possession is given to another. While you hold that, you shall not claim the legacy." 1 Pom. Eq. Jur. §§ 465, 466; 1 White & T. Lead. Cas. Eq. pt. 1, pp. 541, 547, 548; *Kinnaird v. Williams*, 8 Leigh, 400; *Craig v. Walthall*, 14 Grat. 518; *Dixon v. McCue*, Id. 540. In order, however, to raise a case of election, it is well settled the intention on the part of the testator to give that which is not his own must be clear and unmistakable. It must appear from language which is unequivocal, which leaves no room for doubt as to the testator's design. The necessity for an election can never arise from an uncertain or dubious interpretation of the clause of donation. 1 Pom. Eq. Jur. § 472; 2 Story, Eq. Jur. § 10.

It is not necessary, however, that this intention should be expressly declared. The dispositions of the instrument, fairly and reasonably interpreted, may of themselves show a clear design on the part of the testator to bestow upon the devisee property which in fact belongs to another.

As in other cases, the intention may be gathered from the whole and every part of the instrument. The difficulty of ascertaining the testator's intent, it is said, is always much greater where he has a partial interest in the estate devised than where he undertakes to dispose of an estate in which he has no interest.

In the former case, the presumption is that he intended to dispose of that which he might properly dispose of, and nothing more; and this presumption will always prevail, unless the intention is clearly manifested by demonstration plain, or necessary implication on the part of the testator to dispose of the whole estate, including the interest of third parties. Generally, when the testator has an undivided interest in certain property, and he employs general words in disposing of it, as "all my lands," or "all my estate," no case of election arises from it; for it does not plainly appear that he meant to dispose of anything but what was strictly his own. 2 Story, Eq. Jur. § 1087; 1 Pom. Eq. Jur. § 489.

A case of election does arise, however, when the testator, having an undivided or partial interest in an estate, devises it specifically, thus indicating a purpose to bestow it as an entirety. This rule on this subject is thus laid down in 1 Pom. Eq. Jur. § 489. Where the testator proposes to give the whole thing itself, using language which, by reasonable intention, must necessarily describe and define the whole corpus of the thing in which his particular interest exists as a distinct and identified piece of property, then an intention to bestow the whole, and not merely the testator's individual share, must be inferred, and a case for an election arises. This rule is mentioned and commented on by Judge Christian in delivering the opinion of this court in *Gregory v. Gates*, 30 Grat. 83, to which I refer

as authority for other views here announced.

Now, let us apply these principles to the case in hand. In the first place, there can be no doubt that the tract of land or estate in question was universally known and described as the "Home Place." It is so spoken of by all the witnesses, by the parties, and it was so denominated in all the pleadings. Mrs. Penn, in her answer, describes it as the "Home Place." She speaks of the "upper half of the home place" and the "lower half of the home place." It is scarcely to be supposed that the testator would term it differently from every other person; that he referred only to his partial interest of one-third when by universal consent, usage, and habit, the entire tract was known and recognized as the home place. His language is: "That my wife shall retain the home place, and at her death it [the home place] shall be the property of my son Stuart B. Penn, which I hereby give him, his heirs and assigns, forever." What gives some significance, at least, to this language is that the mansion house, occupied by the testator and his family for many years, was located, not upon the half in which the testator had an interest of two-thirds, but upon that portion exclusively owned by Mrs. Penn. It was this portion upon which the family resided that might with some propriety be termed the "Home Place," and not the two undivided thirds of one-half, constituting merely a part of the tract.

It was said in the argument before this court that the language of the clause now under consideration is different from the other clauses of the will. For example, that the testator, when disposing of his own property, invariably uses the words, "I give and bequeath," whereas in the present instance he merely expresses the wish that his wife shall retain the home place. This difference of phraseology grows out of the fact that the testator was carefully defining and limiting an estate to be enjoyed by his wife during her life, and the language used by him was such as he supposed would accomplish the object. He then proceeds to say that it is his will and desire at her death it (the home place) "shall be the property of my son Stuart B. Penn, which I hereby give him, his heirs and assigns, forever." It is impossible by argument or illustration to add to the force and perspicuity of this language. Nothing can be plainer, more direct and comprehensive. The cases of *Padbury v. Clark*, 2 Macn. & G. 298; *Howells v. Jenkins*, 2 Johns. & H. 706; *Grosvenor v. Durston*, 25 Beav. 97; *Grissell v. Swinhoe*, L. R. 7 Eq. 291, 295,—in which it was held that the devisee was bound to elect,—are directly in point and conclusive of the question.

The other dispositions made by the testator confirm thoroughly this view of his intention. He gave to his son George S. Penn an estate worth about \$11,000, to his son William Penn an estate of the value of \$14,000, and to Mrs. Mayo property worth \$12,000 or \$15,000.

The provision made for his wife was more

than sufficient for her support and maintenance during her life in the most comfortable and abundant manner. If, however, he designed that his son Stuart B. Penn should take the one-third of the home place, subject to the incumbrance of the life estate, the provision for him was wholly inadequate, and disproportionate to the benefits conferred upon his other children. On the other hand, if the testator intended that the entire home place should be the property of his son Stuart B. Penn, the period of his enjoyment would be postponed until the death of Mrs. Penn, and the value of the devise would be about equal to the provision for the other children.

I am therefore of opinion that by the plain terms of the will Mrs. Penn was put to her election, and that she could not and cannot choose both her own estate and the bequests made in her favor.

The next inquiry is, whether Mrs. Penn did, in fact, elect to claim under the will.

An election may be implied as well as expressed. Whether there has been an election must be determined upon the circumstances of each particular case, rather than upon any general principles. 1 White & T. Lead. Cas. Eq. 539, 571, 572. It may be inferred from the conduct of the party, his acts, his omissions, and his mode of dealing with the property. Unequivocal acts of ownership, with knowledge of the right to elect, and not through a mistake with respect to the condition and value of the estate, will generally be deemed an election to take under the will. 1 Pom. Eq. Jur. §§ 514, 515. Lapse of time, although not of itself conclusive, yet, when connected with circumstances of enjoyment, may be decisive upon the question of election.

In *Adsit v. Adsit*, 2 Johns. Ch. 448, 451, Chancellor Kent said: "Taking possession of property under a will or other instrument, and exercising unequivocal acts of ownership over it for a long period of time, will amount to a binding election."

"Positive acts of acceptance or renunciation," says Mr. Justice Story, "may arise from long acquiescence, or from other circumstances of a stringent nature, and are not indispensable."

"Again," he says, "it may be necessary to consider whether he [the devisee] can restore other persons affected by his claim to the same situation as if the acts had not been performed, or the acquiescence had not existed, and whether there has been such a lapse of time as ought to preclude the court from entering upon such inquiries upon its general doctrine of not entertaining suits upon stale demands or after long delays." 2 Story, Eq. Jur. §§ 1097-1098.

Where the election is once made by the party bound to elect, either expressly or impliedly, and with full knowledge of all the facts, it binds not only himself, but also all those parties who claim under him, his representatives and heirs. 1 Pom. Eq. Jur. § 516.

Let us apply these principles to the case before us. Upon the death of the testator, in the year 1849, Mrs. Penn continued in the possession of the home place until the present time, a period of 30 years. It does not appear that she ever expressed any dissatisfaction with the provisions of the will till the filing of her answer in the cause in the year 1867. In the year 1850 the entire tract was entered upon the commissioner's books of the county and assessed with taxes in her name, as tenant for life. Whether this was done by her direction or not, it does not appear. It can scarcely be supposed she was ignorant of a fact disclosed on every tax ticket paid by her.

It has been already stated that by the will testator's slaves were given to Mrs. Penn, in full confidence that she would make such disposition of them among his children as would be just and equitable, after retaining such proportion of them as she might desire for her own use during her life.

The residue of the real and personal estate was also given to her in trust for the benefit of the children. In the year 1850,—not long after the testator's death,—the executors turned over to her the entire personal estate, including slaves, and took her receipt, stating that this was done in conformity with the provisions of the will. The executors must therefore have understood that Mrs. Penn had accepted the provision made for her benefit. Upon no other ground would they have been warranted in thus dealing with the assets. The terms of the receipt given by her show that she was perfectly apprised of the contents of the will, that she knew the condition and value of the property, and that she had united with the executors in fulfilling the intentions and wishes of the testator. Had Mrs. Penn renounced the will, as she was bound to do, in order to claim her own estate, she would have been entitled only to one-third of the slaves for life, and one-third of the personal property absolutely. As it was, she received from the executors under the will 49 slaves, of the value of \$18,370, and other property, worth between \$5,000 and \$6,000. The testimony shows that Mrs. Penn never made any formal division of the property; that she, however, distributed among her children about 12 of the slaves, retaining the residue in her own possession, for her own use and benefit, until their emancipation in 1865. It is of no sort of consequence that during his lifetime Stuart B. Penn resided at the home place, and managed and controlled all the operations of the estate. This was, of course, done by the authority of Mrs. Penn, and doubtless for the reason that it was more agreeable to her that one of her sons should relieve her of the trouble and responsibility, to which, amid the infirmities of declining years, she was unequal. She certainly exercised a dominion and ownership of the property, to which she was en-

titled only under her husband's will, and which she could never have assumed unless she intended to conform to its provisions.

After this long lapse of time, after this long-continued enjoyment and possession of the estate, and unequivocal recognition of the provisions of the will by receiving the property from the executors, it is too late for Mrs. Penn, at this day, to disclaim the testator's bounty, and assert title to her own estate.

The slaves have long since been emancipated, the personal property exhausted, and it is now impossible to place the children in the condition they would have occupied had Mrs. Penn in the outset declared her intention to hold her own property.

So far from it, it is very clear that she made her election to claim under the will, and that she did so with a deliberate and intelligent choice, and with a full knowledge of all the circumstances, and of her own rights. No possible injury can accrue to any one from the conclusion thus reached, for Mrs. Penn lived and died in the enjoyment of the estate. She never attempted any other disposition of it.

Stuart B. Penn, the devisee, is dead, without children, and the estate has passed in due course of law to Mrs. Penn's children. A contrary decision can result only in disturbing a condition of things settled and acquiesced in for many years by all parties. I think, therefore, there is no error upon this branch of the case in the decision of the circuit court.

The learned counsel for the appellant, in his petition for an appeal, and in his argument before this court, has taken the ground that the parties bringing this suit are neither heirs nor purchasers nor beneficiaries under the will of Charles Penn, but judgment creditors of William J. Penn, and, as such, intruders and volunteers, seeking to set aside a family settlement, and to vest in William J. Penn an interest which he himself does not claim, and to which he never asserted any title. It will not be denied that complainants, by virtue of their judgments, have a lien upon all the real estate of their debtor, and that under our statute they may enforce that lien in a court of equity.

This right of the complainants, and, indeed, of all judgment creditors, cannot be affected by any omission of disclaimer on the part of the debtor. According to repeated decisions of this court, when the freehold has once vested, the owner cannot divest himself of the title by any mere parol disclaimer; but he can only do so by deed or some other act sufficient to pass an estate. Even had William J. Penn executed such deed, voluntarily relinquishing his title, his creditors would not be bound by it. When the court has once settled that Stuart B. Penn is entitled to the home place under the will of his father, William J. Penn, as one of his heirs, has an absolute title to

his just share or proportion of that estate, and his creditors may not only subject it to satisfaction of their debts, but they may resort to a court of equity for the purpose of ascertaining that interest, and of removing every obstacle in the way of the just enforcement of their liens. William J. Penn can no more defeat the claims of his creditors by a disclaimer of title than he could do so by a voluntary deed, or gift or assignment.

In *Dold v. Geiger's Adm'r*, 2 Gratt. 98, it was held that choses in action, to which the wife becomes entitled during coverture, are liable to the claims of the husband's creditors, and a voluntary relinquishment of the same by the husband, and a settlement upon the wife, before being reduced into possession, will not protect such choses in action from such creditors' claims.

Judge Stanard, in answer to an objection similar to the one made here, said: "I think it may safely be laid down as a just deduction from the elementary principles of our law that the general rule is that the rights of property of a debtor, whether in possession or in action, present or reversionary, in law or in equity, and of value adequate to pay his debts, and without which he is insolvent, and the payment of his debts must be frustrated, cannot by the mere volition of the debtor, in the form of assignment, surrender, or other modes of arrest, pass to volunteers without valuable consideration, and be thereby placed in the hands of such volunteers, beyond the reach and secure from the claims of such creditors." This opinion of Judge Stanard, and, indeed, the decision itself, constitutes a complete answer to the points made by counsel, and render unnecessary any further discussion of the subject.

The next question is whether the circuit court erred in disallowing the account of William J. Penn against the estate of Stuart B. Penn, for money alleged to have been paid by the former as administrator of Stuart B. Penn. The latter died in the year 1857, considerably indebted. William B. Penn qualified as his administrator, and removed to the home place, thereafter residing with his mother, the life tenant. There is no doubt that the net income derived from the estate was appropriated by him to the payment of his brother's debts. The only question is whether this income was sufficient for that purpose, or whether any part of the indebtedness was discharged by William J. Penn out of his private means. William J. Penn, in one of his depositions, states that from 1857 to 1860 he realized from the home place an income of \$6,196.15, all of which, by the direction of his mother, was applied to the payment of his brother's debts. He further states that Stuart B. Penn had a note in bank of \$4,600, for which the witness, at the request of his mother, substituted his own note. The larger por-

tion of this latter note was paid off by him in February, 1864, and the balance in 1865, in Confederate money. This, reduced to its actual value in sound money, amounts to a very insignificant sum.

In the concluding part of William J. Penn's deposition he expresses the opinion that he has been fully reimbursed for all moneys expended by him in the payment of his brother's debts. Unfortunately for the parties setting up this claim, William J. Penn is their witness, and their only witness. They cannot ask the court to discard their own testimony, and enter a decree in their favor upon a case unsupported by proof. I have no doubt, however, that William J. Penn has given an accurate and truthful account of his transactions and dealings with the estate.

The home place was regarded as one of the most valuable estates on James river, yielding a large income annually to its owners. A very small portion of its profits was required for the support of Mrs. Penn; the balance passed into the hands of William J. Penn, and I am satisfied that he was fully reimbursed for every dollar appropriated by him for the payment of his brother's debts.

The complainants, after the fullest opportunity, have been unable to adduce any testimony to the contrary. They are clearly not entitled to a reversal of the decree in the present state of the case, and it is most apparent that nothing is to be gained by further inquiry.

Upon the whole, I think the decree of the circuit court should be affirmed.

Decree affirmed.

FITZHUGH v. HUBBARD.

(41 Ark. 64.)

Supreme Court of Arkansas. May Term, 1883.

Appeal from circuit court, Phillips county; J. N. Cypert, Judge.

M. T. Sanders and Tappan & Hornor, for appellant. Thweatt & Quarles, for appellee.

SMITH, J. William St. John Hubbard died in the year 1878. Just before his death he made his will, which was afterwards duly proved, and which is in the words following:

"I bequeath and leave unto my brother, Edward L. Hubbard, the full amount of his indebtedness to me, and the remainder of my property, both personal and real, to my sister, Mrs. Sarah L. Fitzhugh, after paying all of my debts, and my sister to administer without bond."

In point of fact Edward L. Hubbard was not then indebted to the testator. He had formerly owed the testator a debt of \$4,221.61, which was evidenced by note and secured by deed of trust upon real estate; but this debt had been transferred, eight months before the execution of the will, to Mrs. Sarah L. Fitzhugh. The deed of trust contained the usual power of foreclosure by advertisement and sale upon default in payment; and, in case of the refusal of the trustee to act, the sheriff of Phillips county was empowered to execute it.

Cage, the trustee, who was also the draftsman of the will, did refuse to sell the property, alleging as his reason that the debt had been satisfied by the provisions of the will, whereupon the services of the sheriff were called into requisition. After due notice he sold and conveyed the lands to Mrs. Fitzhugh, who brought ejectment. The defendant set up as an equitable defense that the deed of trust under which the plaintiff claimed title had been canceled, and the debt which it was intended to secure had been released to him by virtue of said will. The cause was transferred to equity. Testimony was taken on both sides, and at the hearing the court required Mrs. Fitzhugh to elect whether she would affirm the will and accept the devise to her, or renounce the same and assert a right to the debt due by Edward L. Hubbard. She elected to take under the will. The court thereupon dismissed her complaint, set aside the trustee's sale and conveyance, and canceled Edward L. Hubbard's note and deed of trust. Mrs. Fitzhugh has appealed, and the main question is whether this is a proper case for the application of the doctrine of election.

"An election in equity is a choice which a party is compelled to make between the acceptance of a benefit under an instrument and the retention of some property, already

his own, which is attempted to be disposed of in favor of a third party by virtue of the same instrument. The doctrine rests upon the principle that a person claiming under an instrument shall not interfere by title paramount to prevent another part of the same instrument from having effect according to its construction. He cannot accept and reject the same instrument. It is a doctrine which is principally exhibited in cases of wills. * * *

"The most common instance which is put of a case of an election is where a testator gives money or lands to A., and by the same will gives something of A.'s to B. Here A. must elect. He must either give effect to the will by allowing B. to have the property which the testator intended should go to him, or, if he chooses to disregard the will and retain his own property, he must make good the value of the gift to the disappointed beneficiary." Bisp. Eq. § 295; see, also, Story, Eq. Jur. § 1076 et seq.; 1 White & T. Lead. Cas. Eq. 342.

Here the testator has undertaken to dispose of a debt which belonged to Mrs. Fitzhugh. But he has given her the whole of his own estate. Her conscience is therefore affected by the implied condition annexed to the testator's bounty that, while availing herself of the will in one direction, she shall not defeat its operation in another.

The ultimate question in all such cases is this: Did the testator intend that the devisee, upon accepting the benefit conferred upon him, should acquiesce in the donation of the devisee's own property to another? Hence it becomes important to determine how far parol evidence is receivable to manifest such intention. Cage and other witnesses were sworn to prove declarations of the testator that in using the language, "indebtedness to me," he referred to the debt which had been assigned to Mrs. Fitzhugh. In *Robinson v. Bishop*, 23 Ark. 378, this court expressed its preference to construe wills from their own terms, rather than to take the deposition of the scrivener as to what the testator meant by particular clauses.

Parol evidence is admissible, in this class of causes, to the same extent as in other cases, in aid of the construction of written instruments, and no further. You may show the condition of the subject-matter and the surrounding circumstances, so as to place the court in the position of the testator; but his purpose to put the devisee to his election must appear from the will itself. 2 Redf. Wills, 745.

But as it was in proof that Edward L. Hubbard owed the testator no other debt, the will can have no reasonable construction without including Mrs. Fitzhugh's debt.

The decree below is affirmed.

WILBANKS et al. v. WILBANKS.

(18 Ill. 17.)

Supreme Court of Illinois. Nov. Term, 1856.

Error to circuit court, Jefferson county.

The defendant in error filed his bill against the plaintiffs, to enjoin the plaintiffs from prosecuting an action of ejectment against Walter S. Akin and David Rotramel, for the recovery of forty acres of land which the defendant in error claims under the will of his father, Robert A. D. Wilbanks, deceased.

The bill states that R. A. D. Wilbanks, the father, entered the forty acres in the name of his wife, Sarah U. Wilbanks; that she died leaving the plaintiffs in error her heirs at law by her said husband; that the forty acres in dispute were part of the homestead or farm upon which said Wilbanks, the father, and wife resided.

That Wilbanks, the father, married a second time and afterward died, leaving a son, the defendant in error, by his second wife, and made a will bequeathing to his said second wife, for life, the homestead, and at her death willed it to the defendant in error, and that the forty acres were included in the bequest.

That the plaintiffs in error were also provided for, one of them (T. J. Wilbanks) having a specific bequest left to him, of real and personal estate, and that the others were also as to the balance of the real estate of the testator undisposed of, made residuary legatees.

The defendant in error asks that the plaintiffs be enjoined from prosecuting their action at law, for the reason that the intestate, by devising the said tract of land to the defendant, intended to put the plaintiffs off with what he gave them under the will, and that the plaintiffs ought to elect whether they would refund the value of the land or be perpetually enjoined from prosecuting their action at law.

The plaintiffs demurred to the bill generally and specially, and contend that the facts stated in the bill do not warrant the issuance of an injunction against the plaintiffs, because the defendants to the suit at law are not parties; that from the face of the bill they are manifestly proper parties to the proceedings, and for that cause the demurrer ought to have been sustained to the bill; they also contend that the facts stated in the bill do not show a case of election in equity at all, because: 1st, they were residuary legatees; 2d, Wilbanks, the intestate, was tenant by the curtesy, and had an interest in the land in question; 3d, because the testator treated the land as his own property; and, 4th, the forty acres of land in dispute are not described in the will at all, and the court will not supply the defect by implication, from the fact that it was within the boundaries of the land bequeathed to his sec-

ond wife and the defendant upon her decease.

The demurrer was sustained. The plaintiffs stood by their demurrer; but the court ruled them notwithstanding to answer over, which they refused to do. A decree pro confesso was entered at September term, 1855, of the Jefferson circuit court, and the plaintiffs were perpetually and unconditionally enjoined from prosecuting their suit at law.

The plaintiffs assign for error, the ruling of the court below, on the demurrer, and contend that the demurrer ought to have been sustained to the bill, and that the overruling the demurrer and granting the injunction was erroneous, and that the decree of the court was rendered without any equity whatever to support it; and further, that if the injunction ought to have been awarded at all, it ought to have been awarded on condition of the plaintiff failing to elect.

R. S. Nelson, for plaintiffs in error. D. Baugh, for defendant in error.

SCATES, C. J. The testator in this case disposed of all his estate, both real and personal. The objects of his bounty were exclusively those upon whom the law would have cast the estate in case of intestacy; but whether in the same proportions under the will as at law, does not appear. Whether the provisions of the will are as beneficial as those of the law, or not, the devisees may not therefore disturb or set aside its provisions, unless under circumstances which raise a right of election.

The widow accepted the devise made to her, which barred her dower; and the heirs as such merely could not avoid the provisions of the will, which disposed of the whole estates, real and personal, so far as they belonged to the testator. The legal title to the tract in controversy was not in the testator, but the plaintiffs, his children by a former wife, as heirs to their mother, in whose name the land had been purchased of the United States.

The testator devised this tract to his second wife for life, as a part of his homestead, with remainder to defendant in fee, his son by the second wife.

The object of the bill by defendant is to enjoin the plaintiffs from proceeding in ejectment, to recover the land as heirs at law of their mother, upon the ground that they have devises and bequests made to them by the same will, of which they have accepted, and they cannot, therefore, in equity and conscience be permitted to claim under the will the benefit of the devises and bequests to them, without giving full effect to it in every respect, so far as they are concerned.

We think the circumstances clearly present a case for election (waiving any question of a resulting trust for the husband), and assuming the fact to be as is alleged, that

the provisions of the will have been accepted, the plaintiffs are estopped in equity and conscience from all claim to this tract of their own, which is given to the defendant. In the general language of the authorities, they may not, at the same time, take under the will and contrary to it. This was the doctrine of the civil law, from whence, doubtless, we derived the rule. But it seems to have been confined to cases of wills by the civil law, while the rule with us has been extended to deeds and other contracts; and it has been held to be the rule at law as well as in equity.

The intention of the author of the deed or will to dispose of property which is not his, must be manifest; it is difficult to apply the doctrine of election when the testator has some present interest in the estate disposed of, though not entirely his own; for it might be that he intended to dispose only of his own interest. Yet it is a question of intention, which is to prevail, and will be gathered from the terms of the instrument.

An absolute power in the testator to dispose of the subject, and an intention to exercise that power, seems in general sufficient to make a case of election; a devise to the heir, although inoperative, compels him to elect between the estate devised, and claims adverse to the will. The estate descending to the heir under his election to claim against the will, descends subject to the implied condition.

These principles are extracted from Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. 394b. The doctrine of election is very fully and comprehensively laid down in that case and note, and in *Gratton v. Haward*, 1 Swanst. 413, and note c. See also, *Noys v. Mordaunt*, 2 Vern. 581; 2 Story, Eq. Jur. §§ 1075-1096; 2 Williams, Ex'rs 1236, section 9 of Election (E) and notes; 1 Rep. Husb. & Wife, 566, note 1; (7 Law Lib. 334.)

It has been suggested that the testator here was tenant by the curtesy of this tract of land, and it should therefore be intended and understood that he devised that interest which belonged to him, and not the fee, which was in his children by his first wife. This view of the devise cannot help or explain away the plain and obvious meaning and intention upon the face of the instrument; and that was to pass the fee in all the lands disposed of in the will. Besides, this would make the will inoperative as to this tract; for the estate by curtesy terminated with the life of the testator, at which time the devise took effect. We cannot indulge in a construction that would defeat the intention, make the provision inoperative, or render the will void. Nor can we indirectly do the same thing by supposing that the testator believed this tract to belong to him; and intended only to dispose of so much as belonged to him. Where such appears to have been the clear intention of the testator

to dispose of so much, and no more than he might own, and the particular property was devised or bequeathed under the impression that it belonged to the testator, then, it may be, that the question of repugnancy and election might not arise; but the devisee or legatee might take the interest given, without surrendering his claim to his own property. Still the foundation of the doctrine of election is the intention of the testator. So that when he clearly intends to dispose of the property of another, real or personal, although the will or deed alone and of itself may be ineffectual, inoperative, or void as a conveyance or sale, yet it affords authentic evidence of the intention of the testator or grantor, and that intention shall be made effectual and prevail to transfer the property of one who accepts a benefit under such will or deed. 2 Story, Eq. Jur. § 1077. Indeed, in section 1076, Mr. Justice Story illustrates this doctrine of election by putting a case precisely like that before us. If the testator should devise an estate belonging to his son, or heir at law, to a third person, and should in the same will bequeath to his son, or heir at law, a legacy of one hundred thousand dollars, etc., an implied or constructive election is raised. The son or heir must relinquish his own estate or the bequest under the will.

The party is entitled to a full knowledge of the circumstances, and of the situation and value of the estates or provisions made; and an election made in actual ignorance of material facts will not preclude the party from exercising the right anew upon obtaining full information. This record does not show that the election here was without full knowledge of all material facts.

But admitting that the plaintiffs may yet make a new election, if they claim, by descent and against the will, all the lands and personalty devised and bequeathed to them in the will, they will be liable to make compensation to the disappointed devisee to the extent of the value of the devise intended for him. So that equity will lay hold of the devise or bequest renounced, and substitute compensation for the devise or bequest defeated. See 2 Story, Eq. Jur. and 1 Swanst. above.

Whether by renunciation the party forfeits all interest, as in case of estates upon express conditions, or is entitled to any surplus after full compensation, as seems to be warranted by the current of authorities, is immaterial here, it seems to us. For its loss to defendant from the midst of his homestead tract, would cost plaintiffs more in compensation out of their devises than it could be worth to them thus situated and surrounded. And they cannot now assert their title as heirs to their mother, without making compensation to defendant, out of the devises to them in the will. Decree affirmed.

ROGERS v. JONES.

(3 Ch. Div. 688.)

High Court of Justice. Aug. 3, 1876.

By a marriage settlement dated the 11th of November, 1833, certain messuages and hereditaments (including six cottages in Rhos street, Ruthin) were settled to the use of William Williams for life, with remainder to the use of his wife, Jane Williams, for life, with remainder to the use of the first and other sons of W. Williams in tail, and for default of such issue to the use of his first and other daughters in tail, and for default of such issue to the use of the heirs of the survivor of them, the said W. Williams and Jane Williams.

William Williams, by his will made in 1860, gave to his said wife, Jane Williams, all his real estate during her life, and after her decease he purported to devise "all those six cottages situate in Rhos street" (being part of the property included in the said settlement) to his nephew, Thomas Rogers, his heirs and assigns.

The testator died in 1860 without issue, and his widow, Jane Williams, became absolutely entitled under the settlement to the property therein comprised.

In 1864 Thomas Rogers, not being aware of the settlement, sold and conveyed to the plaintiff his supposed reversionary interest under the testator's will in the said cottages.

In 1875 Jane Williams died, having appointed the defendants, W. D. Jones and R. P. Davies, her executors.

After the death of Jane Williams, the plaintiff first ascertained that she had, in 1872, sold the six cottages in Rhos street to a purchaser for value without notice of the devise in the testator's will.

The plaintiff now brought his action against the executors of Jane Williams, and submitted that he was entitled to be indemnified out of her estate in respect of the loss sustained by him in consequence of the sale of the cottages by the defendant, or that such sale was an election by her to take the cottages against the will of the testator, and that, consequently, the plaintiff, as the person injured by such election, was entitled to

receive compensation for such injury out of the other benefits derived by Jane Williams under the will of the testator, for the loss occasioned to the plaintiff by such election, and to have the amount of such benefits ascertained and paid out of her estate.

C. C. Ellis & Co., for plaintiff. F. W. Adams, for defendant.

Chitty, Q. C., and Mr. Romer, for plaintiff. Cookson, Q. C., and Mr. Bradford, for defendant.

JESSEL, M. R. The testator in this case gave his real estate to his wife for her life, with remainder as to six cottages, which did not belong to him, to his nephew Thomas Rogers. At the time of the devise the testator's only interest in these cottages was a life estate under the settlement, with a contingent remainder if he survived his wife.

Under these circumstances a case of election arises. The doctrine of election is this, that if a person whose property a testator affects to give away takes other benefits under the same will, and at the same time elects to keep his own property, he must make compensation to the person affected by his election to an extent not exceeding the benefits he receives. In this case the widow, having elected to take against the will, was bound to make compensation to the plaintiff to the extent of the benefits she received under the will. Therefore, in her lifetime, she might to this extent have been thus made liable.

But it is said that the plaintiff's right to be indemnified is lost by the death of the widow. Why? I see no principle upon which her death should exonerate her estate. The liability of her estate must now be ascertained, and there must be an inquiry as to the amount of the benefits which the widow received in her lifetime under the will, and as to the compensation to which the plaintiff is entitled in respect of the loss he has sustained by not getting possession of the six cottages at the death of the widow, so far as such loss does not exceed her benefits under the will.

The pleadings to be amended by making T. Rogers complainant.

KONVALINKA v. SCHLEGEL et al.

(9 N. E. 868, 104 N. Y. 125.)

Court of Appeals of New York. Jan. 18, 1887.

Appeal from supreme court, general term, second department.

John W. Konvalinka, Henry McCloskay, and W. E. Glover, for appellant, Konvalinka, Ex'r, etc. George Bliss, for respondents, Maria Schlegel and another.

ANDREWS, J. The question is whether the widow of the testator is put to her election between dower and the provision in the will. The estate of the testator consisted of both real and personal property. The will, after directing the payment of the testator's debts and funeral expenses, and after giving to his wife the bedroom furniture in his dwelling-house, and to his children the rest of the furniture therein, proceeds as follows: "All the rest, residue, and remainder of my estate, property, and effects of every nature, kind, and description I give, devise, and bequeath to my executors and executrix hereinafter named, and I authorize and direct them to sell and dispose of the same at such time, and on such terms, as to them shall seem best, and to divide the proceeds thereof equally among my wife and children, share and share alike." There can be no controversy as to the general principles governing the question of election between dower and a provision for the widow in the will. Dower is favored. It is never excluded by a provision for a wife except by express words, or by necessary implication. Where there are no express words, there must be, upon the face of the will, a demonstration of the intention of the testator that the widow shall not take both dower and the provision. The will furnishes this demonstration only when it clearly appears, without ambiguity or doubt, that to permit the widow to claim both dower and the provision would interfere with the other dispositions, and disturb the scheme of the testator as manifested by his will. The intention of the testator to put the widow to an election cannot be inferred from the extent of the provision, or because she is devisee under the will for life or in fee, or because it may seem to the court that to permit the widow to claim both the provision and dower would be unjust as a family arrangement; or even because it may be inferred or believed, in view of all the circumstances, that, if the attention of the testator had been drawn to the subject, he would have expressly excluded dower. We repeat, the only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility arising on the face of the will between a claim of dower and a claim to the benefit given by the will. We cite a few of the cases in this state show-

ing the general principle, and the wide range of application. *Adsit v. Adsit*, 2 Johns. Ch. 452; *Sanford v. Jackson*, 10 Paige, 266; *Church v. Bull*, 2 Denio, 430; *Lewis v. Smith*, 9 N. Y. 502; *Fuller v. Yates*, 8 Paige, 325; *Havens v. Havens*, 1 Sandf. Ch. 331; *Wood v. Wood*, 5 Paige, 599.

In view of these settled rules, we think the widow in this case was not put to her election. The devise to the executors was void as a trust, but valid as a power in trust, for the sale of the lands and a division of the proceeds, and the lands descended to the heirs of the testator subject to the execution of the power. 1 Rev. St. p. 729, § 56; *Cooke v. Platt*, 98 N. Y. 35.

It is strenuously urged that, the power of sale being peremptory, it worked an equitable conversion of the land into personalty, as of the time of the testator's death, and created a trust in the executors in the proceeds for the purpose of distribution, which trust it is alleged is inconsistent with a claim of dower. The doctrine of equitable conversion, as the phrase implies, is a fiction of equity, which is frequently applied to solve questions as to the validity of trusts; to determine the legal character of the interests of beneficiaries; the devolution of property, as between real and personal representatives; and for other purposes. It seems to be supposed that there is a necessary repugnancy between the existence of a trust in real property created by a will and an outstanding dower interest of a widow in the trust property. We perceive no foundation for this contention. If the purposes of a trust, as declared, require that the entire title, free from the dower interest of the widow, should be vested in the trustees, in order to effectuate the purposes of the testator in creating it, a clear case for an election is presented. *Vernon v. Vernon*, 53 N. Y. 351. But the mere creation of a trust for the sale of real property, and its distribution, is not inconsistent with the existence of a dower interest in the same property. There is no legal difficulty in the trustee executing the power of sale, but the sale will necessarily be subject to the widow's right of dower, as it would be subject to any outstanding interest in a third person paramount to that of the trustee.

In the cases of *Savage v. Burnham*, 17 N. Y. 577, and *Tobias v. Ketchum*, 32 N. Y. 327, the widow was put to her election, not because the vesting of the title in trustees was per se inconsistent with a claim for dower, but for the reason that the will made a disposition of the income, and contained other provisions which would be in part defeated if dower was insisted upon. There is language in the latter case which, disconnected from the context, may give color to the contention of the appellant. But it is the principle upon which adjudged cases proceed which is mainly to be looked to, because a correct principle is sometimes mis-

applied. There is, however, no ground for misapprehension of the meaning of the learned judge in that case, interpreting his language with reference to facts then under consideration.

It has frequently been declared that powers of or in trust for sale are not inconsistent with the widow's right of dower. *Gibson v. Gibson*, 17 Eng. Law & Eq. 349; *Bending v. Bending*, 3 Kay & J. 257; *Adsit v. Adsit*, supra; *In re Frazer*, 92 N. Y. 239. And it was held in *Wood v. Wood*, 5 Paige, 596, that the widow was not put to her election, where the testator devised all his property to trustees, with a peremptory power of sale, and directed the payment to the widow of an annuity out of the converted fund. The same conclusion was reached, under very similar circumstances, in *Fuller v. Yates*, 8 Paige, 325; and in *Re Frazer*, supra, the widow's dower was held not to be excluded by a provision in the will, although as to a portion of the realty the power of sale given to the executors was peremptory.

The general doctrine is very clearly stated by the vice-chancellor in *Ellis v. Lewis*, 3 Hare, 310: "I take the law to be clearly settled at this day that a devise of lands *eo nomine* upon trusts for sale, or a devise of lands *eo nomine* to a devisee beneficially, does not, per se, express an intention to de-

vise the lands otherwise than subject to its legal incidents, dower included." This remark of the vice-chancellor also answers the claim that the testator, when he described as the subject of the dower, "all the rest, residue, and remainder of my estate," meant the entire title, or the estate as enjoyed by him. A similar argument was answered by Lord Thurlow in *Foster v. Cook*, 3 Brown, Ch. 347. "Because," he said, "the testator gives all his property to the trustees, I am to gather, from his having given all he has, that he has given that which he has not."

The argument that the testator intended equality of division between his wife and children is also answered by the same consideration. The proceeds of the testator's estate were by the will to be equally distributed. It left untouched the dower of the widow, which he could not sell or authorize to be sold, and which was a legal right not derived from him, and paramount to all others. It may be conjectured, perhaps reasonably inferred, that the testator really intended the provision for his wife to be exclusive of any other interest, but so it is not written in the will, and we are not permitted to yield any force to the suggestion. It is a question of legal interpretation, which has been settled.

The judgment should therefore be affirmed. All concur.

REED v. DICKERMAN.

(29 Pick. 146.)

Supreme Judicial Court of Massachusetts.
October Term, 1831.

Writ of dower. The following facts were agreed to by the parties.

Elijah Reed, the late husband of the demandant, died seised in fee of the land described in the writ. On August 8, 1816, he made his last will, containing the following provisions: "I give and bequeath to my beloved wife, Lucy Reed, and Alice Reed, my daughter, one-half of my dwelling house where I now live, the southerly part of said house, and the north buttery in said house, during my wife's natural life. Also to my beloved wife I give and bequeath one-half of my indoor movables. I also give and bequeath to my beloved wife one cow, which I order my sons, Solomon and Elijah, to keep for her, or some other in the room of it, free from any expense to her during her natural life. Also I give and bequeath to my wife and my daughter, Alice Reed, one heifer, a year old last spring, and hereby order my two sons, Solomon and Elijah, to be at one-half the expense of keeping said heifer for their mother." The will was proved in September, 1816. Soon after the death of the testator, the demandant selected a cow from the stock on the farm, and that cow, or another instead of it, has ever since been kept on the farm for her by her sons, Solomon and Elijah, and she has had the use of it ever since, until within a year past, when she sold it. A heifer was provided for her and Alice by Solomon and Elijah, and was kept by them for their mother until it died, which happened soon after the probate of the will. The demandant has always, since the death of her husband, been in the possession of the indoor movables. She has always lived in that part of the house which was devised to her, and Alice has lived with her. It appeared by the records of the probate court that in March, 1829, the judge of probate appointed a committee to set off by metes and bounds and define that part of the dwelling house of the testator unto his widow and Alice, which was devised to them for their use during their natural life, together with the cellar, privileges, and appurtenances; and in April, 1829, the committee made a return, showing their performance of the duty required of them. The real estate of the testator was appraised, soon after his death, at \$10,529, and the personal at \$647, his debts amounted to a sum between \$3,000 and \$3,600, the real estate given to Alice was worth \$900, one-half of the indoor movables was worth \$95, and the fee simple of the whole dwelling house was worth between \$1,300 and \$1,400. A demand was made upon the defendant, on July 5, 1830, to assign dower to the demandant.

On the foregoing facts, or such of them as would be admissible in evidence on a trial

before a jury, and on such inferences as may be legally made from them, the case was submitted to the court, and if, in the opinion of the court, the demandant was entitled to recover, the defendant was to be defaulted; but otherwise, the demandant was to become nonsuit.

Mr. Eddy, for demandant. W. Baylies and Mr. Miller, for tenant.

MORTON, J. The demandant is clearly entitled to recover her dower, unless she is barred by the provision made for her in the will of Elijah Reed. In that is given to her a freehold estate in a part of the dwelling house of the deceased, and also certain personal property. The will contains no declaration of the testator's intention, whether this was to be in lieu of, or in addition to, the dower of his widow.

By St. 1783, c. 24, § 8, "the widow, in all cases, may waive the provision made for her in the will of her deceased husband, and claim her dower, and have the same assigned her in the same manner as though her husband had died intestate, in which case she shall receive no benefit from such provision, unless it appears by the will plainly the testator's intention to be in addition to her dower." This is a material alteration of a rule of the common law applicable to this case. By that rule a devise or bequest to a widow is presumed to be in addition to her dower, unless it clearly appears that it was the intention of the testator that it should be in lieu of dower.

The wife has a legal interest in her husband's estate, of which she cannot be divested without her own consent. After his death she is legally entitled to dower, unless by some act of her own during his lifetime she has barred her right, or after his decease voluntarily relinquished that right. A bequest or devise is deemed a bounty, and not the payment or satisfaction of a pre-existing debt or obligation. A gratuity cannot extinguish a legal right; hence the common-law rule that a donation in a will does not operate as an extinguishment of the right of dower, but is presumed to be a gratuity in addition to the existing legal right, but a donation may be made on a condition, and that condition may as well be the relinquishment of the right of dower as the performance of any other act, and if a donation in a will be made on the express condition that dower shall not be claimed, or, if it clearly appear from the will that it was the intention of the testator that the widow should not have both the donation and the dower, then the donation shall be taken to be in lieu of dower, and the widow cannot hold both. She may have her election. She cannot claim under the will and adversely to it; but she is not thereby divested of her right of dower, but may have her election between her dower and the provision made for her in the will.

By the clause of our statute just quoted,

this presumption of law is reversed, and the provision in the will is deemed to be in lieu of dower, unless it plainly appears that the testator intended it to be in addition to it.

In this case there is no express declaration that the testamentary provision was intended to be in addition to dower, nor can any such intention be inferred from all the will taken together. The inadequacy of the provision alone will not justify such an inference.

The plaintiff must therefore take the devise and bequests in the will, unless she seasonably elected to waive them. The statute seems to presume an acceptance. There is some positive act to be done by the widow, indicating her election, before she can be entitled to dower. The demand required to be made thirty days before an action can be commenced might be considered an election, where no election had previously been made.

Within what time shall a widow be holden to waive the provision made for her in the will, or to be bound by it? In New York, the widow shall be deemed to have elected to take the testamentary provision, unless she enters upon or commences a suit for her dower within one year after her husband's death. In Virginia, she is allowed nine months, and in Vermont only sixty days, in which to make her election; and, on failure to do it, she is confined to her dower at common law. Our statute has not fixed any precise time for the election; but doubtless the widow would be holden to have accepted the testamentary provision, unless she waived it in a reasonable time, that the settlement of the estate might be closed and distribution made among the heirs. What shall be deemed a reasonable time, not being fixed by statute, cannot be accurately defined by any gen-

eral rule, and need not now be discussed. For we are all of opinion that, under the circumstances of this case, the demandant is precluded from waiving the provisions of the will and claiming dower.

Fourteen years elapsed after the probate of the will before any demand of dower was made. During the whole of this time she occupied the real estate which was devised to her. The personal property bequeathed to her was received by her, and some of it has been disposed of by her. The benefit of the other provision in the will in her favor had been enjoyed by her. A decree of the probate court has been made, assigning to her by definite bounds that part of the real estate which was devised to her; and the whole estate has passed out of the hands of the original devisees. We think, after all this, it is too late for the widow to waive the provision made for her in the will and claim her dower.

It is true that in equity the widow may sometimes be relieved from an improvident election; but this can only be done where some deception or fraud was practiced upon her, or at least where she acted under an ignorance of the facts or a misapprehension of her legal rights. But here is no evidence of any deception, or misapprehension, or even ignorance of the circumstances of the case. The plaintiff chose to regard and carry into effect the provisions and directions contained in her husband's will. No desire to avoid it on her part was known to exist till many years after the death of her husband, and not until the estate had passed from her family into the hands of strangers. We are entirely clear that she cannot now change her determination, waive the provisions of the will, and claim her dower.

STRONG v. WILLIAMS.

(12 Mass. 391.)

Supreme Judicial Court of Massachusetts.
1815.

PUTNAM, J. delivered the opinion of the court.

The general rule anciently established in chancery was, that when a testator being indebted gave to his creditor a legacy equal to, or exceeding the amount of his debt, the legacy should be considered as a satisfaction for the debt. The rule has been acknowledged in later cases, but with marks of disapprobation, and a disposition to restrain its operation in all cases where, from circumstances to be collected from the will, it might be inferred that the testator had a different intention. *Haynes v. Mico*, 1 Bro. Cha. Ca. 131. Thus where the testator left a sufficient estate, it was determined that he was to be presumed to have been kind as well as just. So if the legacy was of a less sum than the debt; or of a different nature; or upon conditions; or not equally beneficial in some one particular, although more so in another.

All the cases agree that the intention of the testator ought to prevail; and that, *prima facie* at least, whatever is given in a will is to be intended as a bounty. But by later cases the courts have not been disposed to understand the testator as meaning to pay a debt, when he declares that he makes a gift; unless the circumstances of the case should lead to a different conclusion.

Thus in the case cited for the plaintiff, *Brown v. Dawson*, 2 Vern. 498, where the wife joined in the sale of her jointure, and the husband gave her a note of 7*l.* 10*s.* *per annum* for her life; and afterwards upon another such sale he gave her a bond for 6*l.* 10*s.* *per annum* for her life; and he afterwards made his will, and gave her 14*l.* *per annum* for life: the legacy was adjudged to be a satisfaction for the note and bond. Here it will be perceived that the annuity given in the will amounted exactly to the sums secured by the bond and note: and the presumption of satisfaction proceeded upon the similitude of the legacy to the debt. 2 Fonbl. 380, *in notis*. So in the case of *Fowler v. Fowler*, 3 P. Will. 353, the general rule was applied. There the husband, being indebted to the wife for arrears due by the marriage settlement, gave her a larger legacy by the will: and it was held a satisfaction of the debt. But it is to be observed that lord chancellor Talbot expressed great dissatisfaction with the rule: and it does not appear that any circumstances could be found, to take the case out of its general application. In that case the court refused parole evidence, to prove that the testator intended both should be paid.

But cases of this nature must depend upon the circumstances: and there must be a strong presumption, to induce a belief that

the testator intended the legacy as a payment, and not as a bounty. 2 Fonbl. 382. Thus where the testatrix had given her servant a bond for 20*l.* free of taxes for her life, and afterwards made her will and gave the servant 20*l.* *per annum* payable half yearly, but said nothing about the taxes, the court held that both should be paid. *Atkinson v. Webb*, 2 Vern. 478.—Here the legacy, being not quite so beneficial as the debt, did not raise a presumption that it was intended as a payment.

So where the testator having sufficient assets, and having manifested great kindness for the legatee, gave a legacy of a greater amount than he owed, it was holden by lord chancellor Cowper, that the testator might be presumed to be kind as well as just: and he decreed the payment of the legacy as well as the debt. *Cuthbert v. Peacock*, 1 Salk. 155. It has been holden that a legacy for a less sum than the debt shall never be taken as satisfaction; 2 Salk. 508; and that *specific things* devised are never to be considered as satisfaction of a debt, unless so expressed. 2 Eq. Ca. Abr. title Devises pl. 21, cited Bac. Abr. Legacies D.

So the circumstance, that the testator had devised "that all his debts and legacies should be paid," was holden sufficient to take the case out of the general rule: as where the testator, indebted to his maid servant 100*l.*, by bond for wages, afterwards gave her 500*l.* lord chancellor King decreed that both should be paid, as the testator had made provision for the payment of his debts. 1 P. Will. 408, 409, *vide note*.

So where it appeared that the legatee had lived with the testatrix as a servant for twenty or thirty years, and she had given her a bond for 260*l.* and in one month afterwards she made her will and gave her 500*l.*: and in another clause she gave the rest of her servants 5*l.* apiece, but not to Jane Greese, the legatee; "because," said the testatrix, "I have done well for her before;" and she also made provision for her debts and legacies. Lord Hardwicke thought the circumstances above stated took the case out of the general rule, and decreed the legacy to be no satisfaction for the debt. *Richardson v. Greese*, 3 Atk. 65; *Nicholls v. Judson*, S. P., 2 Atk. 301; *Clark v. Sewell*, S. P., 3 Atk. 97.

So where the testator was indebted for goods on an open account, a legacy for a larger sum was not held a satisfaction: because he might not know whether he was indebted or not; and therefore no presumption was to arise, that he intended merely to pay a debt. *Powel's Case*, 1 P. Will. 299; 10 Mod. Case No. 201, p. 398.

In the case at bar, the consideration for the legacy appears from the will to have been for the services of the legatee. A presumption that the legacy was intended to be a satisfaction of the bond also, must rest on the fact that the bond was given for the same services: of which fact there is no evidence be-

fore us. It may have been for a different cause. We can only presume that it was for a lawful one.

It appears also from the will, that the testator intended his debts and legacies should be paid, before his residuary legatees should take any thing. The pecuniary legacy to the plaintiff also is not so much as the debt; and therefore cannot be considered as a payment

of it. Neither is there any declaration of the testator, that the specific articles given should be considered as a satisfaction of the debt. It appears also that there are sufficient assets.

From a consideration of the principles and decisions applicable to this case, we are therefore all of opinion that the plaintiff ought to recover.

Defendant defaulted.

DEICHMAN v. ARNDT.

(22 Atl. 799, 49 N. J. Eq. 106.)

Court of Chancery of New Jersey. Oct. 26, 1891.

Action by Deichman against Arndt for the construction of a will.

Charles A. Fitch, for complainant. *Wm. M. Davis*, for defendant.

BIRD, V. C. By the bill in this case the complainant asks the aid of the court in determining the true construction of the last will of Ann Arndt, deceased, and consequently the rights of the legatees and devisees under said will. At the time of her death and of the making of her will she was the owner of a lot of land with a dwelling thereon, in which she resided. Before the making of her will she gave a bond to William M. Davis, the guardian of Harry King Arndt, one of her infant children, conditioned for the payment of \$500, with interest. To secure this bond she gave a mortgage upon said house and lot. By her will she devises this house and lot to her son Harry in the following language: "I give to my son Harry King Arndt, absolutely, to be held in trust, however, by my executor hereinafter named, the dwelling-house and lot wherein I now reside, situate on Main street, in Phillipsburg, N. J., until he arrives at the age of twenty-one (21) years; my executor to rent the same, collect the rent, pay all taxes, insurance, services, and repairs, and the balance remaining to be used for the support and maintenance of my son Harry King Arndt, hereinbefore named." Two questions are presented in the bill for consideration, viz.: Is the devise to be regarded as a payment and discharge of the bond, and is the gift to Harry an absolute fee? In this case the testatrix in clear language directs that all of her debts be paid as soon as conveniently can be after her decease. She makes disposition of her personal estate, including bank-stock, giving a portion thereof to her daughter, a portion to another son, and a portion to the said Harry. The division of this personal property is not equal, but the extent of inequality is not made apparent. She first gives to her daughter certain household furniture; and, in the second place, to her son Frank certain household furniture; and, in the third place, makes the devise of the house and lot to Harry. She then provides for the protection of her cemetery lot, and gives the three children all of her silver-ware. Immediately after this she directs her executor to sell "the balance of my household effects," and to divide the proceeds thereof between her three children, directing him, however, to hold the share of Harry until he arrives at the age of 21 years. Then she directs her executors to collect the dividends of her 19 shares of bank-stock, and to pay the same towards the support and maintenance of Harry until he arrives at the age of 21 years, at which last-mentioned date he is authorized to sell the said stock and divide the proceeds between her three children. Notwithstanding this last provision, she authorizes her executor to sell all the said

shares of bank-stock at such time or times as he shall think fit, and to invest the proceeds, and pay the interest thereof for the support and maintenance of her son Harry until he arrives at the age of 21 years. She then directs that the residue of her estate, "consisting principally of bonds and mortgages and notes, money and stock, should be divided equally between my three children, share and share alike, my executor, however, retaining that portion falling to my son Harry King Arndt until he arrives at the age of twenty-one years." From this it appears that the testatrix was indebted to the guardian of her son in the sum of \$500: that she made her said son both devisee and legatee, imposing a condition upon the devise that the executor should receive the rents and profits until the son arrives at the age of 21 years, for his support and maintenance, and a like condition upon the gift of the legacy; and that, as the matter stands, both the devise and the legacy are of uncertain value. Where there is nothing to show a contrary intention upon the part of the testator, and he directs the payment of his debts, the gift of a legacy is never presumed to have been given for the purpose of discharging a debt due from the testator to the legatee. *Van Riper v. Van Riper*, 2 N. J. Eq. 1, *Heisler v. Sharp*, 44 N. J. Eq. 167, 14 Atl. Rep. 624; *Rusling v. Rusling*, 42 N. J. Eq. 594, 8 Atl. Rep. 534; *Chancey's Case*, 1 P. Wms. 403, 410, 2 White & T. Lead. Cas. 752, notes, 820; *Reynolds v. Robinson*, 82 N. Y. 103; *Boughton v. Flint*, 74 N. Y. 477; *In re Huish*, 43 Ch. Div. 260. The courts so little favor the discharge of debts by legacies that they have uniformly laid hold of slight circumstances to overcome the presumption that payment was intended independently of the direction to pay debts. Hence, when the gift has been of land or of goods and chattels, or upon conditions unfavorable to the donee when compared with the present discharge of the debt, the payment of both has been required. 2 White & T. Lead. Cas. 821. "Money and land being things of a different kind, the one, though of greater value, shall never be taken in satisfaction of the other, unless so expressed." "Whatever is given by will is *prima facie* to be intended a benevolence." *Eastwood v. Vinke*, 2 P. Wms. 613, 616. In this case the court remarked: "But, though the court has gone so far, it never yet construed a devise of land to be a satisfaction for a debt of money." In *Bryant v. Hunter*, 3 Wash. C. C. 48, Fed. Cas. No. 2,068, WASHINGTON, J., says: "The general rule is that a devise of land is not a satisfaction or part performance of an agreement to pay money." See, also, *Eaton v. Benton*, 2 Hill, 576, 580. The bond in this case being for the payment of money, and the gift being land, the construction must necessarily be controlled by the cases cited. It can make no difference that the payment of the bond was secured by mortgage on the land devised. It cannot be doubted but that the gifts of goods and chattels and proceeds of bank-stock and residue by the testatrix to her son Harry are alike subject to the same conditions that govern with

respect to the devise of land. According to all of the cases there is no similitude whatever between those gifts and the obligation which the testatrix had directed her executor to pay.

I have not thought it necessary to put any stress upon the fact that both the bond and the mortgage were given to the guardian of the devisee and legatee. It has been suggested that if this bond be paid to the guardian of Harry, Harry's proportion of the estate of the testatrix will be much larger than the portion received by his brother and sister. This would be an important consideration if it were the duty of courts to construe wills so as to make an equal disposition of the estate disposed of thereby among legatees and devisees, irrespective of the directions of the will. There is nothing in this will to give any certain assurance to the court that the testatrix intended to make an equal disposition of her estate among her children. If there be any inequality in the value of the gifts, the testatrix may have had very good reason therefor; but, whether she had or not, she had a lawful right to make any distinction she chose. This bond must be first paid out of the personal estate, as other debts, before the payment of any of the legacies.

The next question presented for consid-

eration is whether or not the interest devised to Harry be less than the fee-simple absolute. When the sentence making the devise to Harry is read, if there be any doubt as to the extent of the interest devised, such doubt will be dissipated upon careful reflection. The testatrix first declares that she gives him the premises absolutely, but afterwards gives such directions as at first view would seem to have been intended as a qualification to the extent of limiting his interest to the rents and profits until he arrives at the age of 21 years. But when this sentence and this apparent qualification are read in connection with the succeeding clauses in the will, by which gifts are made to Harry, the doubt is removed. She ordered the silver to be divided between her three children; but Harry's interest in other personal property and in the bank-stock and in the residue of the personal property is to be retained by the executor, and the interest and dividends paid to Harry, until he arrives at the age of 21 years, when he is entitled to the possession of the principal. From the control given to the executor over the interest of Harry until he arrive at the age of 21 years the testatrix in all probability intended to provide against the necessity of appointing a guardian for him. In my judgment the fee-simple absolute vested in Harry.

DEWITT v. YATES.

(10 Johns. 156.)

Supreme Court of New York. May, 1813.

This was an action of debt for a legacy. The cause was tried at the Saratoga circuit in September, 1812. Peter Yates, by his last will, dated the 15th of August, 1807, bequeathed as follows: "Item, I give to my daughter Maria's children, of her body, two hundred and fifty pounds; if any of the five children should de cease before my de cease, or after, the parts of the de ceased shall come to the then living; each of them is to have fifty pounds when they come of age, or when they or either of them should marry."

In a subsequent part of the will, the testator having devised the half of a farm, etc., to his son-in-law, Philip Vanderbergh, and his wife, and the other half to his wife, etc., directs as follows: "In consideration of which, it is my will, and I do hereby order, that the said Philip Vanderbergh, his heirs, etc., shall pay to the children of my said daughter Maria, to wit, Sarah (the wife of the plaintiff), John, Maria, Catalina, and Catharine, the sum of two hundred and fifty pounds, equal to 625 dollars, to be paid unto them and each of them, in sums of fifty pounds, as they respectively shall arrive at the age of 21 years, or on the day that they or either of them shall marry," and appointed the defendant and three others his executors.

It was proved that Philip Vanderbergh, the devisee, in October, 1807, paid to the plaintiffs the 50 pounds given to Sarah, the wife of the plaintiff, and named in the second clause of the will.

It was admitted that a year had elapsed since the death of the testator; that the plaintiffs had duly demanded payment of the legacy, mentioned in the first clause, of the defendant, previous to the commencement of the suit, and had tendered and filed a bond according to the directions of the statute; and that the defendant had assets in his hands, after payment of all debts and other legacies, sufficient to pay the legacy in question.

The defendant offered a witness to prove that, before and at the time the testator made his will, he expressed his intention to give one legacy to the children of his daughter Maria, and that was the legacy directed to be paid by Philip Vanderbergh; but the evidence was objected to, and overruled by the judge.

A verdict was taken for the plaintiffs, subject to the opinion of the court, on a case made.

Mr. Huntington, for plaintiffs. Mr. Skinner, for defendant.

KENT, C. J., delivered the opinion of the court. This is the case of a sum of money

given twice in the same instrument to the same legatee. The general rule on this subject, from a review of the numerous cases, appears evidently to be that where the sum is repeated in the same writing the legatee can take only one of the sums bequeathed. The latter sum is held to be a substitution, and they are not taken cumulatively, unless there be some evident intention that they should be so considered, and it lays with the legatee to show that intention and rebut the contrary presumption; but where the two bequests are in different instruments, as by will in the one case and by a codicil in the other, the presumption is in favor of the legatee, and the burden of contesting that presumption is cast upon the executor. The presumption either way, whether against the cumulation because the legacy is repeated in the same instrument, or whether in favor of it because the legacy is by different instruments, is liable to be controlled and repelled by internal evidence, and the circumstances of the case. *Godol. Leg. p. 3, c. 26, § 46; Swinb. pt. 7, c. 21, § 13; Duke of St. Albans v. Beauchlerk, 2 Atk. 636; Garth v. Meyrick, 1 Brown, Ch. 30; Ridges v. Morrison, Id. 389; Hooley v. Hatton, Id. 390, note; Wallop v. Hewett, 2 Ch. R. 37; Newport v. Kinaston, Id. 58; James v. Semmens, 2 H. Bl. 214; Allen v. Callen, 3 Ves. Jun. 289; Barclay v. Wainwright, Id. 462; Osborne v. Duke of Leeds, 5 Ves. 369.* This question, which appears to have arisen so often and to have been so learnedly and ably discussed in the English courts, was equally familiar to the civil law. The same rule existed there, and subject to the same control. *Dig. 30, 1, 34; Dig. 22, 3, 12; and the notes of Gothofrede, Id.; Voet, Con. ad Pand. tom. 2, 408, s. 34.* And Chancellor D'Aguesseau, in his pleadings in the Case of the Heirs of Vaugermain (*Oeuvres*, tom. 2, 21), adopts and applies the same rule to a case arising under the French law. The civil law puts the case altogether upon the point of the testator's intention; but then, if the legacy was repeated in the same instrument, it required the highest and strongest proof to accumulate it. *Evidentissimis probationibus ostendatur testatorem multiplicasse legatum voluisse.*

In the present case, what are the intrinsic circumstances to show a manifest intent of the testator to multiply the legacy? The only material variation in the two bequests is that, in the latter instance, the legacy was charged upon Philip Vanderbergh in respect of the real estate to him devised; but this affords no evidence of an intention to accumulate. The inference is the other way. It was only strengthening the security of the legacy by means of the charge. There was no specified object. There was no assigned reason or cause, as respected the legatees, for repeating the bequest. Courts have required some new or additional cause for enlarging the bounty before they have held

it accumulative, unless the words of the will clearly showed the intent. In a will, the testator gave double legacies to his daughters, but he added, in those cases, that they were "in addition" to what he had before given; and the master of the rolls, in *Barclay v. Wainwright*, said that he laid considerable stress upon this, that where the testator meant addition he expressed it. The whole will denotes throughout a careful and studied apportionment of the testator's estate among his children, according to his opinion of their wants and circumstances; and he imposed several trusts and charges, probably with a view to greater accuracy in the partition of his estate. He appoints four sons executors, but he charges his funeral expenses upon three, and his debts upon two, of them. A small variation in the direction

as to payment will not alter the construction. In *Halford v. Wood*, 4 Ves. 76, the legacy was an annuity of £30 for life, and in the one instance it was declared to be payable quarterly, and in the other instance the will was silent as to the payment, and yet it was not held accumulative. So, also, in *Greenwood v. Greenwood*, 1 Brown, Ch. 31, note, the one legacy was simply to Mary Cook, but the other was to Mary Cook "for her own use and disposing, notwithstanding her coverture"; and yet Lord Bathurst decreed that she was entitled to one legacy only.

As, then, the substituted legacy in this case has been paid by the devisee, on whom it was charged, the defendant is entitled to judgment.

Judgment for the defendant.

EDWARDS et al. v. RAINIER'S EX'RS.
(17 Ohio St. 597.)

Supreme Court of Ohio. Dec. Term, 1867.

Error to court of common pleas, Pickaway county. Reserved in the district court.

The original petition was filed by the executors of Isaac Rainier, deceased, against his devisees and legatees, on the 3d day of June, 1864, in the court of common pleas of Pickaway county, to obtain a construction of the will of said deceased.

The will is dated September 8, 1860, to which a codicil is added, dated December 4, 1861. The testator died March 25, 1863, and his will was admitted to probate April 29, 1863, and is as follows:

"(1) I will that all my just debts and funeral charges be paid.

"(2) I give and bequeath to Mary Rainier, my much-esteemed wife, in lieu of her right of dower, thirty acres of land during her natural life, and bounded as follows: * * * Out of the farm on which I now reside, situated in Madison township, Pickaway county. And I also give to my wife all the household and kitchen furniture of every description, except what is hereafter willed. And I also give to my wife five hundred dollars in cash; and I also give her my sorrel mare Fly, and my top buggy, with the harness belonging thereto. And my said wife is to have sufficient timber of any part of said quarter section, for the use and support of her said dower, together with fuel sufficient for fire. And the widow may select what books she may think proper for her own use, except those hereafter willed.

"(3) I give and bequeath to my daughter Sarah A. Edwards, wife of Stephen S. Edwards, all notes I hold against Stephen S. Edwards, of every description whatever, up to the first day of November, 1852; and I also give to my daughter, Sarah A. Edwards, fifteen hundred dollars in cash.

"(4) I give and bequeath to my son Isaac Rainier the use, occupation, and enjoyment of the northwest quarter of section eleven, in Violet township, Fairfield county, Ohio, to have and to hold during his natural life, and then to his heirs.

"(5) I give and bequeath to my daughter Hester Ann Adell the use, occupation, and enjoyment of the northeast quarter of section number fourteen, situate in Violet township, Fairfield county, and state of Ohio, to have and to hold during her natural life, and then to her heirs, subject to the dower of my wife, Mary Rainier. And the said Hester Ann Adell, wife of George Adell, is to pay to my daughter Sarah A. Edwards, wife of Stephen S. Edwards, one thousand dollars in money, in the following payments, to wit, one hundred dollars per year. The first payment to be made one year after my death, and if the said Hester Ann Adell should fail to make the above payments as required, and should it become necessary to

sell any portion of the land, it is my will it shall be taken off the west side, not to exceed thirty acres."

(6) In this item the testator gives to his son John F. Rainier the northwest quarter of section number fourteen, in Madison township, "subject to the widow's dower above written"; and he also gives him "the horse power wood saw, and all the reaping and mowing machines, and all wagons and farming utensils of every description whatever, and all the stock of every kind (except two cows, which I leave to the widow, she having choice); also Clerk's Commentaries on the Old and New Testament, six volumes, Webster's Unabridged Dictionary, and all the books belonging to me not taken by the widow; and I also give to my son John F. Rainier all mechanic tools of every kind whatever, and one bedstead, bed, and bedding."

(7) In this item he gives to his daughter Mary E. Pontius, wife of Franklin G. Pontius, the northwest half of the northeast quarter of section eleven, in Violet township, and "five hundred dollars in money, including a duebill" of \$82 against said Franklin G. Pontius.

"(8) I give and bequeath to my niece Almira Ebright one bedstead, bed, and bedding; and I also give to Almira Ebright one hundred dollars in money, provided she continues to live with the family until she arrives at the age of eighteen years, if there should be that amount remaining after paying off the other legatees as above given.

"If the widow should see proper to marry again, she then shall forfeit her interest in my real estate, and my daughter Hester Ann Adell and my son John F. Rainier shall pay, each of them, two hundred and fifty dollars in lieu thereof.

"All the above legacies to be paid in two years after my decease, or as soon after as can be collected."

The testator appointed John F. Rainier and George Adell executors of his will.

By the codicil, the testator gave the northwest quarter of section eleven, in Violet township, to John F. Rainier and George Adell in trust for Isaac Rainier for life, and then to his heirs, and revoked all right that Isaac had in the foregoing will except as expressed in the codicil.

He gives to John all the household furniture after the death of his wife, and adds the following clause: "And it is my will that each my several children shall have all the growing and matured crops that may be (on) the different tracts of land that I have willed to them as above written."

It was claimed by the executors that the sum of \$1,000, mentioned in the fifth item of the will, was intended to be a part payment of the sum of \$1,500 bequeathed in the third item to Sarah A. Edwards; while the latter claimed that said sum of \$1,000 was a legacy to her in addition to the sum of

\$1,500. The executors aver that the personality is insufficient to pay said legacy unless said sum of \$1,000 be applied for that purpose; but Mrs. Edwards answers that the personality was sufficient when the will was executed, and that if there is not now enough it is because it was expended in improvements on the real estate. This is not denied by reply.

The executors claim the corn in cribs, on the lands devised as aforesaid, at the time of the testator's decease; but the same is claimed by the respective devisees of the land on which the corn was grown and matured, and on which the cribs were severally located.

The court of common pleas decreed that the will be construed to give to Sarah A. Edwards a legacy of \$1,500 only; that the sum of \$1,000 mentioned in the fifth clause is a fund for the part payment thereof, and not an additional legacy; that the corn in the cribs passed to the executors, and not to the devisees; and that the sum of \$500 given to the widow is a debt in lieu of dower, and not a legacy.

To reverse this decree a petition in error was filed in the district court, which was there reserved for decision in this court.

The following are the assignments of error:

(1) There was error in finding that the legacy to Sarah A. Edwards was a legacy of \$1,500 only, and not a legacy or legacies of \$2,500.

(2) There was error in finding that the corn named in the petition as being in the cribs on the land of Isaac is not embraced in the provisions of the will, but belongs to the executors.

(3) There was error in finding that the sum of \$500 to the widow is a debt in lieu of dower, and not a legacy.

(4) General assignment of errors.

C. N. Olds, for plaintiffs. Henry F. Page, for defendants.

DAY, C. J. We are called upon, under this proceeding in error, to determine whether the court of common pleas correctly construed the will of Isaac Rainier, deceased. No bill of exceptions was taken in that court embodying the evidence there given, and, so far as evidence was admissible to aid in the construction of the will, it may be presumed to have been before the court. At most, however, the evidence could only inform the court of all the circumstances that surrounded the testator, to aid it in determining the meaning the testator intended should be given to the words he used in the will.

With this presumption in favor of the judgment below, we are left to construe the will by the language used therein, aided only, on the principal question, by a fact conceded by the pleadings, that the testator,

when he executed the will, had personal property sufficient to fill all the legacies upon the largest construction of the bequests.

It is claimed by the executors that the sum of \$1,000, to be paid by Mrs. Adell to Mrs. Edwards, is to be applied on the legacy to her of \$1,500, and is not to be regarded as a legacy in addition to that sum.

Mrs. Edwards claims that it was the intention of the testator to give her both sums.

Here arises the principal question presented for our consideration: Was the \$1,000 intended by the testator to be an additional benefit or legacy to Mrs. Edwards?

The books afford us but little aid in the solution of this question: for, in the language of Chief Justice Hornblower in *Jones v. Creveling's Ex'rs*, 19 N. J. Law, 127: "After a careful examination of the cases cited on the argument and of many others, I am satisfied, notwithstanding all the nice distinctions that have been taken by courts of law and courts of equity upon the subject of single or cumulative legacies, we must come down to the plain common-sense question of what was the intention of the testator."

Chief Justice Kent, after much research, arrived at substantially the same result in *De Witt v. Yates*, 10 Johns. 156. Although he recognizes the general rule that, where the sum is repeated in the same writing, the presumption is against the legatee, and that where the two bequests are in different instruments the presumption is in his favor, he adds: "The presumption either way, whether against the cumulation, because the legacy is repeated in the same instrument, or whether in favor of it, because the legacy is by different instruments, is liable to be controlled and repelled by internal evidence, and the circumstances of the case."

The general rule is stated in an English treatise to be that, where two legacies are given by the same testamentary instrument of equal amount, courts infer an intention in the testator to give but one legacy; and that, "where the legacies given by the same testamentary instrument to the same person are of different amounts, the legacy shall be considered accumulative." *Rop. Leg.* *996, *998.

If the \$1,000 was in the form of a direct bequest, these authorities might aid us in arriving at a conclusion; but the real question is whether that sum was intended to be in part payment of a legacy already expressly given in the will; if not, the question is settled, for it is clear that the testator intended Mrs. Edwards should have the money. If he did not intend that it should apply in part payment of the \$1,500, it is equally clear that he intended it should be an additional legacy.

The only question then is whether the testator intended that Mrs. Edwards should receive the sum of \$1,000, to be paid to her as directed in the fifth item of the will, in

part payment of the legacy he had given her in the third.

The intention of the testator in relation to this "is to be gathered from the phraseology of the will itself, and, to arrive at this intention, it is necessary to look into the entire instrument." *Williams v. Veach*, 17 Ohio, 180; *Beckwith v. Moore*, 14 Ohio St. 129; *Brasher v. Marsh*, 15 Ohio St. 103.

Let us then look at the will. We search in vain for any expression of a purpose that the \$1,000 should be applied in part satisfaction of the legacy bequeathed in the third item of the will. There is no language used in the instrument from which such an intention can fairly be implied. It would have been most natural, in a matter of so much importance, to have indicated that the \$1,000 was to be paid to Mrs. Edwards, to apply on the legacy before given to her, if such was the intention of the testator. If he intended to make the mode of paying this legacy of \$1,500 to differ so widely from that of paying all the other legacies in his will, it is singular that he did not add to the gift of "fifteen hundred dollars in cash" some words indicating such a purpose, or else have done so in connection with the direction that a \$1,000 should be paid to the legatee of the \$1,500. This strikes us with the more surprise, if such was his intention, since in other parts of his will, in matters of less importance, he is sufficiently explicit. Where he directs two of his legatees to pay money to his widow in the contingency of her marriage, he specifies that it shall be "in lieu" of her interest in his real estate. In the second item he gives his wife all the household and kitchen furniture, except what is "hereafter willed"; she is also to have such books as she may select, "except those hereafter willed"; and in the sixth clause he devises land subject to the widow's dower "above written." While thus explicit in minor matters, if such was his purpose he would naturally have added to the legacy of \$1,500, or to the requirement to pay the legatee of that amount the sum of \$1,000, some words indicating a purpose to have the latter sum applied on the former.

Nor was it at all singular, as contended in argument, that the testator did not embrace in the third item all he intended to give his daughter Mrs. Edwards, but left a part to be inserted in the fifth.

After providing for his wife in the second clause, it would seem that he makes a further provision for her in the fifth, in relation to the real estate; clearly, in the sixth, he gives her some property in addition to that bequeathed to her in the second. Moreover, there are obvious reasons, if he did intend to give the \$1,000 in addition to the \$1,500, why he should insert that gift in the clause we find it, and no particular reason why both gifts should be inserted in one item of the will. One was a general legacy; the other was to be paid by a particular

person, and at particular times, and is in a clause naming the person to pay it, and providing the means of securing payment. It would have been more certain, doubtless, if the testator had added, in the fifth item, for what purpose he directed the sum of \$1,000 to be paid to Mrs. Edwards, whether as payment on the legacy already given to her, or in addition thereto. He did, however, take care to express a purpose that the money should be paid by Mrs. Adell to Mrs. Edwards; and there he leaves it in her hands, without any intimation but that he intended it should be fully and unconditionally her property; certainly there is no intimation that he intended it to diminish the amount of the legacy before given to her.

Nor can the failure to express any purpose to have the \$1,000 applied on the legacy of \$1,500 be the result of haste, for the testator lived two years and a half after he made the will; neither was it the result of accident or oversight, for he carefully revised his will, more than a year after its execution, as is shown by the codicil then added thereto.

While, then, we fail to find in the will anything from which it can fairly be inferred that the testator intended the \$1,000 should be applied in reduction of the legacy of \$1,500, is it not clearly inferable from the will that he intended it should be in addition thereto?

In *Creveling's Ex'rs v. Jones*, 21 N. J. Law, 576, it is said: "Upon a question whether two legacies shall be construed to be cumulative or not, a fair and forcible argument in support of the increase may be drawn from the fact that they are for different sums; or the sums are stated in different sections of the will; or one in the will and another in a codicil; or the sums are made payable at different times, or out of different funds."

We find in this will nearly all these indices of cumulative legacies. But if we seek to find the intent of the testator, I think it may be clearly discovered if we give to the language he has used in the will its natural and ordinary meaning, and give to every part of the instrument its just operation and effect. 1 Redf. Wills, 431.

The testator concludes his will by directing "all the above legacies to be paid in two years" after his decease. This embraces the whole \$1,500, as much as any part of it. It is a direction to his executors not to pay part of any legacy, but "all." This direction applies only to the legacies to be paid by the executors, and not to the amount to be paid by one legatee to another. In such cases the testator not only specifies the amount to be paid, but the person to pay it, and in every instance it is to be paid in consideration of real estate devised. The executors have no more to do, for aught that appears in the will, with the amount to be paid by Mrs. Adell to Mrs. Edwards, than

they have with the several amounts to be paid by other devisees to the widow in case of her marriage.

The sum directed to be paid by Mrs. Adell to Mrs. Edwards is a matter that the testator has left entirely between them, and not as a legacy that the executors are called upon to settle out of the personalty; therefore they are directed to pay "all" the legacies in two years, and the sum to be paid by one daughter to the other is left upon a different security, and to be divided into payments that are to run for longer periods. Moreover, upon the other construction, the executors might not know for years, beyond the time limited for the payment of legacies, what amount to pay on the \$1,500, for they could not know how much Mrs. Adell would pay, or, if she failed to pay, how much the land charge would sell for.

If the clear and plain directions of the testator in his will be executed, there will be no difficulty; the executors will pay "all" the legacies in two years, and the annual payments due from Mrs. Adell will be paid every year for ten years; then the intent of the testator, as expressed by the language he has used, will be fulfilled.

The will cannot be construed to apply the \$1,000 to the reduction of the legacy of \$1,500, without adding to the instrument material words not written there by the testator.

We cannot think, in the absence of any intimation of the kind, that the testator intended to diminish his legacy of \$1,500 "in cash," which he positively directs to be paid in two years, by directing that part of it be paid in ten years without interest.

The plain reading of the will affords the only consistent construction that can be given to it, and points out the only practical method of its execution. If we give to all the language the testator has used bearing upon the question its natural and ordinary import, and there stop to inquire for the meaning of the testator, his intention is clear

and obvious. It is only when we begin to strain or distort what the testator has said by constructions or presumptions that doubts of his intention arise. To adopt the construction claimed by one party, "we must expunge, transpose, or interpolate material words; to sustain that of the other, we leave the will as it is." Reading the will, then, as it is written, we think the testator clearly intended to give Mrs. Edwards a legacy of \$1,500 in cash, to be paid in two years by his executors, out of the estate that would come to their hands; and, in addition thereto, to give her \$1,000, to be paid by a different person, out of a different fund, and at widely different times. In so holding we but leave the money where the testator willed to leave it, and so left it after a deliberate revision of his will.

The court of common pleas, therefore, erred in their construction of the will upon this point.

As to the amount bequeathed to the widow in lieu of dower, although error is assigned upon this ruling of the common pleas, it is not now urged. We do not feel called upon, therefore, to express an opinion on that point. Indeed, it is doubtful if the question can be made on this record. The reasons, however, for sustaining the holding of that court on this point are so strong, that we are content to affirm that part of the decree without further consideration.

As to the corn in the cribs, we think the codicil may be fairly construed to mean as held by the common pleas.

We see no reason, therefore, why the decree of that court should not be affirmed in all respects, except as to the construction of the will relating to the bequests to Mrs. Edwards; as to that, it must be reversed; and, unless cause be shown to the contrary, a final decree will be entered here in favor of the plaintiffs in error.

WHITE, WELCH, BRINKERHOFF, and SCOTT, JJ., concur.

ROQUET v. ELDRIDGE et al.

(118 Ind. 147, 20 N. E. Rep. 733.)

Supreme Court of Indiana. April 2, 1889.

Appeal from circuit court, Vigo county; Joshua Jump, Special Judge.

Action by Hugh D. Roquet, administrator c. t. a., etc., of William B. Eldridge, deceased, against William G. Eldridge and others, heirs, devisees, and legatees of said decedent, to settle the estate. From a judgment declaring certain legacies adeemed, the legatees, William G. Eldridge and others, appeal.

C. F. McNutt and Stimson & Stimson, for appellants. S. C. Davis and S. B. Davis, for appellee.

MITCHELL, J. After the issues were joined in the court below, the judgment appealed from was rendered upon an agreed statement of facts. The questions for decision arise out of the facts agreed upon, which, so far as they are material, are as follows: In November, 1863, William B. Eldridge executed his last will and testament, by the second clause of which he devised to his sons Hamilton Eldridge and Abram A. Eldridge his homestead farm, to be held by them jointly. To his daughters, Amanda and Cynthia, and to his sons William G. and Robert B., he bequeathed \$500 each, to be paid in cash, which sums were to be taken and considered as in full of each of their respective interests in the homestead farm. The will contained a recital, the effect of which was that the devises and bequests thus made were to be considered as the disposition of the homestead farm among the testator's children, and were not to affect any other interest or estate. Afterwards, and during the life-time of the testator, his sons Hamilton and Abram A. Eldridge, devisees of the homestead farm, furnished their father \$2,000 in money, out of which he paid to each of the four legatees above named the sum of \$500, and received from each a receipt of the following tenor, viz.: "Received of William B. Eldridge, \$500, in consideration of my interest in his homestead farm, corresponding with his last will." One of the daughters was a married woman at the time she received the money and executed the receipt therefor, as above. The testator died in February, 1881, having had but the six children named above. He had only about \$500 in value of personal property, which, with the farm above mentioned, valued at about \$6,400, comprised his whole estate.

On behalf of the administrator with the will annexed, it is insisted that the sums paid to the several legatees by the testator in his life-time constituted a satisfaction or ademption of the legacies provided by the will, while the legatees insist that the lega-

cies are specific or demonstrative in their character, and that since it does not appear that the money paid them was raised out of, or derived from, the land comprised in the homestead farm, the payment did not work an ademption of the sums bequeathed by the will. The legacies were, however, neither specific nor demonstrative. Speaking upon the subject of specific legacies, the lord chancellor in *Fielding v. Preston*, 1 De Gex & J. 438, said: "There have been attempts in various cases to determine the meaning of a specific legacy, and what is the test whereby such legacies may be distinguished from general bequests. There are objections to most of the definitions, but I think we are quite safe in treating that as a specific bequest which the testator directs to be enjoyed in specie." A legacy is specific when it can be satisfied only by the transfer or delivery of some particular portion of or article belonging to the estate, which the testator intended should be transferred to the legatee in specie. 2 Redf. Wills, 122; 2 Rap. & L. Law Dict. tit. "Legacy." Lord Hardwicke said, in *Ellis v. Walker*, Amb. 309: "The court leans against considering legacies as specific." Unless, therefore, it appears that the money or thing to be transferred is so clearly identified and inherently described as that the legatee can say to the executor that all or a portion of the very fund or property in question was transferred by the will, the bequest will not be regarded as specific. *Sidebotham v. Watson*, 11 Hare, 170.

While it is true the doctrine of ademption does not apply to specific devises or legacies, as a general rule, (*Swails v. Swails*, 98 Ind. 511.) yet, even in case of a specific devise or bequest, if the very thing devised or bequeathed had been transferred to the devisee or legatee in the life-time of the testator, so that there would be nothing left for the will to operate upon, an effectual ademption would have taken place.

Accepting the foregoing as the true criterion of a specific legacy, it becomes clear that the bequest of \$500 in cash to each of the sons and daughters named, and the further direction that this was to be considered in full of their respective interests in the homestead farm, and that the devises and bequests previously made were not to affect any other interest or estate, did not constitute a specific bequest of any portion of the testator's estate to be transferred in specie. Neither did the legacies belong to that intermediate class which are sometimes denominated "demonstrative," and which are peculiar, in that they are not ordinarily liable to be adeemed or abated by an advancement made in a general way. "A demonstrative legacy is a bequest of a sum of money payable out of a particular fund or thing. It is a pecuniary legacy, 'given generally, but with a demonstration of a particular fund as the source of its payment.'"

It is therefore equivalent to, or in the nature of, a devise or bequest of so much or such a part of the fund or thing specified." *Glass v. Dunn*, 17 Ohio St. 413; 5 Amer. & Eng. Enc. Law, 541; 2 Redf. Wills, 140, 141.

While it is quite true the will plainly indicates that the sums bequeathed to the sons and daughters named were to be taken in full of their respective interests in the homestead farm, which was specifically devised to the two other sons named in the will, there is no direction that the bequests are to be paid out of any particular fund, or that the fund out of which payment is to be made is to be derived from the rents, issues, or profits of the land, or that the legatees are to have any interest, as such, in the land itself. The implication is that the bequests were chargeable against the devisees of the land, or, at most, that they should be chargeable upon the farm. Moreover, since it appears by the agreed statement of facts that the sons to whom the homestead farm was devised furnished the money with which the legacies were paid, it is not apparent why this should not be held to satisfy the bequests, even though it should be conceded that they were payable out of the land. If thus payable, it must have been contemplated that the amount should constitute a charge upon the farm, to be removed by the devisees at some time, by paying the several amounts to the legatees. We know of no authority which would justify a holding that a general legacy which is payable out of a particular fund, or in a specified manner, may not be satisfied, in case the legatee receives the amount thereof from the testator in his lifetime, out of the very fund devoted to the payment of the bequest, provided it clearly appears that the amount was given and received with the intention that it should work an ademption of the legacy. If we assume

that the homestead farm was to be the source from which the fund was to be derived, out of which the legacies were payable, the conclusion follows that the devisees of the farm were to take it subject to the burden of paying the legacies after the testator's death. Having furnished the money to the testator during his life-time with which to pay off the bequests, and the money having been paid to the legatees and received by them for that purpose, the legacies are effectually satisfied from the very source contemplated by the will. An ademption results where a parent or other person standing in loco parentis, after having made a bequest, gives a portion to the child to whom the bequest is made, equal to or in excess of the amount bequeathed, the portion given and the legacy being ejusdem generis. *Weston v. Johnson*, 48 Ind. 1. Within the rule thus stated the legacies were adeemed.

Whether a legacy be specific or demonstrative, if it clearly appears that the particular thing or fund bequeathed has been irrevocably delivered over to the legatee in the lifetime of the testator, the legacy is adeemed because the testator's title to the thing or fund has been divested by the gift, and has become vested in the legatee during the lifetime of the testator. *Clayton v. Akin*, 38 Ga. 320.

The fact that one of the legatees was a married woman at the time she received the money from her father and signed the receipt is of no consequence. The receipt of the money from the source contemplated by the will satisfied the legacy by operation of law, and not by force of any contract. Money paid to a married woman in ademption of a legacy produces the same legal result as if she were unmarried.

There was no error. The judgment is affirmed, with costs.

ROGERS et al. v. FRENCH.

(19 Ga. 316.)

Supreme Court of Georgia. Jan. Term, 1856.

Error from superior court, Marion county; Worrill, Judge.

In equity.

John French and Elizabeth, his wife, filed a bill against the executors of John Rushin, deceased, for the recovery of the legacies left them under the will. The bill and answer are voluminous, as is also the evidence in the case. The following is sufficient to understand the questions made in this court:

The defendants gave in evidence the following receipt:

"July 30, 1830. Received of John Rushin Five Hundred Dollars, which is considered and to be considered by all whom it may concern as that amount advanced by him, the said John Rushin, to me as legacy, that would ever be coming to me from him in his lifetime, or from his estate after his decease.

"[Signed] John French."

John Rushin's will was dated 26th June, 1855, and by that will he gave to Mrs. French a little negro worth not exceeding \$200, and one equal share of all his property. Subsequent to the making of his will, he distributed some of his negroes to his children, among others, to Mrs. French. There was some evidence to show that the question of the ademption of this legacy of the little negro had been submitted to Judge Taylor. Defendants' solicitors requested the court to charge: "(1) That if they believed that after the making of the will, bequeathing to complainant a little negro worth \$200, over and above her equal proportion of the property to be distributed under the will of John Rushin, the testator, in his lifetime, gave complainant a negro of equal or greater value than the one mentioned in the will, this is prima facie an ademption of the legacy; and, to rebut this presumption of an ademption, the testimony must be clear and relevant, not presumptive merely, but a demonstration from the language and conduct of the testator that he considered the gift by the will as a subsisting benefit."

The court declined to charge the latter portion of this request, but charged "that, to rebut the presumption of an ademption, the jury might resort to presumptive evidence, but the presumption must be clear and satisfactory; that if they believed the testator gave complainant, after the making of the will, and at or about the same time he gave other property to each of his other children of equal value, they might infer from these facts that the legacy was not adeemed."

Defendants' counsel farther requested the court to charge: (2) That in a court of equity the presumption is against a double portion, and the receipt given by French in 1830, although it bears date prior to the will,

is, nevertheless, a charge against him, for which he is bound to account.

This the court declined to charge: (3) As to effect of a responsive answer as evidence, and that an answer is responsive where it has necessary connection with and grows out of the allegation, and is explanatory thereof.

This the court gave, and added: He supposed the latter clause referred to that portion of defendants' answer which stated that Judge Taylor had determined that the legacy of the little negro was adeemed. The court charged that this was not responsive, there being no allegation in the bill on the subject.

To these charges as given, and refusals to charge, defendants excepted, and have assigned error thereon.

Miller & Hall, for plaintiffs in error. Stubbs & Hill, for defendant in error.

LUMPKIN, J. (1) Was the court right in refusing to give the first charge as requested, without the modification and explanation which accompanied it in the charge as given?

In *Ex parte Pye*, 18 Ves. 152, Lord Eldon observes "that where a father gives a legacy to a child the legacy, coming from the father to his child, must be understood as a portion, though it is not so described in the will, and afterwards advancing a portion to that child, though there may be slight circumstances of difference between the advance and the portion, and a difference in amount, yet the father will be intended to have the same purpose in each instance; and the advance is, therefore, an ademption of the legacy. But a stranger giving a legacy is understood as giving a bounty, not paying a debt. He must, therefore, be proved to mean it as a portion or provision, either on the face of the will, or if it may be, as it seems it may, by evidence applying directly to the gift proposed by the will." (See, also, *Elkenhead's Case* cited in 2 Vern. 257; *Precedents in Chancery*, 182, and *Ambler*, 325.)

Thus, then, we have the rule clearly stated and carrying this doctrine of ademption to its utmost limits. The English courts regret, as well they may, that it has been pushed so far. We see and feel the reasonableness of the rule which requires the courts to lean against double portions, as it is called; and we can readily understand why a legacy in a will should be adeemed by a subsequent advance having the same object in view as the legacy, notwithstanding any slight difference in value or amount between the legacy and the advance. A father, for instance, directs by his will his executors to pay to a daughter \$1,000 to purchase, upon her marriage, household furniture. The child, however, marries in the lifetime of the father, and he advances to her \$1,000, or some sum approximating to that, for the same purpose specified in the will. This is, and manifestly should be, a case of ademp-

tion, and so should all others standing upon the same footing. But suppose the legacy be a little negro for a nurse, and the subsequent advance be of money to buy a carriage, is there any propriety in construing this advance to be an ademption of the legacy?

Listen to the reasoning of the chancellor in the case of *Pye*, just cited, in support of what he deduces from the books as the "unquestionable doctrine" of the courts upon the subject: "By a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion that the father is paying a debt of nature, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole or in part; and in some cases it has gone the length, consistent with the principle, but showing the fallacy of much of the reasoning, that the portion, though much less than the legacy, has been held a satisfaction, in some instances, upon this ground, that the father, owing what is called a debt of nature, is the judge of that provision by which he means to satisfy it; and though, at the time of making the will, he thought he could not discharge that debt with less than £10,000, yet, by a change of his circumstances and of his sentiments upon that moral obligation, it may be satisfied by the advance of a portion of £5,000."

Is not such reasoning from the mouth of such a judge well calculated to inspire the hope that the day is not distant when all precedents will be abolished, and every case be tried by an enlightened tribunal upon its own merits? To such a consummation the world must, from the necessity of the case, to say nothing of its policy, sooner or later come; for the world will not contain the law books that will be written, much less will lawyers and judges, with their stinted income, be able to buy them. Necessity will become the mother of justice in this case, as she is said to be generally of invention. Would that some Caliph Omar would arise to apply the torch to all the repositories of legal learning throughout the globe! Precedent! Precedent! This is the vampire that is forever draining the very life blood of justice. Give the books of reports as fuel for baths. They will contribute much more to the health, happiness, and convenience of the people than as at present employed.

But to return from this digression, and without elaborating the rule further, we remark that the presumed ademption may be destroyed or confirmed by the application of parol evidence of a different intention by the testator. 2 Atk. 48; 3 Atk. 77; 7 Ves. 708; Select Eq. Cas. 141. And this was the substance of the charge as given. The judge instructed the jury that they might, in order to rebut the presumption that the advance made by the testator to French and wife, in his lifetime, and subsequent to the making

of the will, was an ademption, look to the fact of whether or not similar advancements were made to the other children; and this the court was authorized to do by the testimony of Mrs. Wilkes, the widow of John Rushin, who states that she lived with the testator from 1834, the year before he made his will, down to 1843, when he died, and that the advancements made to all the children during that period were equal, and that the testator tried to make them so.

(2) Was the advance of \$500 made in land by the testator to John French, the husband of his daughter, in 1830, five years before he made his will, a charge against his share of the estate? The case of *Upton v. Prince*, Cases Tem. Talb. 71, is cited in support of the proposition that an advance made prior to the making of a will may adeem a legacy. The testator, William Prince, had two sons,—William and Peter, Elizabeth, Sarah, Mary, and Anne. In his lifetime, and soon after the sons became of age, they desired their father to advance to each of them a sum of money toward setting them up in the world, and agreed that whatever he should advance should be part of what he should give them by will, whereupon the father, on the 11th of June, 1734, advanced £1500 to William Prince, who gave the following instrument for the same: "Received of my father the sum of £1500, which I do hereby acknowledge to be on account and in part of what he hath given or shall, in and by his last will, give unto me his son." And on the 31st March, 1727, the father advanced £1500 to Peter Prince, who gave a similar instrument to that of his brother. On the 17th of August, 1730, William Prince, the father, executed his will, which contains the following recital: "And whereas, I have heretofore paid to, given, or advanced with my children, William, Elizabeth and Sarah, the sum of £1500 apiece, now, I do hereby, in like manner, give and bequeath unto my three other children, Peter, Mary and Anne, the several sums of £1500 apiece." He then willed that the residue of his estate should be divided in six equal parts, and gives the one-sixth to each of his children. He deposited the two receipts given by William and Peter in a drawer with his will, and intimated that the said drawer should not be opened after his death by either of his said sons unless his other children, or one of his sons-in-law, were present.

The question was whether Peter should have a new sum of £1500 upon the words of the will, or whether he should not be in the same case with William; they both being equally advanced by the father, and this seeming only a mistake in the testator. The lord chancellor decreed the £1500 received by Peter in his father's lifetime to be a satisfaction for what the father gave him by his will, and that he should not have another £1500 upon the words of the will.

While we controvert the general doctrine

that a previous advance made to a child shall adeem an express gift by a subsequent will, wherein and whereby the testator undertakes to dispose of the property which he then has, still we are not prepared to deny the justice of this case. Here it was a question of intention, as it should be in every case, and all the facts go to show that Peter's name was, by mistake, inserted with those of the unportioned part of the children. The whole will establishes that it was the intention of the testator that the two sums of £1500 paid to William and Peter should be deducted out of the legacies given to them; else why deposit their receipts in a drawer with his will with directions that the drawer should not be opened after his death by either of his said sons unless his other children, or one of his sons-in-law, were present?

Before dismissing this case, I would remark that the able counsel, Mr. Hall, who adduces it, concedes that it is the only direct authority he can find upon the point; and, if he has found none others, we may safely assume that none other exists. I will add that *Upton v. Prince* is only recognized by Mr. Williams on Executors, and other law writers in this way. They say, in referring to it, that if an advance previously made will adeem a legacy a fortiori will an advance made subsequent to the execution of the will. In our judgment it is always a question of intention, in all cases, whether the advance be before or after the execution of the will, and that no arbitrary rule should control the matter.

How, then, stands the present case? The testimony shows that in 1830, the date of the receipt given for \$500 given by French to his father-in-law, old man Rushin advanced \$500 to each of his children. This fact is not disputed, but it is insisted that French got \$500 extra of the rest; else it is asked, why should a receipt be required of him when the rest gave none? Perhaps they have been lost or destroyed. The defendants, and not French, have had the custody of the testator's papers. Perhaps French lived at a distance and forwarded this receipt, not knowing but such an acknowledgment would be exacted of all. Be this as it may, there is one fact which, to our minds, is conclusive, that this \$500 was not intended by the testator to be a charge on the legacy of French and wife. In his

will he mentions, in every other case, what sums are to be charged against his other children, or a portion of them; and there is not a word as to this extra advance, as it is pretended, to French. It was made five years only before the will was executed, and his attention was called to the subject by referring to the respective advances made to some of the other children. It is not likely that this would have been overlooked or forgotten. He is silent as to the \$500 advance made to each of the children in 1830, and from this we infer that the testator himself considered that all, at that time, were advanced *pari passu*.

But it is suggested that the defendants have sworn to the fact, and that their answer is not overcome by counteracting testimony. They only testify as to their information and belief, and the rule does not apply to such answers.

(3) Was the court wrong in making the addition which it did to the third charge, as requested? It is not complained that the charge, as asked, was not given. The error assigned is that the judge selected that portion of the defendant's answer which set forth the award made by Judge Taylor, and stated that the same was not responsive to the bill, whereas, it is urged that the same was responsive, and that admitting it was not. Still, it was wrong to single out this particular portion of the answer and omit any reference to the rest.

In the first place, we concur with the circuit court in holding that the reference to the award made by Judge Taylor was not responsive to any allegation, but matter purely in evidence; and, secondly, that the omission of the court to refer to the rest of the answer was favorable to the defendants. It left the jury to infer that the balance of the answer was responsive.

It is finally contended that the advancements made to the different legatees, and to French and wife amongst the rest, should be brought into hotchpot; but no such necessity exists, provided the advancements were equal, for in that event each is entitled to an equal share under the will of what remains. We see no error in this record, to make it proper to send back a case, like this, which has been pending so long, and occupied so much time of the country. There should be an end of litigation unless manifest injustice has been done.

CLARK v. JETTON.

(5 Sneed, 229.)

Supreme Court of Tennessee. December Term, 1857.

This bill was filed in the chancery court at Murfreesboro, for the purposes fully stated in the opinion. At the October Term, 1857, Chancellor Ridley gave a decree for the complainants, from which the defendants appealed.

W. L. Martin, for complainants. Rucker and E. A. Keeble, for defendants.

CARUTHERS, J. On the 29th April, 1851, John L. Jetton made his will, disposing of all his property to his wife, children, and grandchildren. He gave to his wife one-third of his land for life, and one-tenth of "all his slaves and other personal property," after the payment of debts and expenses. Item 3. "After the payment of debts and expenses aforesaid, and the taking out one-tenth for my widow, the residue of said slaves, and other personal property, monies, etc.," "I direct to be divided into nine equal parts, one part of which I give to my son Lewis, one part to the children of Mary Graham, one part to Jane Barr, one part to Charlotte Bryant;" and so on to each of his daughters, nine in number. He limits the estates of his daughters to their natural lives, to their separate use, and then to their children, in remainder. He died in 1854. His will was proven and recorded without contest. After the execution of this will, the testator made several deeds of gift to a part of his children and his widow, the defendant. On the 19th August, 1853, he made a deed of gift to his wife for life, and then to all her children one negro woman and child; and, on the same day, he gave by deed to a trustee, for the benefit and separate use of his daughter Francis L. Burke, a negro man; and at the same time, and in the same way, a negro man was given to his daughter Jane Barr. On the 25th August, 1853, he gave a negro boy to his son Lewis; and, on the 29th, he gave to a trustee, for the use and benefit of his daughter Martha A. Sawyer, a lot in Pulaski and a negro man, with the same limitations and restrictions.

These deeds of gift were all regularly proven and recorded. This bill was filed September, 1856, by the children and legatees, not thus advanced, for the purpose of setting aside all said deeds of gift, upon the ground of the mental incapacity of the donor, and undue influence on the part of his wife; and, if this cannot be done, they pray that the several gifts may be held to satisfy the legacies of defendants by way of ademption. Upon the first question we have no difficulty. The old man was very intemperate and aged, but had sufficient capacity to make a binding contract at the

time these deeds were made. Such is the opinion of the witnesses to the deeds, although one of them, who was draftsman, was led to doubt upon that subject by some interviews a month or more afterwards, yet at the time of the transaction he has no doubt. The proof falls short entirely of showing that degree of mental unsoundness or imbecility that would invalidate the gifts; but it is insisted that, if he were not of unsound mind, yet his intellect was so enfeebled by long-continued inebriety that he was easily influenced by his wife, and that she, against his will, caused him to make these donations, by the exercise of an absolute dominion over his will. As an evidence of this, it is said that she procured, by her dictation and power over him, a remainder interest to be vested in an illegitimate child of hers, born before his marriage with her, jointly with her children by him, in the two slaves given to her for life. He had taken this child with her, and raised it in his house with his other children; and it is not unnatural that he should freely yield to her wishes in giving to it a small pittance of his estate. Whether this child will get anything under the deed is a question not now to be decided, and does not affect the argument. There is evidence that for several of the last years of his life, embracing the time of these gifts, she managed most of his business, and that he deferred to her in many things; but this was rendered necessary by his intemperate habits, and was a prudent delegation of authority, rather than an evidence of either a want of sense or submission to undue influence. He sometimes said he was in torment, etc., when he was drunk. It was very natural he should feel that way when under the dominion of liquor; and that she should "torment" him about his self-destructing habits was to be expected, in view of the destruction of health and happiness, which was the inevitable consequence of his ruinous course; but it by no means follows, as a necessary consequence, that the fact that she vexed or tormented him would augment her influence. His remarks about not being able to do as he pleased, or at liberty to invite his friends to dinner, etc., are all attributable to the same cause, and have very little weight in establishing this point, for which they are adduced in evidence. In all this, we find nothing to authorize the conclusion, or at least not sufficient for that purpose, that he was unduly influenced by her to make the deeds of gift in question, or that there was any fraud practiced upon him by his wife, or anybody else. He deliberately made the arrangement with his attorney to write them, and gave every evidence of a free and settled purpose in doing what he did. The deeds of gift were, therefore, valid and binding, and vested good titles in the donees.

2. The second ground assumed by the com-

plainants is that the gifts, if good, operated as an ademption of the legacies in the will to the extent, at least, of the value of the property, and that, in the division of the property under the will, the respective donees must be made to account for it. This is a more difficult question, and must be decided by reference to the authorities. The general rule on this subject is that where a parent, or one standing in loco parentis, gives a legacy to a child, and afterwards advances a portion to that child, it will be an ademption or satisfaction of the legacy to the extent of the value of the portion, unless a contrary intent appears. 2 Williams, Ex'rs, 1143, and subsequent pages; 2 Story, Eq. Jur. § 1111. But the rule has several qualifications and exceptions. It is founded on the presumption that a bequest by the father is intended as a portion to the child, and so of the after gift; and the presumption will be that a double portion was not intended, where nothing else appears, and therefore it will be taken that the gift was intended as a satisfaction of the legacy when it is of equal or greater value, and, if less, pro tanto. *Rop. Leg.* 370, 374; 2 Williams, Ex'rs, 1143. The word "ademption," is synonymous with "satisfaction" when applied to specific legacies. In that case, the disposition of the thing given before the death of the testator is a complete extinction of the legacy, and the intention of the testator in such cases is immaterial, because there is nothing at the time the will takes effect for it to operate upon. *Rop. Leg.* 329. But in respect to general legacies, the question is one of intention, and this intention will be presumed, as we have said, in all cases of legacies and subsequent gifts by a parent, or one standing in, or occupying the place of, parent, unless that presumption is rebutted. Such is the general rule. But this presumption of ademption will not prevail, (1) where the testamentary portion and subsequent advancement are not of the same nature; (2) where the latter depends on a contingency, and the former is certain; (3) when either is in lieu of, or a compensation for, an interest to which the child is entitled; or (4) where the bequest is of a residue or part of a residue. Williams, Ex'rs, 1144, 1145. *Rop. Leg.* 377, states that another exception to the general rule is where the bequest is of an "uncertain amount." "It has, therefore, been determined more than once," he says, "that a devise of a residue, or of part of a residue, to a child, is not adeemed by a subsequent gift upon the legatee's marriage." Though, Sir W. Grant intimated a doubt as

to the correctness of this opinion, in 15 Ves. 513, as the author states, yet it is considered well settled as the law, when not controlled by special circumstances. In *Farnham v. Phillips*, 2 Atk. 216, Lord Hardwicke said, "There was no case where the devise had been of a residue that was uncertain, and that at the testator's death might be more or less, in which the gift of a subsequent portion had been held an ademption." Where a testator directed a debt of 100 pounds to be paid out of an estate, and the residue divided between his wife and children, and afterwards gave one of his daughters a thousand pounds, it was held that this did not operate as an ademption of her testamentary share of the residue. This was the case of *Farnham v. Phillips*, above cited. The application of this doctrine to the case before us produces a result that we would rather avoid, if we could do so upon any principle settled by authority. It must result in giving the defendants the benefit of the will, as well as the deeds of gift. The provision for them under the will is that they are each to have one-ninth of the residue of his slaves and other personal property and money, after the payment of debts, expenses, and the one-tenth to the widow. The testamentary portions or legacies must be fluctuating and uncertain, or, in the language of the books, they may "be more or less, something, or nothing" at the death of the testator and settlement of the estate. In answer to the seeming injustice of this doctrine, it may be said that it is the right of every man to give as a bounty to his children, or others, in such proportions as he chooses, to some more and others less. Where he intends or desires equality, or to make gifts in his lifetime operate in the ademption or satisfaction of general legacies, it is easy to express such purpose. Where he fails to do so, the rules of law must prevail without regard to the consequences. This doctrine of ademption does not apply to real estate, nor to legacies and gifts to others than children, or those who stand in that relation, in cases of general legacies. This distinction rests upon artificial reasons, the justice and propriety of which are not very clear, nor the reasons on which it is founded approved; but that branch of the doctrine, having no application to the case before us, need not be discussed, but left for a case to which it applies. The decree will be reversed, and the bill dismissed as to this branch of the case, but remanded for further proceedings as to other matters connected with the settlement of the estate.

KEEP et al. v. MILLER et al.

(6 Atl. 495, 42 N. J. Eq. 100.)

Court of Chancery of New Jersey. Nov. 6, 1886.

Bill for relief. On final hearing upon pleadings and proofs. Facts are given in the opinion.

Alfred Mills, for complainants. S. D. Haines and S. B. Ransom, for defendant Faulks.

RUNYON, Ch. The bill states that John B. Miller, deceased, late of Madison, in the county of Morris, made and entered into a valid contract in writing with Jehiel K. Hoyt upon the twenty-fifth of April, 1872, for the sale and conveyance by him to the latter, or to such company of individuals as might be named by him, (Hoyt,) certain land therein mentioned for the price of \$800 an acre; and that on or about the tenth of June following he made another like agreement in writing with Hoyt for the conveyance to him, his heirs and assigns, or to such person or persons as he might designate, of the same property, on or before the first day of September then next, for the price of \$39,392, to be paid, and which Hoyt thereby stipulated to pay, as follows: \$100 upon the execution of the agreement, and \$4,900 on the delivery of the deed,—the balance, \$34,392, to be secured by the bond of the grantee or grantees, and his or their mortgage of the property; that the time for the delivery of the deed was, by another agreement in writing, made on the twentieth of August, 1872, between Miller and Hoyt, extended to the first day of October then next; that Miller died September 5, 1872, intestate, leaving a widow and a son, the defendant David L. Miller, who was his only heir at law; that letters of administration of his estate were granted to Theodore Little, October 1, 1872; that after the death of John B. Miller, and on or about the twenty-eighth of September, 1872, Hoyt notified David L. Miller that he would be ready to take the deed, and carry out the agreement on his part on the first of October then next, and requested Miller, as heir at law, to deliver at that date a deed for the property, in conformity with the contract, to Henry E. Reddish and Henry O. Ohlen, whom he designated as grantees; that David L. Miller did not and never would convey the property, except upon condition that he should receive the purchase money for his own use; that the complainants are informed that Reddish and Ohlen, on or about the first of October, 1872, demanded of David L. Miller that he convey the property to them by warranty deed, free from any dower of his wife, and from the dower of the widow of his father, and from the lien of certain judgments which were of record against him, David L. Miller, and tendered the money and

bond and mortgage, but he would not comply with the request; that neither David L. Miller, nor Hoyt, Reddish, or Ohlen, ever requested the widow to release her dower to Reddish and Ohlen; that she never refused to release it to them, but was at all times ready to release it upon condition that the purchase money should be paid, and secured to be paid, to the administrator of John B. Miller, and that David L. Miller was aware of her readiness to release upon that condition; that on or about the thirteenth of December, 1872, the widow wrote a letter to her late husband's administrator in which she said that she had expected to join with her husband in the conveyance to the purchaser, but he died before any conveyance was made; that she was still ready to do all that she could to perform the agreement, and was ready to release her dower on condition that the purchase money should be paid, or secured to be paid, to the administrator, and she offered to release her dower upon those terms in case the administrator should take judicial proceedings to compel specific performance of the agreement; that he did bring suit to that end in this court in December, 1872; that in January following the widow died, and the complainants in this suit were appointed administrators of her estate; that in the suit brought by the administrator of John B. Miller specific performance was decreed, but the decree was, upon appeal, reversed, so far as Hoyt and Reddish and Ohlen, and the performance of the agreement by them, were concerned.

By the decree of the court of errors and appeals the bill was dismissed as to those defendants, but was retained as to the others, in order that the legal representatives of the widow might have an opportunity of raising, by cross-bill, the question whether they have any remedy against David L. Miller. This suit is brought accordingly by the administrators of Mrs. Miller against David L. Miller and his wife, and his assignee in bankruptcy, (he filed his petition in bankruptcy after the decree for specific performance was entered,) the administrator of John B. Miller, (he refused to bring the suit, or to join in it, or to permit the complainants to bring it in his name,) and the administrators of a judgment creditor of David L. Miller. The prayer of the bill is that the land may be decreed to be personal property, and may be sold under the order of this court; that the proceeds of the sale may go into the hands of the administrator of John B. Miller as personal property, to be administered and distributed by him accordingly; that it may be decreed that the complainants, as the legal representatives of the widow, shall have her share thereof according to law; and that, if necessary, it may be decreed that David L. Miller's wife has no dower in the property, and that the judgment above mentioned is no lien upon the premises. None of the defendants have answered except the assignee in bankruptcy.

By the decree in the above-mentioned suit, brought by John B. Miller's administrator, (*Miller's Adm'r v. Miller*, 25 N. J. Eq. 355; S. C. on appeal, *Reddish v. Miller's Adm'r*, 27 N. J. Eq. 514,) in addition to decreeing specific performance, it was decreed that David L. Miller, at and ever since the death of his father, had been, and at the date of the decree was, seized of the property as a trustee to and for the use of Reddish and Ohlen, and not otherwise, and that David L. Miller's wife was not, and had not been, entitled to any dower or right of dower in or to the land, and that the judgment creditors of David L. Miller were not entitled to any lien to or claim upon or against the property by virtue of their judgments, and also that the moneys decreed to be paid, and the bond and mortgage decreed to be given, on account of purchase money, were and should be personal assets in the hands of the administrator of John B. Miller, and should be by him administered as personal property in due and legal course of administration, and that he should pay to the administrators of the widow her distributive share thereof. That decree (it was made over 10 years ago) was not appealed from by David L. Miller.

The only question presented for decision is whether, under the circumstances of the case, the contract of sale worked an equitable conversion of the land into money at the death of John B. Miller. That it would have done so had the contract been enforced against the vendee is indisputable, and is not denied. But the answering defendant insists that the failure to compel specific performance prevents such result. That failure, however, was due, not to the invalidity of the contract, but to the fact that, because of the length of time which had elapsed between the time fixed by the contract (as extended) for the completion of the purchase and the making of the decree for specific performance, it was inequitable to require the vendee to complete the purchase, seeing that he had tendered himself ready to comply with the requirements of the contract on his part at the time fixed, and that in the meantime the property had fallen in value. It may be remarked that the noncompliance upon the part of the heir was not due to the widow. She did not refuse to release. She was never asked to release. On the thirteenth of December, 1872, she stated to her late husband's administrator, by letter, that she was willing to release in case he should take judicial proceedings to compel specific performance of the contract. It is proved that on the very day on which, under the contract as extended, the deed was to be delivered, her attorney stated to the attorney of Reddish and Ohlen that she was willing to release upon such a payment as would secure her rights, by which was meant payment to her husband's administrator, and not to David L. Miller.

A valid and binding contract of sale such as a court of equity will specifically enforce

against an unwilling purchaser operates as a conversion. The cases in which the court has refused to decree that a contract for sale works equitable conversion are those in which the contract was such as equity would not enforce.

The counsel for the answering defendant insists that the decision in the case of *Teneick v. Flagg*, 29 N. J. Law, 25, is decisive of the question under consideration, and is adverse to the claim of the complainants. But it is to be observed that that was an action at law. Mrs. Attie Teneick had agreed to convey land to James Buckalew, and had received part of the purchase money. He refused to accept the deed because of the pendency of an action of ejectment brought against Mrs. Teneick by other parties to obtain possession of the land. She delivered a deed for the property to her agent, to be delivered by him to Buckalew upon the favorable termination of the action of ejectment. She died before the termination was reached. By her death the action of ejectment abated, and it was not renewed. After her death her heirs conveyed the property to Buckalew in pursuance of her agreement, and the purchase money was paid to her administrators. The husband of one of the heirs brought suit against the administrators to recover a share of the money. The court held that he was entitled to recover, on the ground that on the death of Mrs. Teneick the title descended to her heirs; the deed held in escrow passing no title, since the event on which it was to be delivered to Buckalew did not happen in the life-time of the grantor, and at her death the deed ceased to have any validity. In the decision of the case the difference between the equitable rule and the legal rule was distinctly recognized by Justice Haines in his opinion. The cause was, of course, decided in the court of law upon the legal rule.

Upon a full and careful consideration of the matter I reached the conclusion in the suit for specific performance that the contract worked a conversion. See *Miller's Adm'r v. Miller*, *supra*. The only new feature now presented is the fact that the appellate court has decided that specific performance ought not to have been decreed. The reason for that conclusion has already been stated. It was not the invalidity of the contract, nor any consideration which rendered the contract unenforceable in equity at the death of John B. Miller, or at the time fixed by the contract for completing the purchase. The contract was one which, at the time fixed by it for completing the purchase, could have been enforced against the purchaser in equity, and it would have been enforced at that time on the application of the heir, with the consent of the widow, and she was willing to join him in enforcing it if he had been willing to secure to her her right in the purchase money. In equity he ought

to have enforced it. Equity regards that as done which ought to have been done. The doctrine of conversion is a reasonable one. In this case, John B. Miller had made a sale of the property, which, had he lived, he would have been able to enforce in equity, and which it is to be presumed he would have enforced. He had sold the property at a high price. It should not be, and it is not, in the power of the heir to defeat the right of the next of kin by his own unwillingness to carry out the contract. By force of the contract the vendor became in equity trustee of the property for the vendee, and the latter became trustee of the purchase money for the former. It has been held that the equitable rights of the next of kin of the vendor are not defeated, where the vendee,

by his laches, after the death of the vendor, loses his right to specific performance, provided the contract was enforceable in equity at the death of the vendor. *Curre v. Bowyer*, reported in a note to *Farrar v. Earl of Winterton*, 5 Beav. 1. Where there is a contract for the sale of an estate, the estate is in equity considered as converted into personality from the time of the contract, although the purchaser has an election to purchase or not as he shall see fit. *Lawes v. Bennet*, 1 N. J. Law, 167; *Sugd. Vend.* (8th Am. Ed.) 187, and cases cited.

The sale in this case worked an equitable conversion of the land into money, and the widow was entitled, accordingly, to a distributive share of the purchase money as part of the personal property of her husband.

WHELESS v. WHELESS et al.

(21 S. W. 595, 92 Tenn. 293.)

Supreme Court of Tennessee. March 2, 1893.

Appeal from chancery court, Davidson county; J. A. Cartwright, Special Chancellor.

Bill for partition by Joseph Wheless and others against H. H. Wheless. Judgment for complainants. Defendant appeals. Affirmed.

Dickenson & Frazer, Stokes & Stokes, and Frizzell & Zarecor, for appellant. Joseph Wheless, Jr., and N. D. Malone, for respondent G. A. Tillman, guardian ad litem. J. S. Pilcher, for widow of J. F. Wheless. J. W. Byrnes, for petitioner McCrosky.

CALDWELL, J. Gen. John F. Wheless died intestate and without issue, leaving a widow, and numerous collateral kindred. The bill in this cause was filed for a partition of his lands, where that could be done, and for sale and division of proceeds, where partition in kind might not be practicable. The widow, in her answer, claimed that the undivided interest of her husband in what is known as the "Baxter Smith Tract" was not realty, but personal property, under the doctrine of equitable conversion, and that it therefore belonged to her, as distributee, and not to the heirs. The chancellor decided this question against her, and she appealed.

No doctrine is more firmly fixed in English and American jurisprudence than that of equitable conversion, by which, under certain circumstances, real estate is treated, in equity, as personal property, and personal estate as real property. Through this doctrine, courts of equity treat as land money directed to be employed in the purchase of land, and, as money, land directed to be sold and converted into money; and the direction upon which the conversion arises may be made by will, or by deed, settlement, or other contract inter vivos. Adams, Eq. *135, 136; 1 Pom. Eq. Jur. § 371; 2 Story, Eq. Jur. § 790; 4 Amer. & Eng. Enc. Law, 127; 6 Amer. & Eng. Enc. Law, 664, 665. It was early recognized in this state, (Stephenson v. Yandle, 3 Hayw. [Tenn.] 109,) and has since been applied in several cases upon the construction of wills. McCormick v. Cantrell, 7 Yerg. 615; Williams v. Bradley, 7 Heisk. 58; Green v. Davidson, 4 Baxt. 448. The difficulty which sometimes arises in the application of the principle to a particular instrument lies, not in the subtlety of the principle itself, but rather in ascertaining the intention of the maker from the words employed. To operate as a conversion, the direction that the form of the property be changed must be imperative, in the sense of being positive and unmistakable. If the intention, as gathered from the whole instrument, be left in doubt, or the direction allows the trustee to sell or not, as he deems best, the courts are not at liberty to say that a conversion has taken place, but must deal with the property according to its actual form and character. 2 Story, Eq. Jur. § 1214. Mr.

Pomeroy says: "No express declaration in the instrument is needed that land shall be treated as money, although not sold, or that money shall be deemed land, although not actually laid out in the purchase of land. The only essential requisite is an absolute expression of an intention that the land shall be sold, and turned into money, or that the money shall be expended in the purchase of land. * * * The true test, in all such cases, is a simple one: Has the will or deed creating the trust absolutely directed, or has the contract stipulated, that the real estate be turned into personal, or the personal estate be turned into real?" 3 Pom. Eq. Jur. § 1159. Again: "The whole scope and meaning of the fundamental principle underlying the doctrine are involved in the existence of a duty resting upon the trustees or other parties to do the specified act; for, unless the equitable right exists, there is no room for the operation of the maxim, 'Equity regards that as done which ought to be done.' The rule is therefore firmly settled that, in order to work a conversion while the property is yet actually unchanged in form, there must be a clear and imperative direction in the will, deed, or settlement, or a clear, imperative agreement in the contract, to convert the property; that is, to sell the land for money, or to lay out the money in the purchase of land. If the act of converting—that is, the act, itself, of selling the land, or of laying out the money in land—is left to the option, discretion, or choice of the trustees, or other parties, then no equitable conversion will take place, because no duty to make the change rests upon them. It is not essential, however, that the direction should be express, in order to be imperative. It may be necessarily implied. * * * If by express language, or by a reasonable construction of all its terms, the instrument shows an intention that the original form of the property shall be changed, then a conversion necessarily takes place." Id. § 1160. To the same effect are Wurt's Exr's v. Page, 19 N. J. Eq. 375; Ford v. Ford, 70 Wis. 19, 33 N. W. Rep. 188; Hobson v. Hale, 95 N. Y. 588. Numerous other authorities, textbooks, and judicial decisions are at hand; but they are, in the main, so harmonious, and so entirely in accord with the full quotations just made from Mr. Pomeroy, that we forbear to make further citations with respect to the character of direction necessary to work the notional change, and call the doctrine of equitable conversion into play. As a matter of some moment on the question of construction, it is well to observe that unless the sale or purchase contemplated is expressly directed to be made at a specified time in the future, or upon the happening of some particular event, which may or may not happen, the conversion takes place, in wills, as from the death of the testator; and in deeds, and other instruments inter vivos, as from the date of their execution. 3 Pom. Eq. Jur. § 1162.

The instrument upon which the controversy arises in this cause is a deed, in the following language: "We, Baxter Smith and wife, Bettie G. Smith, * * * in consideration of the sum of \$34,395.60, paid

and secured to be paid as hereinafter mentioned, have bargained and sold, and do hereby transfer and convey, unto James H. Yarbrough, in trust, as hereinafter mentioned, the following tract of land * * * to have and to hold, for himself and other beneficiaries hereinafter named, in trust for the following uses and purposes: That is to say, said tract of land has been jointly purchased by James C. Warner, Percy Warner, John P. White, John F. Wheless, B. F. Wilson, W. M. Grantland, Charles L. Ridley, Baxter Smith, and J. H. Yarbrough, L. H. Davis, and G. A. Maddux,—the last three purchasing as a firm, under the firm name and style of Yarbrough, Maddux and Davis,—each paying and to pay one tenth of the purchase money for said land, as hereafter set out, except John P. White, who pays two tenths. * * * Said tract of land is conveyed to said J. H. Yarbrough, as trustee for said named purchasers, with power and authority to hold, possess, and manage the same in their interest and behalf, and to sell and convey the same, by deed in fee simple, upon the written direction of a majority in value of the adult beneficial owners then living, upon such terms and conditions as they may direct, and to collect and divide the proceeds of sale among said beneficiaries, their heirs, administrators, executors, and assigns, as their several interests may appear. * * The aforesaid sum of \$34,395.60 has been paid, and secured to be paid, as follows: * * To secure the payment of the promissory notes herein described, a lien is expressly retained upon the share or interest of the maker alone, and not against the tract as a whole. In case any of the beneficiaries herein named, in order to preserve his or their own title, should have to pay and discharge for another any accruing taxes or other incumbrance or lien upon the whole property, then, in that event, he or they shall have a lien upon the share or interest of the person who has failed to make such payment. Should said J. H. Yarbrough desire to resign the trust herein given him, he may do so, by and with the consent and approval, in writing, of a majority in value of the adult beneficiaries, owners, named above, and appoint in his room and stead a new trustee, and clothe him with like power and duties as those now conferred on him, by a suitable deed of conveyance in writing, to be recorded in the register's office of Davidson county, Tennessee."

Such are the material portions of the instrument the court is called upon to construe in this case; and the inquiry is whether the land conveyed thereby is to be treated, in equity, as realty, or as personality. If as realty, the share of Gen. Wheless passed to his heirs, under the statute of descent; if as personality, it went to his widow, as sole distributee, subject in either case, of course, to his debts.

A general view of the deed readily discloses a proposed speculation, entered into by several persons jointly,—a syndicate buying land to sell again. In furtherance of the scheme a trustee was appointed, and the land conveyed to him for the benefit of all the purchasers,—for each of them according to his interest. The idea of a

resale, as the ultimate object of the enterprise, runs through the whole instrument. It appears, from the nature of the transaction; from the words conferring upon the trustee power and authority "to sell, * * * and collect and divide the proceeds;" and from the provision for appointment of a successor in case the trustee should resign. That a partition in kind should ever occur, or that the trust should cease before a sale of the land and division of its proceeds were fully accomplished, was never contemplated. The land was bought to sell again, and a trustee was appointed as a part of the plan. All this is clear; but it is entirely consistent with the proposition that the trust was created merely as a cheaper and more convenient method of preserving and conveying the land. More is required to make a case of equitable conversion. The fact of a contemplated resale is present in every purchase of land upon speculation; and land purchased with such view is not converted into personality by the mere appointment of a trustee to receive the title, and as the agency through which the resale is to be accomplished for the owners. It is manifest that the paramount object of the enterprise was a resale of the land through the trustee, as representative of the beneficial owners, yet the deed does not contain any imperative direction that he shall sell; no absolute, unconditional duty to sell is placed upon him. "The equitable 'ought'" is not to be found in the deed, either as a matter expressed or to be necessarily implied. Not only does it contain no positive direction that he shall sell, but it, in reality, does not even permit him to sell, upon his own motion. His only power of sale is made to depend, expressly, upon the direction of others. He has no independent authority in that respect. The words of the deed on this point are: "With power and authority to hold, possess, and manage the same in their interest and behalf, and to sell and convey the same, by deed in fee simple, upon the written direction of a majority in value of the adult beneficial owners then living, upon such terms and conditions as they may direct." This language imposes upon the trustee no positive, unqualified obligation to sell the land at all events. At most, it but gives him authority to sell at such time, and upon such terms and conditions, as others may direct. In effect, it but makes him the instrumentality through which a majority of the beneficial owners living at any given time may make a sale. He has no right to sell without their written direction, and no authority to demand or require such direction at one time or another. It cannot be that a conversion was wrought by the creation of a trust so passive as this one is.

To meet the fact that the trustee has no power to sell unless directed by a majority of the adult beneficiaries to do so, it is suggested that the beneficiaries themselves are clothed with a trust, to the extent of being empowered to direct when and how the sale shall be made, and that they are bound to give such direction. There can be no doubt that it was contemplated that the beneficiaries should at some time give the trustee the required direction to

sell the land, and that a duty was, to that extent, indirectly devolved upon them; but that can hardly be said to have made trustees of them, or to have magnified the limited power of the real trustee into an imperative obligation to convert the land into money. The purchasers, though intending an ultimate sale, clearly had no thought that the terms of the deed changed the character of the property, and converted the real estate into personality. That they intended the land to be held as realty until actually sold and turned into money is manifest from the general frame and terms of the deed, and especially from those parts of it retaining separate liens in favor of the grantor, and providing for a special lien in favor of such beneficiaries as might be compelled to pay taxes or discharge liens for others. In the portion of the deed last referred to, the interest of each of the several beneficiaries is referred to as an interest in land, as such, and provisions are made with reference thereto which would be inappropriate as applied to personality. We are of opinion that the deed shows upon its face when considered as a whole, that the

land was conveyed to a trustee merely for convenience, and to save expense and trouble in the ultimate sale and conveyance, and that no conversion took place.

Our attention has been called to the very instructive and soundly reasoned case of *Crane v. Bolles*, (N. J. Ch.) 24 Atl. Rep. 237, in which a conversion of land into money was held to have occurred under direction contained in a will. There are several points of similarity between that case and this one, and perhaps as many important differences. The principles of law laid down in that case are the same recognized and applied by us in this one, the difference in result reached being due to difference in purport of instruments construed. Without stating the aspects in which the two instruments agree, or those in which they differ, we are content with simply saying that the court in that case said that the direction for sale was "imperative," and did not depend on the "request or consent" of the testator's children, while in this case there is no imperative direction to sell, and the power to sell does depend on the direction of the beneficiaries. Affirm the decree.

PRENTICE v. JANSSEN.

(79 N. Y. 478.)

Court of Appeals of New York. 1879.

C. Bainbridge Smith, for appellants. Joshua M. Van Cott, for respondents.

MILLER, J. The complaint in this action demands an equitable partition or sale of several pieces of land therein described, upon a portion of which was erected a hotel, called the Pavilion Hotel, together with the personal property, consisting of furniture in said hotel, and that an account be taken of the disbursements and expenditures made by the plaintiff, Augustus Prentice, for the benefit of and as additions to said property, and that the share of the defendant, Mary Ann Janssen, be charged upon the same and deducted from her portion of the proceeds of the sale of the property. The land belonged to Francis Blencard at the time of his decease in 1868, and the title is derived under the provisions of his last will and testament. The plaintiff, Augustus Prentice, holds three-fourths, by conveyances from the residuary legatees or their representatives, and the defendant, Mary Ann Janssen, the remaining one-fourth. The defendant last named has joined with the plaintiff in making leases of the property since 1873; large sums have been expended in making improvements by the owners, and the rents have been received and applied in part, if not entirely, for that purpose.

The residuary clause in the will of Francis Blencard devised and bequeathed his property to five of his children, among whom were Francis H. Blencard and the defendant, Mary Ann Janssen. It also authorized Francis H. Blencard to carry on the hotel business in the Pavilion Hotel, for the term of five years, if he so desired, and the executors were empowered and directed, after the testator's death, to sell and convert into money all the real and personal property of which he should be seized or possessed, including the hotel property, after the right of occupancy of his son had ceased, as they should deem advisable, and divide the proceeds equally among the residuary legatees. The son, Francis H., died before the testator, and no action was ever taken by the executors to sell the property, and it remained undisposed of, and was used and regarded by the owners as real estate to which they had title. Only one of the executors, the defendant, Gerhard Janssen, was living at the time of the commencement of this action, and he is made a party, as the husband of the defendant, Mary Ann Janssen, and does not by his answer claim any rights as executor or that he is a proper party as such. The answers admitted that plaintiff and the defendant, Mrs. Janssen, owned the property as tenants in common. We think that under the provisions cited

from the testator's will, the executors who were donees of a power took no estate in the lands as trustees, but merely a power in trust to be executed for the purposes of distribution, according to the will, which was liable to be defeated by a reconversion of the property, which was made personal by the will, into real estate.

The testator by the authority and direction to his executors to sell the real estate, constructively converted the same into personal estate, and being thus converted, the residuary legatees were entitled to take the same as such and had a right at their election to reconvert into real estate. No distinct and positive act is required for such a purpose, and the rule applicable to such a case is that "in the reconversion of real estate a slight expression of intention will likewise be considered sufficient to demonstrate an election on the part of those absolutely entitled." Leigh & D. Conv. (5 Law Library), m. p. 168; *Mutlow v. Bigg*, L. R., 1 Ch. Div. 385; 1 Jarm. Wills, 523 et seq. The real estate was not disposed of by the executors under the provisions contained in the will, and as there was no lawful purpose for which a sale was absolutely required there was no obstacle to prevent a reconversion of the same by the parties in interest from personal into real estate. This they elected to do by positive and unequivocal acts. Three of the four residuary interests were conveyed to the plaintiff, Augustus Prentice, and the defendant, Mary Ann Janssen, retained the other one-fourth. The whole has since been enjoyed, possessed and treated the same as real estate. This was done by the acquiescence of the executors and all the parties in interest, not only by possession, but by acts showing their intention beyond any question. In *Story*, Eq. Jur. § 793, it is said that if land is directed to be converted into money merely, the party entitled to the beneficial interest may if he elects so to do, prevent any conversion of the property and hold it as it is. This has been done by the residuary legatees here; and as the lands were not sold and disposed of by the executors, and no diversion made, the rule applies that the person entitled to the money, being of lawful age, can elect to take the land, if the rights of others will not be affected by such election. *Hetzel v. Barber*, 69 N. Y. 1, 11. No rights of other parties were injured by the election to reconvert; and as three-fourths of the residuary interests had been sold and conveyed to the plaintiff by those who were entitled to the proceeds of a sale, if one had been made under the power, and the owner of the remaining one-fourth had assented to the reconversion, by exercising acts of ownership, and the purpose of the power had become unattainable, the power to sell became extinguished, and the plaintiff and defendant already named became owners as tenants in common. *Hetzel v.*

Barber, *supra*; Garvey v. McDevitt, 72 N. Y. 563. Neither the will itself nor the surrounding circumstances evince in any way that the testator intended not only to confer a power of sale, but that the exercise of such power would become absolutely necessary to enable the executors to make the distribution required to the residuary legatees, within the principle laid down in Crittenden v. Fairchild, 41 N. Y. 289, 292, which is relied upon by the defendant's counsel. The facts here are far different from the case cited. The distribution was actually made and the purpose of the will fully accomplished by the reconversion of the personal estate into real estate by the parties in interest, as is quite obvious, and each of the legatees had received their full share as directed; thus rendering the exercise of the power of no avail. It follows that the executors having only a power to sell for the purpose of distribution—which power never was exercised, and which became of no use by reason of the reconversion of the land into realty—Gerhard Janssen, the surviving executor, had no right, title, interest, or lien upon the property, which rendered him a necessary party to the action as such executor. The provision of 1 Rev. St. p. 735, § 107, which makes a power of sale a lien or charge upon the land, has no application when it had ceased to operate, and was of no practical use. As by the reconversion no interest remained in the executors, there could be no lien or charge upon the land. Equity would not interfere to compel the execution of the power under 1 Rev. St. p. 734, § 96, because the purpose had been accomplished without its exercise.

Nor was it necessary that Gerhard Janssen, the surviving executor, should be a party for any other reason. In regard to the payment of debts and legacies there was no evidence that any debt or legacy remained unpaid when this action was brought. Seven years had then elapsed, and as debts and legacies are primarily to be paid out of the personal estate, unless express directions or a clear intent to the contrary is found, or to be gathered from the will (*Bevan v. Cooper*, 72 N. Y. 317; *Kinnier v. Rogers*, 42 N. Y. 531), the presumption is that they have been paid. The burden of proof was on the defendants to establish that they were not, if such was the fact. No such defense was set up in the answer or interposed upon the trial, and as the case stood the plaintiff was not required to show that the debts and legacies had been paid. The same remarks will apply to the point made, that there was no payment or accounting for the testamentary expenses.

Charles Blancard, a son of the testator, was not, we think, a necessary party defendant in this action. By the will he is bequeathed the sum of \$5,000, and he is not named therein as a residuary legatee. It is

claimed that he became entitled to an interest in the residuary portion of the estate which was given by the testator to his brother Francis, who died before the testator, without leaving any child or descendant, and that the share bequeathed and devised to Francis lapsed and his share descended to the testator's heirs at law; that Charles Blancard was one of them, and therefore a necessary party to the action. Without considering the question whether the devise to Francis H. Blancard having lapsed it passed, under the residuary clause, to the four children named who survived him, or whether the papers produced upon the argument of this appeal, showing that Charles Blancard had sold and conveyed away all the interest which he may have had in the property, and therefore was not a proper and necessary party to the action, it is sufficient to say that the point does not arise upon the record before us, and it is a complete answer to the objection that the admission made by the pleadings, that the plaintiff and the defendant are the sole owners of the real estate, dispensed with the production of evidence upon the trial to establish such fact and preclude the objection that Charles Blancard had an outstanding interest as an heir at law under the residuary clause in the will of Francis Blancard.

No title was acquired by the deed from Wemple, as executor of Caroline Blancard, deceased, of the interest of the decedent in one of the lots of the Pavilion Hotel, to the defendant, Mary Ann Janssen. Nor is there any valid reason why Mrs. Janssen should be subrogated in this action to his rights because the real estate had been converted into personalty. By the will of Caroline Blancard the executor was authorized and empowered, during the minority of the nephews and nieces of the testatrix, to whom she had given one-half of the property, to sell or lease jointly with the other owners of the undivided shares therein. After one of the devisees became of age the executor conveyed to Mrs. Janssen all the interest and estate vested in him as such. He had no estate in the premises and only a power in trust, which was to be executed while the devisees were in a minority in connection with the other owners. He had therefore no authority to execute the conveyance to Mrs. Janssen, and the deed was invalid and conferred upon her no title. Subsequently Mr. Wemple, as special guardian of one of the devisees, who was an infant, by order of the court conveyed all of her interest under the will of Caroline Blancard, including that which had been previously attempted to be conveyed to Mrs. Janssen, to the plaintiff, Augustus Prentice, and by other conveyances the interest of the other devisees was acquired by him. As the executor had no authority to convey the premises, the right acquired by the deed of the special guard-

ian could not be affected by the knowledge of the purchaser of the conveyance to Mrs. Janssen.

We think that the share of Mrs. Janssen was properly chargeable with its proportion of expenditures made by Augustus Prentice, the plaintiff, for repairs and improvements of the property. By the lease \$5,000 was to be applied for improvements and repairs. It was supposed that they would not exceed that amount; but the covenant to make repairs was properly construed by the referee to mean that the lessors were to make all repairs, whether they exceeded the sum named or not. It also appears from the referee's findings that Mrs. Janssen after she had knowledge that the repairs exceeded the sum specified, assented to the appropriation of additional sums due for rents, to be used in making improvements; that she stood by and did not object to the erection of a new building, and she thus acquiesced in all the expenditures actually made. Under such circumstances there certainly was an implied obligation that she should pay her share of the moneys expended for the benefit of the property in which she had a common interest, and they are a proper charge against the defendant's portion of the real estate sought to be partitioned or sold. In making the repairs the plaintiff, Augustus Prentice, did not occupy the position of a volunteer, without any authority of his co-tenant, but acted under the lease, which, as we have seen, covered the amount actually expended, and that this was done with the assent and approval of the defendant. The case of *Taylor v. Baldwin*, 10 Barb. 582, 626, which is relied upon by the defendant's counsel, is not adverse to the views expressed.

There is no valid objection to charging the defendant's share of the proceeds of the sale with the amounts expended, as found by the

referee. These expenses were incurred in reference to the property under special circumstances which, we think, render it chargeable therewith, and the judgment properly provided for the payment of defendant's proportion out of her share of the avails realized upon a sale. Nor is any reason shown why she should not be charged with her share of the costs, as found by the referee.

There was no error in the allowance of the architect's fees. Although there is some confusion in the referee's report in regard thereto, it nevertheless appears from the receipts introduced in evidence that the amounts charged in the account were actually paid to him.

We think the court properly ordered that the sale of the real estate and the personal property should be made as one parcel. The real estate as the referee found was so situated that a sale of one portion would interfere materially with the value of the remainder, and the personal property, being purchased for the benefit of the hotel, was of such a character that it could be disposed of more advantageously by a sale with the real estate than by a separate sale. No reason therefore exists why the sale of the whole real and personal estate should not be made together in a single lot. We have examined the authorities cited by the defendant's counsel upon the question last considered, and none of them sustain the position that the court has not the power, in an equitable action, where the parties are tenants in common of real and personal property, to direct a sale of both in one parcel when their interest will be promoted by such a sale.

There was no error, and the judgment should be affirmed. All concur.

Judgment affirmed.

KOPPER v. DYER.

DYER v. KOPPER et al.

(9 Atl. 4. 59 Vt. 477.)

Supreme Court of Vermont. April 30, 1887.

Appeal from chancery, Addison county, December term, 1886; Taft, Chancellor.

Bill in chancery seeking relief from a decree of foreclosure, which had become absolute, on the ground of accident. Heard on pleadings and master's report. Decree that the orator is entitled to relief according to the prayer of his bill, and that the cross-bill of defendant, Dyer, be dismissed, with costs, from which defendant appealed.

In August, 1880, defendant, John M. Dyer, sold and conveyed to Frederick Kopper the premises in controversy, known as the "Lake Dunmore Hotel Property," together with a large amount of personal property used in connection therewith, for \$13,500. Of said purchase money, \$10,500 was secured by mortgages of said real estate and personal property, both executed by Kopper to Dyer, August 23, 1880, conditioned that Kopper pay Mary C. Goddard, according to their tenor, certain notes, amounting to \$10,500, which Dyer had executed, and which were secured by mortgage on his other real estate; that Kopper pay all unassessed taxes on the Lake Dunmore property on the grand list of 1880; and that he keep the premises insured in the sum of \$5,000 for Dyer's benefit. The premises have been continually occupied by Kopper, with the exception stated below, and he is now in possession. The taxes were paid by Kopper to and including 1884. The condition respecting insurance has not been complied with. In 1884, Dyer paid insurance premiums to the amount of \$75. For default in payment, Mary C. Goddard foreclosed her mortgage against Dyer, and obtained a decree of foreclosure at the September term, 1882, of the Franklin county court of chancery. January 19, 1883, Dyer, fearing that Kopper might not satisfy the Goddard decree, and for the purpose of being sure that his own property would not be sacrificed, procured the National Life Insurance Company to hold in readiness for him the amount required to pay that decree; and on May 23, 1883, obtained the same from the company, and paid it in satisfaction of that decree. Dyer was also compelled to pay the company the further sum of \$193.85, in consideration of its having held said amount in readiness from January to May. Dyer also paid \$32.86 costs of the Goddard foreclosure. Dyer made several attempts to foreclose his mortgage against Kopper, and finally it was decreed "that, unless the said Frederick Kopper pay to the clerk of this court, for the benefit of the orator, the sum of \$500 on or before January 1, 1885, and the sum of \$8,052.09 on or before the first day of June, 1885, he, (the said Frederick Kopper,) and all persons claiming under him, shall be foreclosed

and forever barred from all equity of redemption in said premises." Kopper did not pay the \$500 as required by the decree, but sent his personal check under circumstances stated in the opinion. January 2, 1885, Dyer obtained of the clerk of the court a certified copy of the decree for record, and a writ of possession thereunder, and immediately took possession of the property, and has paid taxes thereon since. Kopper at once brought the original bill in this cause, praying for such relief as shall give the orator the benefit of the payment already made, as much as he would have had if the currency had been paid into court, as ordered by the decree; that the decree be opened, and further order made on terms, meet to the court, to relieve the orator from the loss that must result to him should no relief be granted; and for an injunction restraining the defendant from any further proceedings under the writ of possession, and from exercising any use or control of the premises. The bill and injunction were served, and Dyer withdrew from the premises. June 1, 1885, Kopper caused the sum of \$8,600 to be tendered Dyer in payment of the installment of said decree falling due on that day. Dyer refused to receive it, claiming that Kopper did not owe him, and that the property was his. Kopper afterwards filed his supplemental bill in this cause, setting up the tender, and claiming the benefit thereof, with said payment of \$500 to the clerk as a compliance with the terms of the foreclosure decree. Dyer filed his answer to said bill, September 22, 1885, and an amendment thereto, February 20, 1886. May 29, 1885, Kopper conveyed the premises, together with the personal property thereon, which had been mortgaged to Dyer, to Wyman H. Merritt and Frank E. Briggs by warranty deed, which deed was given Merritt and Briggs as security to them for the loan of the money which was tendered to Dyer, June 1, 1885. April 14, 1886, Dyer filed his cross-bill against Kopper, Merritt, and Briggs, for a disclosure of the mortgaged personal property, for surrender of the premises, and an accounting for their use; or, if the decree is to be opened and further time given to redeem, for a correction of the decree, and an accounting and foreclosure. Demurrers to the cross-bill having been overruled, the same was taken as confessed against Merritt and Briggs; and Kopper filed his answer thereto June 19, 1886. The other facts appear in the opinion.

Stewart & Wilds, for Dyer. Ormsbee & Briggs, J. M. Slade, and Noble & Smith, for Kopper.

ROWELL, J. Kopper seeks relief on the ground of accident. That chancery may grant relief on that ground, in cases of this kind, cannot be doubted; and the first question that arises is, has the orator made a case that calls for the interposition of the court in his behalf?

The term "accident," in its legal signification, is difficult to define. Judge Story defines it as embracing, "not merely inevitable casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force, but such unforeseen events, misfortunes, losses, acts or omissions, as are not the result of any negligence or misconduct in the party" affected thereby. 1 Story, Eq. Jur. § 78. Mr. Pomeroy justly criticises this definition as including what are not accidents at all, but mistakes, and as omitting the very central element of the equitable conception, and defines it thus: "'Accident' is an unforeseen and unexpected event, occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right, or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain." 2 Pom. Eq. Jur. § 823. And the chief point of the thing is that, because of the unforeseen and unexpected character of the occurrence by which the legal relation of the parties has been unintentionally changed, the party injuriously affected thereby is, in good conscience, entitled to relief that will restore those relations to their original character, and place him in his former position. *Id.* § 824. But, as a general rule, relief will not be granted unless it can be done with justice to the other party; for, if he cannot be put in as good a situation as he would have been in had the other party performed, the court will not interpose. *Rose v. Rose*, Amb. 331.

Equity, in many instances, relieves against forfeitures occasioned by the non-payment of money at a day certain; and this, although there is no accident, but negligence instead, on the ground that the condition and the forfeiture are regarded as merely security for the payment of the money. This is the ground on which tenants are relieved from forfeitures for the non-payment of rent as stipulated, and mortgagors are allowed to redeem after the law-day has passed. And although the agreement is not wholly pecuniary, nor measured by pecuniary compensation, still, if the party bound by it has been prevented by accident, without his fault, from an exact fulfillment, so that a forfeiture is thereby incurred, equity will interpose, and relieve him from the forfeiture, upon his making compensation, if necessary, or doing anything else in his power to satisfy the equitable rights of the other party. 2 Pom. Eq. Jur. § 833.

In *Cage v. Russel*, 2 Vent. 352, it is laid down as a standing rule of equity that a forfeiture shall not bind when the thing can be done afterwards, or any compensation can be made for it. Forfeitures are odious, and courts struggle against them, and relief is granted for the non-performance of diverse

collateral acts whereby they are incurred; as for not laying out a specific sum in repairs in a given time, (*Sanders v. Pope*, 12 Ves. 282,) for cutting down timber when covenanted against, (*Northcote v. Duke*, Amb. 511,) for not renewing a lease in time, (*Rawstorne v. Bentley*, 4 Brown Ch. *415,) and the like. Relief is also granted against forfeitures incurred by unintentional breaches of the condition of mortgages for support, on terms that the party in fault fully compensate and indemnify the other party for all he has lost by reason of the breach. *Henry v. Tupper*, 29 Vt. 358.

In *Adams v. Haskell*, 10 Wis. 123, the defendants were prevented by accident from reaching the place of a foreclosure sale until after it was completed, and the court for that reason ordered a resale, but on terms.

In *Pierson v. Claves*, 15 Vt. 93, the orator, by reason of pending negotiations of settlement, without negligence on his part, let the time of redemption expire; and he was relieved by opening the decree, and giving further time to redeem.

The case of *Bostwick v. Stiles*, 35 Conn. 195, is confessedly much in point. That was a bill to open a decree of foreclosure, and obtain further time. The mortgage debt was about \$4,000, and the value of the premises twice that sum. The time limited for payment was August 5th. The petitioner intended to redeem, but, not having sufficient means of his own, he applied to his uncle—a man of property—to help him, and he agreed to, and to furnish the money on August 3d, on which the petitioner relied; but, for some reason not explained, he did not furnish the money as agreed, and the petitioner delayed making other arrangements until the evening of August 5th, when he applied to Russell for assistance. Russell had no money, but plenty of government bonds, and agreed to make payment in them if defendant would take them; and accordingly went to defendant's house that evening, after defendant had gone to bed, and told his wife that he had come prepared to redeem the mortgage for the petitioner, but defendant did not get up, but sent word by his wife that he was sick, and Russell went away. On this state of facts, the court held that the petitioner's failure to pay on August 5th was occasioned by accident, without fault or neglect on his part, and that the accident lay in the fact of his uncle's failure to furnish the money as agreed, and as the petitioner had reason to believe he would. The court says that there is a degree of uncertainty in regard to all business expectations, and that no more ought to be required in respect of future obligations imposed by law than that such means shall be taken to fulfill them as will render it reasonably certain, as far as human sagacity can foresee, that they will be performed.

It is common in England to enlarge the time of redemption on application before the day of payment; and, though the indulgence

is not granted of course, it is said not to require a very strong case to obtain it. And the time may be enlarged more than once. Thus, in *Jones v. Creswicke*, 9 Sim. 304, after the time had been enlarged, and after the order absolute had been made, though not drawn up, the time was again enlarged, on the ground that the man who had agreed to lend the defendant the money was prevented by illness from going up to London on the day it was due, and his wife, whom he had deputed to carry it up, was prevented from doing so because the London coach was full the day before. And see *Edwards v. Cunliffe*, 1 Madd. 287.

And the decree may be opened after the order absolute has been made and enrolled. Thus, in *Ford v. Wastell*, 6 Hare, 229, notwithstanding the order absolute had been drawn up and enrolled, the decree was opened because all the plaintiff's property was involved in an administration suit that she was justified in believing would terminate in season to enable her to avail herself of her property with which to meet the payment, but which had not yet terminated. See, also, *Thornhill v. Manning*, 1 Sim. (N. S.) 451, in which the promptness of the mortgagor in applying was regarded as the great and important feature in the case to guide the court in deciding what it ought to do.

Applying these principles, as shown and illustrated by the cases, it is quite out of the question to say that the defendant is entitled to keep this property, and that the orator has not made a case that calls for the interposition of the court in his behalf. The orator gave \$13,500 for the property, and had paid \$2,724 towards it, and expended about \$10,000 upon it in improvements and repairs; and on January 1, 1885, the time limited by the decree for paying the installment of \$500, he believed the real estate fairly worth \$5,000 or \$6,000 more than he gave for it. He was exceedingly anxious to redeem the property, but had no available means of his own, and relied for means wherewith to pay his debts partly on income assured to members of his family, and partly on the equity of redemption in the property, his ability to make which available at the value he put upon it being his only means of escape from absolute bankruptcy. It appears that his wife and her sister, Miss Jenkins, owned property in New York City, as to which he was agent, and that before and on December 29, 1884, he had been in negotiation with one Martin of that city in respect to leasing it to him; and it was agreed that, on delivery of proper leases thereof, Martin should advance to him \$650 towards performance on his part, and Kopper relied on the use of that money to pay the \$500 installment. Accordingly he went to New York on December 30th, with the lease executed, found Martin, and made an appointment with him for 11 o'clock the next

day; and, on going to the place at the time appointed, found a message postponing the appointment to the office of an attorney down town at 2 that afternoon; whereupon, being unable to communicate with Martin, he went to the office down town at 2, and found that Martin had been there, but had gone. He afterwards met Martin on the street, and, being exceedingly anxious to obtain the money, persuaded him to go back to the attorney's office; but, he being out, they went to another attorney's office, and he was out; and finally he persuaded Martin to give him his check for \$650 before the leases were approved by an attorney. But this was after 3 o'clock, when all the banks in the city were closed. Said check was good, but, being drawn on a bank in the upper part of the city, and it being after banking hours, it was impossible for Kopper to draw the money on it that day. He had for several years kept a deposit account with the Second National Bank of that city, and had at this time a small balance standing to his credit there, and that bank was accustomed to place to his credit the amount of such checks as he deposited there properly indorsed. He had previously carried checks to that bank after business hours for deposit, handing them in over the railing to be credited to him at the opening of the bank the next day. On this occasion he properly indorsed said check "for deposit," and sent it to said bank by a district messenger boy, but whether it reached the bank or not that day does not appear. At the same time he drew two checks on said bank to the order of the person who was then the clerk of the court in which the decree was obtained,—one for \$575, (which he supposed to be the amount required to pay said installment, but which was in fact more than was required;) and one for \$25, for a sum otherwise payable to the clerk,—inclosed them in an envelope, with a letter to the clerk, went to the Grand Central Depot, and sent the package to Middlebury by the porter of the sleeping-car, inclosing it in another envelope to the station-agent there, requesting him to deliver the package to the clerk immediately, which he did on the morning of January 1st, which day was a legal holiday in New York; and the \$650 check was passed to Kopper's credit by the Second National Bank on the next day, the first business day after it was received. Dyer refused to take Kopper's check of the clerk, and the clerk did not treat it as payment of the installment, nor regard it as available funds in his hands, until it was paid, and the avails credited to him by the collecting bank, which was on January 5th, on which day he was trusted by some of Kopper's other creditors, and on the 6th this bill was brought.

On these facts, and the others disclosed by the record, Kopper cannot justly be charged with negligence. The means he had tak-

en to obtain the money rendered it reasonably certain that he would succeed, and that he was anxious to obtain it abundantly appears. That he did not meet Martin at 11 nor at 2 was an unforeseen and unexpected occurrence, external to himself, of which his agency was not the proximate, nor even the remote, cause, and thereby he was prevented from sending his money seasonably, in a form that would have been treated and regarded as payment, whereby, contrary to his own intention and wish, he lost his legal right to pay, and Dyer acquired a legal right not to have him pay; and in these circumstances Kopper is entitled to relief that will reinstate him in his former position, on terms that he satisfy the equitable rights of the other party.

But he cannot have relief under his bill as drawn, for it is not adapted to his case. The original bill goes upon the ground that he is entitled to have his attempted payment of the first installment treated as an actual, seasonable payment; while the supplemental bill sets up a tender of the other installment, and asks that it be adjudged a payment thereof, and that the defendant be decreed to accept and receive the same in full satisfaction and discharge of the decree. But his attempted payment was not payment, and he is not entitled to have it treated as such, because neither the money, nor its equivalent, seasonably came into the hands of the clerk, and Dyer was not bound to accept and receive his check as payment, though he might have safely taken the money after the time expired, if he could have got it; for taking an installment after the time for paying it is expired does not open the decree as to installments for the payment of which the time has not expired. *Smalley v. Hickok*, 12 Vt. 153; *Gilson v. Whitney*, an unreported case in Windsor county a few years ago, *ut audiui*. Nor was the tender of the second installment effective; for, not having paid the first, he had no legal standing for tendering the second.

Redemption is the appropriate relief in this case. Indeed, it is said that whenever a mortgagor is driven to the necessity of filing a bill against the mortgagee, it must be one to redeem, and that the court can relieve him only by allowing a redemption. *Goldsmith v. Osborne*, 1 Edw. Ch. 560; *Cholmley v. Countess of Oxford*, 2 Atk. 267; *Lord Langdale in Dalton v. Hayter*, 7 Beav. 313. But the bill lacks some of the essential elements of a bill to redeem. It neither offers nor avers a willingness to pay, which is necessary by all the authorities. But, inasmuch as the orator is entitled to relief, he should not be turned out of court, but allowed to amend his bill into a bill to redeem, if he shall be so advised. *Harrigan v. Bacon*, 57 Vt. 644.

There was no necessity for bringing the cross-bill. The chattel mortgage was not embraced in the original bill, and so could not

be the subject of a decree; and discovery of property subject to it could not aid in defending the original bill. As to the execution of the decree by giving possession, that can be done by summary process. *R. L. §§ 766, 767*; *Kershaw v. Thompson*, 4 Johns. Ch. 609; *Ludlow v. Lansing*, *Hopk. Ch.* 231; *Valentine v. Teller*, *Id.* 422; *Yates v. Hambley*, 2 Atk. 237.

As to the use of the premises pending suit, the defendant would be entitled in respect thereof, if at all, only on failure of the original bill, in which event he could avail himself of his rights by way of claim for injunction damages. And, as to the alternative prayer for foreclosing any remaining equity, that would be the result of any decree on the original bill. Nor was there any necessity for bringing in Briggs and Merritt, for they purchased pendente lite, and so will be bound by any decree made. Besides, treating them as entitled to the benefit of their demurrer, as they were treated at the bar, they are not proper parties to the cross-bill; for new parties cannot be made in that way. A cross-bill, by force of the term, is a bill by a defendant against the plaintiff or other defendants in the same suit, or both. If an orator desires to make new parties, he amends his bill, and makes them, although it be in respect of matters that have transpired since the filing of his bill; though until very recently, in respect of such matters, he would have brought a supplemental bill. If the interest of the defendant requires the presence of new parties, he takes his objection for want of them, and the orator is forced to bring them in, or have his bill dismissed; and if, at the hearing, the court finds new parties indispensable, it refuses to proceed. These remedies cover the whole subject, and a cross-bill to make new parties is not only irregular and improper, but wholly unnecessary. *Shields v. Barrow*, 17 How. 130.

But if they are not entitled to the benefit of their demurrer because the bill has been taken as confessed as to them, yet Kopper's defense avails for them; for, when the defendants are jointly interested, a decree pro confesso as to some merely takes away their standing in court, and disentitles them to appear or be heard on many questions certainly without an order of court; but the success of the others avails for them, and the bill will be dismissed as to all. 1 Hoff. Ch. Pr. 554; *Clason v. Morris*, 10 Johns. 524; *Frow v. De La Vega*, 15 Wall. 552.

As to the terms that will satisfy the equitable rights of Dyer. As between the two, it belonged to Kopper to pay the Goddard mortgage, and Dyer stood as his surety in respect thereof. *Field v. Hamilton*, 45 Vt. 35; *Wells v. Tucker*, 57 Vt. 223; *Comstock v. Drohan*, 71 N. Y. 9. Hence Dyer is entitled to be reimbursed, not only the principal sum that he paid to redeem said mortgage, but his reasonable costs and expenses in that

behalf in good faith incurred. *Hayden v. Cabot*, 17 Mass. 168; *Downer v. Baxter*, 30 Vt. 467; *Hulett v. Soullard*, 26 Vt. 295; *Comstock v. Drohan*, 71 N. Y. 9.

As to the costs of that foreclosure, it sufficiently appears that they were properly incurred, and Dyer is justly entitled to reimbursement. But, as to the amount paid by him to the insurance company for holding in readiness the money wherewith to redeem, it does not sufficiently appear that that was such a prudent and necessary thing to do in the circumstances as to entitle him to reimbursement. The mortgage of the premises in question being conditioned to keep the property insured for Dyer's benefit, which Kopper neglected to do, he is chargeable with the insurance premium of \$75 that Dyer was compelled to pay in 1884, and this was included in the decree. He is also

chargeable with the \$60.30 paid by Dyer for taxes, as shown by the master's report, as well as with all the other taxes that Dyer has since paid, or that he shall hereafter pay, or become liable to pay, on the property.

As Kopper put his bill upon false ground, namely, that he had performed the decree when he had not, Dyer was justified in defending it, and should recover his costs; and as Dyer had a right, after the decree became absolute, to deal with the property as his own, he is entitled to the costs of his writ of possession, and of the execution of it. *Cree v. Lord*, 25 Vt. 498. In *Thornhill v. Manning*, 1 Sim. (N. S.) 451, the costs of an ejectment were allowed in a similar case.

The decree dismissing the cross-bill is affirmed; but the decree for the orator in the original bill is reversed, and the case remanded, with mandate.

PATTON et al. v. CAMPBELL.

(70 Ill. 72.)

Supreme Court of Illinois. Sept. Term, 1873.

Bentley, Swett & Quigg, for appellants.
Waite & Clarke, for appellee.

CRAIG, J. This was a bill in chancery, filed in the superior court of Cook county, by George W. Campbell, as assignee in bankruptcy of the late firm of Durham & Wood, against William Patton and others, to recover the value of certain goods which had been replevied by Patton & Co. from Durham & Wood.

It appears from the record that on or about the 20th of October, 1870, Patton & Co., of New York, sold Durham & Wood, of Chicago, a bill of goods, amounting to \$1,600, on a credit of four months. About the first of November, after the sale, Durham & Wood failed, and Patton & Co. commenced an action of replevin to recover the goods they had sold. A replevin bond in the penal sum of \$1,000, in the usual form, was filed with the papers in the action, and \$800 or \$900 worth of the goods were replevied.

In the fire of October 8th and 9th, 1871, the papers in the case, including the bond, were destroyed. Subsequently the action was dismissed.

The defendants answered the bill, to which replication was filed, the cause was heard on the proofs taken, and decree rendered in favor of complainants for \$850.

The defendants bring the cause to this court, and seek to reverse the decree on two grounds:

First. For the reason a court of chancery has no jurisdiction, the remedy of complainants being complete at law.

Second. The purchase of goods from Patton & Co., by Durham & Wood, was fraudulent, and Patton & Co., upon discovery of the fraud, had the right to rescind the sale and replevy the property.

The questions will be considered in the order in which they are raised.

The bill in this case is filed to recover upon an instrument under seal, which had been destroyed.

The jurisdiction of a court of equity arising from accident is a very old head, in equity, and probably coeval with its existence. But it is not every case of accident which will justify the interposition of a court of equity. The jurisdiction will be maintained only when a court of law can not grant suitable relief; and where the party has a conscientious title to relief. 1 Story, Eq. Jur., § 79.

In case, however, of lost instruments under seal, equity takes jurisdiction, on the ground that, until a recent period, it was the settled doctrine that there was no remedy on a lost bond in a court of common law, because there could be no proof of the instrument, without which the declaration would be defect-

ive. The jurisdiction having been assumed and exercised on this ground, it is still retained and upheld. 1 Story, Eq. Jur., § 81; Walmsley v. Child, 1 Vesey, Sen., 341; Fisher v. Sievres, 65 Ill. 99.

Under the allegations in the bill in this cause, we think it is well settled that a court of equity had jurisdiction.

The remaining question in the case is, were the goods purchased under such circumstances as gave the appellants the right of rescission on the ground of fraud, or was there such a fraud practised that the title to the property did not pass to Durham & Wood?

The evidence shows that Hart, who was a traveling agent for appellants, called on Durham & Wood, in Chicago, to sell them goods. They examined his samples and told him they wanted to make a large order, and wanted to buy on four months' time. Hart told them, Patton & Co. hardly ever vary from three months' time. Durham remarked, he had bought and could buy of A. T. Stewart & Co., of New York, on four months' time. On this statement, Hart sold the goods on four months' time.

It turned out, on investigation, that Durham & Wood had only bought two bills of goods of Stewart & Co., and they were sold on thirty days' credit.

While it is true the statement made by Durham, that he had bought and could buy goods of Stewart & Co. on four months' time, was false, yet, it does not appear that this statement induced Hart to sell the goods; it only had the effect to cause him to give one month longer credit on the goods than he otherwise would, which did not, in this case, in anywise affect the rights of appellants, for the reason that the failure occurred and the goods were replevied within less than two months after the sale.

It appears, from the evidence, that Hart made no objection to sell the goods on three months' time; he neither asked nor required any representations from Durham, as to the standing or responsibility of the firm, to induce him to sell the goods on a credit of three months. At the time the goods were purchased, it does not appear that Durham & Wood were in failing circumstances, insolvent, or in any manner pressed by their creditors; for aught that appears they were at that time solvent, and responsible for all their contracts.

Neither does it appear that they made any false representations in regard to what they were worth, what property they owned, or the amount of debts they had contracted.

It is not shown that the goods were bought with the intent not to pay for them, or with a view to make an assignment.

We understand the rule to be, that if a party, knowing himself to be insolvent, or in failing circumstances, by means of fraudulent pretenses or representations, purchases goods with the intention not to pay for them,

but with the design to cheat the vendor out of his goods, such facts would warrant the vendor in rescinding the contract for fraud, and would justify him in recovering possession of the property by replevin, where the goods had not in good faith passed into the hands of third parties. *Henshaw v. Bryant*, 4 Scam. 97.

But the case under consideration does not come within this rule.

There is no evidence in this record to show

that the goods were bought with any impure or wrong motives.

It is true that, some two months after the purchase of the goods, the parties went into bankruptcy, but this was involuntary, and does not, of itself, show the condition of the firm at the time the goods were bought.

Upon a careful examination of the whole record, we are satisfied the decree of the court below was correct, and it will be affirmed.

BREWER v. HERBERT.

(30 Md. 301.)

Court of Appeals of Maryland. March 11, 1869.

Appeal from circuit court, Washington county, as a court of equity.

The bill in this case was filed by the appellee for an injunction to restrain proceedings at law and for the specific performance of a contract. The appellee was the owner of a dwelling house and half lot of ground situate in Hagerstown, and sold the same to the appellant on the 9th of October, 1865, by their agreement in writing, as follows, to wit:

"Articles of agreement made and concluded this 9th day of October, 1865, between F. Dorsey Herbert and John A. K. Brewer, both of Washington county and state of Maryland, witnesseth: That in consideration of the sum of four thousand dollars, to be paid as hereinafter mentioned, the said Herbert has this day sold to the said Brewer his house and half lot of ground, situated on the corner of West Washington and Prospect streets, in Hagerstown; and the said John A. K. Brewer on his part agrees to pay the said sum of four thousand dollars, as follows: Two thousand dollars on the 1st day of April, 1866; and one thousand dollars on the 1st day of April, 1867; and one thousand dollars on the 1st day of April, 1868,—with interest from the 1st day of April, 1866; and the said Herbert doth further agree to give the said Brewer possession of the same on the 1st day of April, 1866, and on payment of the whole purchase money to make a good and sufficient deed for the same, clear of all incumbrances, to the said Brewer. In witness whereof the parties hereto have set their hands and seals on the day and year first above written.

"[Signed] F. Dorsey Herbert. [Seal.]

"J. A. K. Brewer. [Seal.]"

Of the \$2,000 to be paid by the agreement on the 1st day of April, 1866, the appellant, at the request of the appellee, paid \$1,000 on the 10th day of October, 1865. At the time of sale the said premises were under lease by Herbert to Dr. Berry, whose term expired on the 1st day of April, 1866. The appellee held a policy of insurance for \$1,000 on the house at the time of sale, which was allowed by him to expire about the last of January, 1866. On the 5th day of February, 1866, the house was totally destroyed by fire, but without any fault on the part of the appellee or his tenant, Berry. On Monday, the 2d day of April, 1866, the 1st being Sunday, the appellee made a tender of the premises, then a vacant lot, to the appellant, which he refused to receive in its destroyed condition. The appellant having refused to receive the ground, and holding that the appellee was unable to perform his part of the contract, by reason of the destruction of the house, brought suit on the law side of the court, to recover from the appellee the said \$1,000, so as aforesaid paid to

him. Whereupon the appellee filed the bill in this cause to enjoin said proceedings at law and for a specific execution of the agreement. The court below by its decree enjoined said proceedings at law, and decreed a specific execution. From this decree the present appeal was taken.

Before BARTOL, C. J., and GRASON, MILLER, and ROBINSON, JJ.

Wm. T. Hamilton, for appellant. A. K. Syester, for appellee.

MILLER, J. After the execution of the written contract for the sale of the house and lot, and before the day fixed for delivery of possession and payment of the first installment of purchase money, the house was accidentally destroyed by fire, without fault of either party or of the tenant then in possession of the same. The vendor had a fee simple title to the property, and at the proper time, under the contract, offered to deliver possession of the premises in the condition in which they then were. This the vendee refused to receive because of the destruction of the house by fire, and the main question in the case is, can he on this ground successfully resist this application in equity by the vendor for a specific performance of the contract?

In contracts of this kind between private parties, the vendee is in equity the owner of the estate from the time of the contract of sale, and must sustain the loss if the estate be destroyed between the agreement and the conveyance, and will be entitled to any benefit which may accrue to it in the interim. This doctrine, notwithstanding the dictum in *Stent v. Bailey*, 2 P. Wms. 290, to the contrary, was plainly announced and settled by the decision of Lord Eldon, in *Paine v. Meller*, 6 Ves. 349, a case very similar in its circumstances to the present, where it was held that if there was no objection to the title of the vendor, or it had been accepted in fact by the vendee before the houses were burned, no solid objection to the bill for specific performance could be founded on the mere effect of the accident before conveyance, "for if the party," says the lord chancellor, "by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being incumbered as his; they may be devised as his; they may be assets; and they would descend to his heir." This decision has always been regarded as fixing the true equitable rule in such cases. It was recognized by Sir Thomas Plumer in *Harford v. Purrier*, 1 Madd. Ch. 287, and in *Rawlins v. Burgis*, 2 Ves. & B. 387, and by Lord Chancellor Manners in *Revell v. Hussey*, 2 Ball & B. 287. From these and other authorities of equal weight announcing the maxim that equity regards as done that which was agreed to be done is deduced as the established doctrine in equity that from the time the owner of an estate

enters into a binding agreement for its sale he holds the same in trust for the purchaser, and the latter becomes a trustee of the purchase money for the vendor, and being thus in equity the owner the vendee must bear any loss which may happen, and is entitled to any benefit which may accrue to the estate in the interim between the agreement and the conveyance. 1 Sugd. Vend. 228, 388-391; 2 Powell, Cont. 69; Dart, Vend. 114-118; 2 Story, Eq. § 1212. The contract here is not for a sale at a future day; it does not use in this respect prospective or contingent terms. Its language is: The vendor "has this day sold to" the vendee his house and lot, which clearly imports a binding contract then executed and consummated. By such terms the title in equity passes from the date of the contract, and if there were nothing else in it there would be no room for argument, for it would be impossible to withdraw the case from the operation of the rule above stated.

But it has been earnestly and strenuously urged by the appellant's counsel that as the contract contains an agreement by the vendor to deliver possession of the house and lot to the vendee on the 1st of April, 1866, the destruction of the house by fire before that period rendered performance by the vendor of this part of the contract impossible, and he cannot, therefore, either in law or equity, ask the vendee to perform his part of it; and this circumstance, it is insisted, distinguishes the case from those cited, and prevents it from falling within the principle established by them. Let us test the soundness of this argument. The vendee knew before and at the time of the contract there was a tenant in possession whose term would not expire until the 1st of April, and the first installment of the purchase money is made payable on, and interest on the deferred payments runs from, that day. The subject-matter of sale is realty,—a lot of ground with a house upon it, described as a house and lot. The agreement as to delivery is not like the usual covenant by a tenant in a lease, to deliver in as good condition and repair as when the contract was made. There is also no difficulty about delivery, except that the premises were not, as to the buildings upon them, in the same condition as at the date of the contract. The question then resolves itself into this, does the fact of the insertion into a contract like the present for the sale of real estate, of an agreement to deliver possession at a future day, make any difference in the application of the rule? It is true it does not appear in the cases cited there were in the contracts any stipulations as to delivery of possession at a future day, nor is this circumstance alluded to, but they explicitly say it is the passing of the title in equity which throws the risk of loss upon the vendee, and entitles him to accruing benefits. To this, as we have seen, a conveyance is not necessary, nor is payment of the pur-

chase money or any part of it; for in *Hampson v. Edelen*, 2 Har. & J. 66, this court has decided that "a contract for land bona fide made for a valuable consideration vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time." See, also, *Siter's Appeal*, 26 Pa. 180. Neither can possession nor delivery of possession be necessary, for, if the contract had been silent on this subject, the vendor would have had the right to retain possession at least until the 1st of April, when the first installment of the purchase money was payable, and if the vendee had obtained possession before he would have been restrained in equity from exercising any acts of ownership prejudicial to the inheritance (*Crockford v. Alexander*, 15 Ves. 138; *Reed v. Lukens*, 44 Pa. 202); and yet the equitable title would all the while have been in him, subject to his disposition by deed or will, and liable for his debts. If, then, in the absence of a stipulation to deliver at a future day, there is an implied right in the vendor to retain possession until that period, and this would make no difference as to the liability of the vendee for an intermediate loss, how can the insertion of such a stipulation have in equity any different effect? The whole foundation of this doctrine of equity is that the equitable title and interest passes by the contract of sale, and from the time of its execution, and it contemplates delivery of possession as well as payment of purchase money, and a conveyance at a future period. Hence Sir Edward Sugden and Sir Thomas Plumer both cite, as in exact accord with the decision of Lord Eldon, the rule of the civil law, where the very case is put in the Institutes: "*Cum autem emptio et venditio contracta sit, periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit: Itaque, si cædes totæ vel aliqua ex parte incendio consumptæ fuerint—emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere.*" In sales of personal property delivery of the goods sold is not necessary to pass the title as between the parties, where the statute of frauds has been gratified by giving something in earnest, or payment of the whole or part of the purchase money, or a sufficient note or memorandum in writing of the bargain, and in such case the property is at the buyer's risk before delivery. *Franklin v. Long*, 7 Gill & J. 418. And even where the seller remaining in actual possession agrees to deliver the property at a particular place, and it is destroyed by fire before such delivery, the loss will fall on the purchaser. *Terry v. Wheeler*, 25 N. Y. 520. Where sales are made under authority of a court, the contract is not regarded as consummated until it has received the court's sanction or ratification, and therefore any loss happening before confirmation falls upon the vendor. *Ex parte Minor*, 11

Ves. 559; *Wagner v. Cohen*, 6 Gill, 102. But where a loss occurs after confirmation, by which the contract is consummated, it falls upon the vendee, even though no purchase money has been paid, and the vendor remains in possession. This was expressly decided in *Robertson v. Skelton*, 12 Beav. 260, where Lord Langdale also said: "In equity the estate belongs to the purchaser from the date of the order to confirm the report, and the right of possession belongs to the vendor till the purchase money, for which it is security, has been paid." Again, if we look to the contract itself, and gather therefrom the intent of the parties, it is clear from the language used their intention was that the equitable title and interest should pass from the day of its execution. Upon this point its terms are too positive and explicit to admit of doubt. Delivery of possession and payment of purchase money were postponed to a future day for the convenience of each party respectively, and we cannot construe the agreement to deliver into a condition that the contract shall be void if there is any change in the state or value of the property on the day of delivery, nor interpolate any such words into the instrument. We are therefore constrained to hold the argument founded on this delivery clause to be unavailing to the appellant.

But it is said specific execution of contracts is in all cases not a matter of absolute right, but of sound discretion in the court, and as the vendor cannot now deliver the house which was the main inducement to the vendee to buy, and constituted the chief value of the property, it would be inequitable to enforce the contract as against him. If this objection were sound, this doctrine of losses and benefits could never have been established. But, whilst it is conceded an application for specific performance is always addressed to the sound discretion of the court, yet where a contract respecting real estate is in writing, and is in its nature and circumstances unobjectionable, it is as much a matter of course for a court of equity to decree a specific performance of it as it is for a court of law to give damages for a breach of it. *Smoot v. Rea*, 19 Md. 405; 2 Story, Eq. Jur. § 751. "The fairness or hardship of a contract, like all its other qualities, must be judged of at the time it was entered into, not by subsequent events." If it was then certain, mutual, fair in all its parts, and for an adequate consideration, it is immaterial that by force of subsequent circumstances it has become less beneficial to one party, unless such change is in some way the fault of the party seeking its specific execution. *Revell v. Hussey*, 2 Ball & B. 288; *Lawder v. Blachford*, Beat. 526; *Webb v. Railway Co.*, 9 Hare, 129; *Low v. Treadwell*, 3 Fairf. 541; *Fry, Spec. Perf.* 93, 98. Adherence to principle compels the courts to overlook the hardship of particular cases. But the doctrine upon which this de-

cision rests is founded in strict justice and equity, for whilst the vendee may think it hard to be compelled to pay for that which he cannot have in the condition it was when he purchased, the vendor, with equal justice, might think it hard to lose his money after a bona fide sale of his property, because of an accident accruing to it without fault on his part. It is to be remembered too that whilst the rule burthens the vendee with a loss it also entitles him to all benefits. Thus where a reversionary interest is agreed to be purchased, and lives drop, or one agrees to purchase an estate in consideration of a life annuity to the vendor, and the *cestui que vie* dies, or where there is a sudden rise in the value of the land from its being required for a public purpose, before conveyance, in all such cases the vendee reaps the benefit. So in the case before us, if a valuable mine had been discovered on the premises the day after the contract, or by any unforeseen or unexpected circumstances their value had been increased a hundred fold, the benefit would have resulted to the vendee, and the vendor could not have been released from his contract. We cannot, therefore, sustain this objection to the bill.

It appears that at the date of the contract the vendor held a policy of insurance upon the house, which by accident he allowed to expire without renewal before the fire, and of this the vendee received from him no notice. A similar state of facts existed in *Paine v. Meller*, and was held to constitute no objection to the vendor's bill. It is admitted there was no understanding between the parties that the vendor should keep the policy alive. They did not contract on any such basis. After the contract the vendee had an insurable interest in the house, and, in the absence of all agreement on the subject, the presumption is he intended to protect himself by insuring in his own name, or to take the risk of a failure to insure. The vendor was not bound to keep up the insurance or give notice to the vendee of its having expired. If the policy had existed at the time of the loss, the vendor could have recovered from the insurance company, but, being trustee of the premises for the vendee, he would be bound in equity to account to the latter for the money so received (*Reed v. Lukens*, 44 Pa. 200); but his failure to renew or to give notice cannot deprive him of his right to enforce the contract of sale.

It also appears there was at the date of the contract a judgment against the vendor for \$2,363.38, but he had at that time entered an appeal from the judgment to the court of appeals, and given an appeal bond with security amply sufficient for that purpose to pay the amount of the judgment with costs, in case he should fail to prosecute his appeal with effect. The authorities are clear that equity will not compel a vendee to take an imperfect or defective title, yet cases of high authority are to be found in which a pe-

cuniary charge against which adequate security has been given has been held not to constitute a defect in title, and also where equity has enforced the agreement where a perfect title can be made at the time of the decree. But this judgment thus appealed from, with appeal bond given, does not, in the sense in which courts of equity use the terms, make this such an imperfect or defective or incumbered title as will prevent specific execution, and especially not where the decree itself, as that appealed from in fact does, can protect the vendee by pro-

viding that the judgment debt may be paid by him out of the purchase money due on the contract and in discharge thereof.

We have bestowed upon the case our best care and consideration. We find nothing in the authorities cited by the appellant's counsel sufficient to overthrow the doctrine upon which we have based our decision, and can discover no ground upon which, in justice and equity, the appellee can be denied the relief he seeks. The decree must be affirmed.

Decree affirmed.

HUNT v. ROUSMANIER'S ADM'RS.

(8 Wheat. 174.)

Supreme Court of the United States. March 14, 1823.

Appeal from circuit court of Rhode Island.

The original bill, filed by the appellant, Hunt, stated, that Lewis Rousmanier, the intestate of the defendants, applied to the plaintiff, in January, 1820, for the loan of \$1,450, offering to give, in addition to his notes, a bill of sale, or a mortgage of his interest in the brig *Nereus*, then at sea, as collateral security for the repayment of the money. The sum requested was lent; and on the 11th of January the said Rousmanier executed two notes for the amount; and on the 15th of the same month, he executed a power of attorney, authorizing the plaintiff to make and execute a bill of sale of three-fourths of the said vessel to himself, or to any other person; and in the event of the said vessel, or her freight, being lost, to collect the money which should become due on a policy by which the vessel and freight were insured. This instrument contained also, a proviso, reciting, that the power was given for collateral security for the payment of the notes already mentioned, and was to be void on their payment; on the failure to do which, the plaintiff was to pay the amount thereof, and all expenses, out of the proceeds of the said property, and to return the residue to the said Rousmanier. The bill further stated, that on the 21st of March, 1820, the plaintiff lent to the said Rousmanier the additional sum of \$700, taking his note for payment, and a similar power to dispose of his interest in the schooner *Industry*, then also at sea. The bill then charged, that on the 6th of May, 1820, the said Rousmanier died insolvent, having paid only \$200 on the said notes. The plaintiff gave notice of his claim; and on the return of the *Nereus* and *Industry*, took possession of them, and offered the intestate's interest in them, for sale. The defendants forbade the sale; and this bill was brought to compel them to join in it. The defendants demurred generally, and the court sustained the demurrer; but gave the plaintiff leave to amend his bill. *Hunt v. Ennis*, 2 Mason, 244, Fed. Cas. No. 6,889.

The amended bill stated, that it was expressly agreed between the parties, that Rousmanier was to give specific security on the *Nereus* and *Industry*; and that he offered to execute a mortgage on them. That counsel was consulted on the subject, who advised, that a power of attorney, such as was actually executed, should be taken in preference to a mortgage, because it was equally valid and effectual as a security, and would prevent the necessity of changing the papers of the vessels, or of taking possession of them on their arrival in port. The powers were, accordingly, executed, with the full belief that they would, and with the intention that they should, give the plaintiff

as full and perfect security as would be given by a deed of mortgage. The bill prayed, that the defendants might be decreed to join in a sale of the interest of their intestate in the *Nereus* and *Industry*, or to sell the same themselves, and pay out of the proceeds the debt due to the plaintiff. To this amended bill, also, the defendants demurred, and on argument, the demurrer was sustained, and the bill dismissed. From this decree, the plaintiff appealed to this court. The cause was argued at the last term.

Mr. Wheaton, for appellant. Mr. Hunter, for respondents.

MARSHALL, C. J., delivered the opinion of the court. The counsel for the appellant objects to the decree of the circuit court on two grounds. He contends, 1. That this power of attorney does, by its own operation, entitle the plaintiff, for the satisfaction of his debt, to the interest of Rousmanier in the *Nereus* and the *Industry*. 2. Or, if this be not so, that a court of chancery will, the conveyance being defective, lend its aid to carry the contract into execution, according to the intention of the parties.

1. We will consider the effect of the power of attorney. This instrument contains no words of conveyance or of assignment, but is a simple power to sell and convey. As the power of one man to act for another, depends on the will and license of that other, the power ceases, when the will, or this permission, is withdrawn. The general rule, therefore, is, that a letter of attorney may, at any time, be revoked by the party who makes it; and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable, in terms, or if not so, is deemed irrevocable in law. 2 Esp. 565. Although a letter of attorney depends, from its nature, on the will of the person making it, and may, in general, be recalled at his will; yet, if he binds himself, for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousmanier, therefore, could not, during his life, by any act of his own, have revoked this letter of attorney. But does it retain its efficacy after his death? We think, it does not. We think it well settled, that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death.

This principle is asserted in *Littleton* (section 66), by Lord Coke, in his commentary on that section (52b), and in *Willes' Reports* (105, note, and 565). The legal reason of the rule is a plain one. It seems founded on the presumption, that the substitute acts by virtue of the authority of his principal, existing at the time the act is performed;

and on the manner in which he must execute his authority, as stated in *Combes' Case*, 9 Coke, 766. In that case, it was resolved, that "when any has authority, as attorney, to do any act, he ought to do it in his name who gave the authority." The reason of this resolution is obvious. The title can, regularly, pass out of the person in whom it is vested, only by a conveyance in his own name; and this cannot be executed by another for him, when it could not, in law, be executed by himself. A conveyance in the name of a person, who was dead at the time, would be a manifest absurdity.

This general doctrine, that a power must be executed in the name of a person who gives it, a doctrine founded on the nature of the transaction, is most usually engrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do, in the name of his principal. He is put in the place and stead of his principal, and is to act in his name. This accustomed form is observed in the instrument under consideration. Hunt is constituted the attorney, and is authorized to make, and execute, a regular bill of sale, in the name of Rousmanier. Now, as an authority must be pursued, in order to make the act of the substitute the act of the principal, it is necessary, that this bill of sale should be in the name of Rousmanier; and it would be a gross absurdity, that a deed should purport to be executed by him, even by attorney, after his death; for, the attorney is in the place of the principal, capable of doing that alone which the principal might do.

This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an "interest," it survives the person giving it, and may be executed after his death. As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire, what is meant by the expression, "a power coupled with an interest?" Is it an interest in the subject on which the power is to be exercised? or is it an interest in that which is produced by the exercise of the power? We hold it to be clear, that the interest which can protect a power, after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. The words themselves would seem to import this meaning. "A power coupled with an interest," is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word "interest," an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases, when the interest commences, and therefore,

cannot, in accurate law language, be said to be "coupled" with it.

But the substantial basis of the opinion of the court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid, if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest, or estate, passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him, by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal, acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected, without violating any legal principle.

This idea may be in some degree illustrated by examples of cases in which the law is clear, and which are incompatible with any other exposition of the term "power coupled with an interest." If the word "interest," thus used, indicated a title to the proceeds of the sale, and not a title to the thing to be sold, then a power to A., to sell for his own benefit, would be a power coupled with an interest; but a power to A., to sell for the benefit of B., would be a naked power, which could be executed only in the life of the person who gave it. Yet, for this distinction, no legal reason can be assigned. Nor is there any reason for it in justice; for, a power to A., to sell for the benefit of B., may be as much a part of the contract on which B. advances his money, as if the power had been made to himself. If this were the true exposition of the term, then a power to A., to sell for the use of B., inserted in a conveyance to A., of the thing to be sold, would not be a power coupled with an interest, and, consequently, could not be exercised, after the death of the person making it; while a power to A., to sell and pay a debt to himself, though not accompanied with any conveyance which might vest the title in him, would enable him to make the conveyance, and to pass a title, not in him, even after the vivifying principle of the power had become extinct. But every day's experience teaches us, that the law is not, as the first case put would suppose. We know, that a power to A., to sell for the benefit of B., engrafted on an estate conveyed to

A., may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given had no interest in its exercise. His power is coupled with an interest in the thing, which enables him to execute it in his own name, and is, therefore, not dependent on the life of the person who created it.

The general rule, that a power of attorney, though irrevocable by the party, during his life, is extinguished by his death, is not affected by the circumstance, that testamentary powers are executed after the death of the testator. The law, in allowing a testamentary disposition of property, not only permits a will to be considered as a conveyance, but gives it an operation which is not allowed to deeds which have their effect during the life of the person who executes them. An estate given by will may take effect at a future time, or on a future contingency, and in the meantime, descends to the heir. The power is, necessarily, to be executed after the death of the person who makes it, and cannot exist during his life. It is the intention, that it shall be executed after his death. The conveyance made by the person to whom it is given, takes effect by virtue of the will, and the purchaser holds his title under it. Every case of a power given in a will, is considered in a court of chancery as a trust for the benefit of the person for whose use the power is made, and as a devise or bequest to that person.

It is, then, deemed perfectly clear, that the power given in this case, is a naked power, not coupled with an interest, which, though irrevocable by Rousmanier himself, expired on his death. It remains to inquire, whether the appellant is entitled to the aid of this court, to give effect to the intention of the parties, to subject the interest of Rousmanier in the *Nereus* and *Industry* to the payment of the money advanced by the plaintiff, on the credit of those vessels, the instrument taken for that purpose having totally failed to effect its object.

This is the point on which the plaintiff most relies, and is that on which the court has felt most doubt. That the parties intended, the one to give, and the other to receive, an effective security on the two vessels mentioned in the bill, is admitted; and the question is, whether the law of this court will enable it to carry this intent into execution, when the instrument relied on by both parties has failed to accomplish its object. The respondents insist, that there is no defect in the instrument itself; that it contains precisely what it was intended to contain, and is the instrument which was chosen by the parties, deliberately, on the advice of counsel, and intended to be the consummation of their agreement. That in such a case the written agreement cannot be varied by parol testimony. The counsel for the appellant contends, with great force, that the cases

in which parol testimony has been rejected, are cases in which the agreement itself has been committed to writing; and one of the parties has sought to contradict, explain or vary it, by parol evidence. That in this case, the agreement is not reduced to writing. The power of attorney does not profess to be the agreement, but is a collateral instrument, to enable the party to have the benefit of it, leaving the agreement still in full force, in its original form. That this parol agreement, not being within the statute of frauds, would be enforced by this court, if the power of attorney had not been executed; and not being merged in the power, ought now to be executed. That the power being incompetent to its object, the court will enforce the agreement against general creditors. This argument is entitled to, and has received, very deliberate consideration.

The first inquiry respects the fact. Does this power of attorney purport to be the agreement? Is it an instrument collateral to the agreement? Or is it an execution of the agreement itself, in the form intended by both the parties? The bill states an offer on the part of Rousmanier to give a mortgage on the vessels, either in the usual form, or in the form of an absolute bill of sale, the vendor taking a defeasance; but does not state any agreement for that particular security. The agreement stated in the bill is, generally, that the plaintiff, in addition to the notes of Rousmanier, should have specific security on the vessel; and it alleges that the parties applied to counsel for advice respecting the most desirable mode of taking this security. On a comparison of the advantages and disadvantages of a mortgage, and an irrevocable power of attorney, counsel advised the latter instrument, and assigned reasons for his advice, the validity of which being admitted by the parties, the power of attorney was prepared and executed, and was received by the plaintiff as full security for his loans. This is the case made by the amended bill; and it appears to the court, to be a case in which the notes and power of attorney are admitted to be a complete consummation of the agreement. The thing stipulated was a collateral security on the *Nereus* and *Industry*. On advice of counsel, this power of attorney was selected, and given as that security. We think it a complete execution of that part of the agreement; as complete, though not as safe an execution of it, as a mortgage would have been.

It is contended, that the letter of attorney does not contain all the terms of the agreement. Neither would a bill of sale, nor a deed of mortgage, contain them. Neither instrument constitutes the agreement itself, but is that for which the agreement stipulated. The agreement consisted of a loan of money on the part of Hunt, and of notes for its repayment, and of a collateral security on the *Nereus* and *Industry*, on the part of Rousmanier. The money was advanced, the

notes were given, and this letter of attorney was, on advice of counsel, executed and received as the collateral security which Hunt required. The letter of attorney is as much an execution of that part of the agreement which stipulated a collateral security, as the notes are an execution of that part which stipulated that notes should be given.

But this power, although a complete security, during the life of Rousmanier, has been rendered inoperative by his death. The legal character of the security was misunderstood by the parties. They did not suppose, that the power would, in law, expire with Rousmanier. The question for the consideration of the court is this: If money be advanced on a general stipulation to give security for its repayment on a specific article; and the parties deliberately, on advice of counsel, agree on a particular instrument, which is executed, but, from a legal quality inherent in its nature, that was unknown to the parties, becomes extinct by the death of one of them; can a court of equity direct a new security of a different character to be given? or direct that to be done which the parties supposed would have been effected by the instrument agreed on between them? This question has been very elaborately argued, and every case has been cited which could be supposed to bear upon it. No one of these cases decides the very question now before the court. It must depend on the principles to be collected from them.

It is a general rule, that an agreement in writing, or an instrument carrying an agreement into execution, shall not be varied by parol testimony, stating conversations or circumstances anterior to the written instrument. This rule is recognized in courts of equity as well as in courts of law; but courts of equity grant relief in cases of fraud and mistake, which cannot be obtained in courts of law. In such cases, a court of equity may carry the intention of the parties into execution, where the written agreement fails to express that intention. In this case, there is no ingredient of fraud. Mistake is the sole ground on which the plaintiff comes into court; and that mistake is in the law. The fact is, in all respects, what it was supposed to be. The instrument taken, is the instrument intended to be taken. But it is, contrary to the expectation of the parties, extinguished by an event not foreseen nor adverted to, and is, therefore, incapable of effecting the object for which it was given. Does a court of equity, in such a case, substitute a different instrument for that which has failed to effect its object?

In general, the mistakes against which a court of equity relieves, are mistakes in fact. The decisions on this subject, though not always very distinctly stated, appear to be founded on some misconception of fact. Yet some of them bear a considerable analogy to that under consideration. Among these, is

that class of cases in which a joint obligation has been set up in equity against the representatives of a deceased obligor, who were discharged at law. If the principle of these decisions be, that the bond was joint, from a mere mistake of the law, and that the court will relieve against this mistake, on the ground of the pre-existing equity, arising from the advance of the money, it must be admitted, that they have a strong bearing on the case at bar. But the judges in the courts of equity seem to have placed them on mistake in fact, arising from the ignorance of the draftsman. In *Simpson v. Vaughan*, 2 Atk. 33, the bond was drawn by the obligor himself, and under circumstances which induced the court to be of opinion, that it was intended to be joint and several. In *Underhill v. Horwood*, 10 Ves. 209, 227, Lord Eldon, speaking of cases in which a joint bond has been set up against the representatives of a deceased obligor, says, "the court has inferred, from the nature of the condition, and the transaction, that it was made joint, by mistake. That is, the instrument is not what the parties intended in fact. They intended a joint and several obligation; the scrivener has, by mistake, prepared a joint obligation."

All the cases in which the court has sustained a joint bond against the representatives of the deceased obligor, have turned upon a supposed mistake in drawing the bond. It was not until the case of *Sumner v. Powell*, 2 Mer. 36, that anything was said by the judge who determined the cause, from which it might be inferred, that relief in these cases would be afforded on any other principle than mistake in fact. In that case, the court refused its aid, because there was no equity antecedent to the obligation. In delivering his judgment, the master of the rolls (Sir W. Grant) indicated very clearly an opinion, that a prior equitable consideration, received by the deceased, was indispensable to the setting up of a joint obligation against his representatives; and added, "so, where a joint bond has, in equity, been considered as several, there has been a credit previously given to the different persons who have entered into the obligation." Had this case gone so far as to decide, that "the credit previously given" was the sole ground on which a court of equity would consider a joint bond as several, it would have gone far to show, that the equitable obligation remained, and might be enforced, after the legal obligation of the instrument had expired. But the case does not go so far; it does not change the principle on which the court had uniformly proceeded, nor discard the idea, that relief is to be granted, because the obligation was made joint, by a mistake in point of fact. The case only decides, that this mistake, in point of fact, will not be presumed by the court, in a case where no equity existed antecedent to the obligation,

where no advantage was received by, and no credit given to, the person against whose estate the instrument is to be set up. Yet, the course of the court seems to be uniform, to presume a mistake, in point of fact, in every case where a joint obligation has been given, and a benefit has been received by the deceased obligor. No proof of actual mistake is required; the existence of an antecedent equity is sufficient. In cases attended by precisely the same circumstances, so far as respects mistake, relief will be given against the representatives of a deceased obligor, who had received the benefit of the obligation, and refused against the representatives of him who had not received it. Yet the legal obligation is as completely extinguished in the one case as in the other; and the facts stated, in some of the cases in which these decisions have been made, would rather conduce to the opinion, that the bond was made joint, from ignorance of the legal consequences of a joint obligation, than from any mistake in fact.

The case of *Lansdown v. Lansdown*, Mos. 364, if it be law, has no inconsiderable bearing on this cause. The right of the heir-at-law was contested by a younger member of the family, and the arbitrator to whom the subject was referred decided against him. He executed a deed in compliance with this award, and was afterwards relieved against it, on the principle that he was ignorant of his title. The case does not suppose this fact, that he was the eldest son, to have been unknown to him; and if he was ignorant of anything, it was of the law, which gave him, as eldest son, the estate he had conveyed to a younger brother. Yet he was relieved in chancery against this conveyance. There are certainly strong objections to this decision in other respects; but, as a case in which relief has been granted on a mistake in law, it cannot be entirely disregarded.

Although we do not find the naked principle, that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided, that a plain and acknowledged mistake in law is beyond the reach of equity. In the case of *Lord Irnham v. Child*, 1 Brown, Ch. 91, application was made to the chancellor to establish a clause, which had been, it was said, agreed upon, but which had been considered by the parties, and excluded from the written instrument, by consent. It is

true, they excluded the clause, from a mistaken opinion that it would make the contract usurious, but they did not believe that the legal effect of the contract was precisely the same as if the clause had been inserted. They weighed the consequences of inserting and omitting the clause, and preferred the latter. That, too, was a case to which the statute applied. Most of the cases which have been cited were within the statute of frauds, and it is not easy to say, how much has been the influence of that statute on them.

The case cited by the respondent's counsel from *Precedents in Chancery*, is not of this description; but it does not appear from that case that the power of attorney was intended, or believed, to be a lien. In this case, the fact of mistake is placed beyond any controversy. It is averred in the bill, and admitted by the demurrer, that "the powers of attorney were given by the said Rousmanier, and received by the said Hunt, under the belief that they were, and with the intention that they should create, a specific lien and security on the said vessels." We find no case which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say, that a court of equity is incapable of affording relief. The decree of the circuit court is reversed; but as this is a case in which creditors are concerned, the court, instead of giving a final decree on the demurrer, in favor of the plaintiff, directs the cause to be remanded, that the circuit court may permit the defendants to withdraw their demurrer, and to answer the bill.

Decree: This cause came on to be heard, on the transcript of the record of the circuit court of the United States for the district of Rhode Island, and was argued by counsel: on consideration whereof, this court is of opinion, that the said circuit court erred, in sustaining the demurrer of the defendants, and dismissing the bill of the complainant. It is, therefore, decreed and ordered, that the decree of the said circuit court in this case be, and the same is hereby, reversed and annulled. And it is further ordered, that the said cause be remanded to the said circuit court, with directions to permit the defendants to withdraw their demurrer, and to answer the bill of the complainants.

HUNT v. ROUSMANIERE'S ADM'RS.
(1 Peters, 1.)

Supreme Court of the United States. January Term, 1828.

(See ante, 170.)

Appeal from the circuit court of Rhode Island. The appellant filed a bill on the chancery side of the circuit court of the United States for the district of Rhode Island, setting forth that, in January, 1820, Louis Rousmaniere obtained from him two loans of money, amounting, together, to \$2,150; and at the time the first loan was made, Rousmaniere offered to give, in addition to his notes, a bill of sale, or mortgage, of his interest in the brig Nereus, then at sea, as a collateral security for the repayment of the money. A few days after the delivery of the first note, dated 11th of January, 1820, he executed a power of attorney, authorizing the plaintiff to make and execute a bill of sale, of three-fourths of the Nereus, to himself, or to any other person; and in the event of the loss of the vessel, to collect the money which should become due on a policy, by which the vessel and freight were insured. In the power of attorney, it was recited that it was given as collateral security for the payment of the notes, and was to be void on their payment; on the failure of which, the plaintiff was to pay the amount and all expenses, and to return the residue to Rousmaniere. On the 21st of March, 1821, an additional sum of \$700 was loaned, for which a note was taken, and similar power of attorney given, to sell his interest in the schooner Industry; this vessel being also still at sea.

On the 6th of May, 1820, Rousmaniere died intestate and insolvent, having paid \$200 on account of the notes; and the plaintiff gave notice of his claim to the commissioners of insolvency, appointed under the authority of the insolvent law of Rhode Island. The plaintiff, in his bill, alleged, that, on the return of the Nereus and Industry, he took possession of them, and offered the interest of the intestate in them, for sale; and the defendants having forbidden the sale, this bill was brought to compel them to join in it.

To this bill, the defendants demurred; and their demurrer was sustained in the circuit court; but leave was given to the plaintiff to amend. An amended bill was then filed, in which it was stated, that it was expressly agreed between the parties, that Rousmaniere was to give specific security on the Nereus and Industry, and that he offered to execute a mortgage on them. Counsel was consulted on the subject, who advised that the power of attorney, which was actually executed, should be taken in preference to a mortgage, because it was equally valid and effectual as a security, and would prevent the necessity of changing the papers of the vessels, or of taking possession of them on their return to port. These securities

were, it was alleged, executed, with a full belief that they would, and with intention that they should, give to the plaintiff, as full and perfect a security, as would be given by a mortgage.

The defendants having also demurred to the amended bill, the circuit court decided in favor of the demurrer, and dismissed the bill; and an appeal was entered to this court. At the February session, 1823, this court considered that the appellant might be entitled to the relief prayed for in equity, but the respondents were permitted to withdraw their demurrer, and to file an answer in the court below. 8 Wheat. 174, 5 L. Ed. 589. The answer of the defendants admitted the loans of money, and the delivery of the promissory notes, and that but \$200 were paid, before the death of the intestate. The execution of the powers of attorney was also admitted, but it was denied that possession of the vessels was taken by the appellant; and they alleged their resistance of the attempt to take possession of them. The answer also asserted ignorance of any agreement for a specific lien on the vessels, except that imported by the language of the powers of attorney; that they had heard and believed, that the appellant meant to be concerned, as a partner, in a voyage of one of the vessels, which was relinquished, and that afterwards he offered to loan the money on security; upon which, the intestate offered to give a mortgage, but the appellant preferred taking the powers of attorney, to avoid inconvenience, and took the powers of attorney, by advice of counsel. The answer also stated, that a bill of sale of the vessels, dated the day before the death of the intestate, by which the vessels were intended to be conveyed to one Bateman, and which the respondents stated, they had heard and believed; was intended to be executed on the evening of that day. The answer also alleged the insolvency of Rousmaniere, and that it existed a long time before his death; which they asserted must have been known to the appellant, and that the intestate resorted to improper modes to keep up his credit.

The evidence taken in the case, consisted of the deposition of Mr. Hazard, the counsel who drew the papers, and in which he stated, that they were intended by both parties to have the effect of a specific lien or mortgage, and he advised them, they would have that effect; and also the deposition of Mr. Merchant, to show that the appellant admitted, that the motive by which he was induced to make the loan, was to compensate Rousmaniere for the disappointment sustained by his not uniting with him in a voyage of one of his vessels; and, accordingly, an agreement was made, by which the appellant was to let Rousmaniere have a sum of money, and that he was to give a bill of sale of a certain vessel; but that afterwards he refused to take the same, on account of the inconvenience and difficulties which

might attend the same; and that he had consulted with Mr. Hazard, upon the subject, who told him, that he could or would draw an irrevocable power of attorney to sell, which would do as well, or words to that effect; and which was accordingly done.

The circuit court pronounce a decree, declaring, that the appellant had no specific lien or security upon either of the vessels, and no equity to be relieved respecting them, and dismissing the bill, with costs; from which decree, an appeal was entered to this court.

On the part of the appellant, it was contended, that the decree ought to be reversed, and a decree entered for the appellant. That the answers to the bill did not respond to the only material facts in the cause; it being fully proved, that the powers of attorney were intended to have the effect of a specific lien, the appellant was entitled to the relief he sought, upon the principles laid down in the former decisions of this court.

Kimball & Webster, for appellant. Mr. Wirt, Atty. Gen., and Mr. Robbins, for appellees.

WASHINGTON, J. This case was before this court in the year 1823, and is reported in 8 Wheat. 174, 5 L. Ed. 589, and was then argued at great length, by the counsel concerned in it. After full consideration, it was decided, that the power of attorney given by Rousmaniere, the intestate, to the appellant, Hunt, authorizing him to make and execute a bill of sale of three-fourths of the *Nereus* and of the *Industry*, to himself, or any other person, and in the event of their being lost, to collect the money which should become due under a policy upon them and their freight, was a naked power, not coupled with an interest, which, though irrevocable by Rousmaniere, in his lifetime, expired on his death.

That this species of security was agreed upon, and given under a misunderstanding by the parties, of its legal character, was conceded in the argument of the cause by the bar and bench; and the second question for the consideration of the court, was, whether a court of equity could afford relief in such a case, by directing a new security of a different character to be given? or by decreeing that to be done, which the parties supposed would have been effected by the instrument agreed upon? After an examination of the cases, applicable to the general question, it was stated by the chief justice, who delivered the opinion of the court, that none of them asserted the naked principle, that relief could be granted, on the ground of ignorance of law, or decided, that a plain and acknowledged mistake in law, was beyond the reach of a court of equity. The conclusion, to which he came, is expressed in the following terms: "We find no case which we think precisely in point; and are unwilling, where the effect of the instru-

ment is acknowledged to have been entirely misunderstood, by both parties, to say, that a court of equity is incapable of affording relief." The decree was, accordingly, reversed; but the case being one in which creditors were concerned, the court, instead of giving a final decree on the demurrer, in favor of the plaintiff, directed the cause to be remanded, that the circuit court might permit the defendants to withdraw their demurrer, and to answer the bill.

After the cause was returned to that court, the demurrer was withdrawn, and an answer was filed, in which the defendants, after admitting the loans mentioned in the bills, by the plaintiff to their intestate, and the notes given for the same, by the latter, and their non-payment; assert their ignorance of any agreement between the plaintiff and their intestate, that the former should have a specific security, other than the powers of attorney, to sell vessels and to collect the proceeds, or, the amount of the policies, in case they should be lost; but express their belief, that the powers of attorney were selected by the plaintiff, in preference to the other securities, which were offered by the intestate. The answer further states, that the estate of Rousmaniere is greatly insolvent, and had been so before his death; that the plaintiff had exhibited and proved his demand, as stated in his bill, before the commissioners of insolvency, duly appointed upon the estate of Rousmaniere; and that his dividend thereon declared, or to be declared, the defendants were, and would be ready to pay according to law.

The principal deposition, taken in the cause, is that of Benjamin Hazard, counselor at law, who deposes, that he drew the powers of attorney, annexed to the original bill; that on the day the first power was executed, Hunt and Rousmaniere came to his office, when the latter stated, that the former had loaned, or agreed to loan, to him, a sum of money, upon security to be given by him, on his interest in the brig *Nereus*, and that he was desirous the security should be as ample and available to Hunt, as it could be made; that he wished and was ready, to give a bill of sale of the property, or a mortgage on it, or any other security, which Mr. Hunt might prefer. Both the parties declared, that they had called upon the witness, to request him to draw the writings, and to obtain his opinion, as to the kind of instrument which would give the most perfect security to the lender. That the deponent then told the parties, that a bill of sale, or mortgage, would be good security, but that an irrevocable power of attorney, such as was afterwards executed, would be as effectual and good security, as either of the others; and would prevent the necessity of changing the vessel's papers, and of Hunt's taking possession of the vessel, upon her arrival from sea. That the parties then requested him to draw such an instrument, as, in his opinion, would

most effectually and fully secure Mr. Hunt; and that the plaintiff frequently asked him, whilst he was drawing the power, and after he had finished, and read it to the parties, if he was quite certain, that the power would be as safe and available to him, as a bill of sale or mortgage, and that upon his assurances that it was, it was then executed. The witness then proceeds to express his opinion, from his knowledge of the parties, and from their declaration at the time, that Rousmaniere would readily have given an absolute bill of sale of the property or any other security which could have been asked; and that Hunt would not have accepted the one which was afterwards executed, if he had not considered it to be as extensive and perfect a security, in all respects, as an absolute bill of sale; and he adds, more positively, that such was the understanding and agreement of both the parties. It appears, by the testimony of this witness, that he drew the power of attorney concerning the Industry, for securing the second loan made by the plaintiff to Rousmaniere, and that the circumstances attending that transaction, were essentially the same as those which have been stated, in respect to the first loan.

We find another deposition in the record, which deserves to be noticed, as it consists of declarations, made by the plaintiff, after the powers of attorney were executed, and may serve, in some measure, to explain the more positive testimony given by Mr. Hazard. This witness, William Merchant, deposes, that after the decease of Rousmaniere, the plaintiff stated to him, and to a Mr. Rhodes, that in consequence of his declining to engage in an enterprise in one of the vessels of Rousmaniere, to which he had at one time consented, and of the complaints of Rousmaniere, on that account, he was induced to offer to Rousmaniere a loan of money. That an agreement was accordingly made, by which he, Hunt, was to let Rousmaniere have a certain sum on loan, and Rousmaniere was to give him a bill of sale of a certain vessel; but that, afterwards, Hunt, reflecting, that if he took that security, he would have to take out papers at the custom-house, in his own name, be subject to give bonds for the vessel, and perhaps, be made liable for breaches of law committed by others, he consulted with Mr. Hazard upon the subject; who told him, that he could, or would, draw an irrevocable power of attorney to sell, which would do as well, and which was accordingly done.

The cause coming on to be heard in the court below, and that court being of opinion, that the plaintiff had no lien or specific security upon these vessels, and no equity to have such lien or security created, against the general creditors of Rousmaniere, dismissed the bill; from which decree, the cause has been brought, by appeal, to this court. It must be admitted, that the case, as it is now presented to the court, is not materially variant from that which we for-

merly had to consider; except in relation to the rights of the general creditors, against the insolvent estate of a deceased debtor, in opposition to the equity which a particular creditor seeks, by this bill, to set up. The allegations of the bills, filed in this cause, which were, on the former occasion admitted by the demurrer to be true, are now fully proved, by the testimony taken in the cause.

Before proceeding to state the general question, to which the facts in this case give rise, or the principles of equity which apply to it, it will be necessary, distinctly, to ascertain, what was the real agreement concluded upon between the plaintiff and the intestate, the performance of which, on the part of the latter, was intended to be secured by the powers of attorney? Was it, that Rousmaniere should, in addition to his notes for the money agreed to be loaned to him by the plaintiff, give a specific and available security on the Nereus and the Industry, or was the particular kind of security selected by the parties, and did it constitute a part of the agreement? It is most obvious, from the plaintiff's own statement, in his amended bill, as well as from the depositions appearing in the record, that the agreement was not closed, until the interview between the parties to it, with Mr. Hazard, had taken place. The amended bill states, that the specific security which Rousmaniere offered to give, was a mortgage of the two vessels, for which irrevocable powers of attorney were substituted, by the advice of Mr. Hazard, and for reasons, which it would seem, were approved of and acted upon by the plaintiff. From the testimony of Mr. Merchant, it would appear, that the security proposed by Rousmaniere was a bill of sale of the vessels, which the plaintiff declined accepting, for reasons of his own, uninfluenced by any suggestions of Mr. Hazard, who merely proposed the powers of attorney as a substitute for the other forms of security which had been offered by Rousmaniere. The difference between these statements is not very material, since it is apparent, from both of them, that the proposed security, by irrevocable powers of attorney, was selected by the plaintiff, and incorporated into the agreement, by the assent of both the parties. The powers of attorney do not contain, nor do they profess to contain, the agreement of the parties; but was a mere execution of that agreement, so far as it stipulated to give to the plaintiff, a specific security on the two vessels, in the mode selected and approved of by the parties; to which extent, it was a complete consummation of the agreement. Such was the opinion of this court, upon a former discussion of this cause, in the year 1823, and such is its present opinion. Upon this state of the case, the general question to be decided, is the same now that it formerly was, and is that which has already been stated.

There are certain principles of equity, applicable to this question, which, as general

principles, we hold to be incontrovertible. The first is, that where an instrument is drawn and executed, which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfil, or which violates, the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. The reason is obvious: the execution of agreements, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and if the instrument which is intended to execute the agreement, be, from any cause, insufficient for that purpose, the agreement remains as much unexecuted, as if one of the parties had refused, altogether, to comply with his engagement; and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case, as well as in the other, by compelling the delinquent party fully to perform his agreement, according to the terms of it, and to the manifest intention of the parties. So, if the mistake exist, not in the instrument, which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a court of equity will, in general, grant relief, according to the nature of the particular case in which it is sought. Whether these principles, or either of them, apply to the present case, must, of course, depend upon the real character of the agreement under consideration. It has been correctly stated, it follows, that the instrument, by means of which the specific security was to be given, was selected by the parties to the agreement, or rather by the plaintiff; Rousmaniere having proposed to give a mortgage or bill of sale of the vessels, which the plaintiff, after consideration, and advice of counsel, thought proper to reject, for reasons which were entirely satisfactory to himself. That the form of the instrument, so chosen by the plaintiff, and prepared by the person who drew it, conforms not, in every respect, to the one agreed upon, is not even asserted in the bill, or in the argument of counsel. The avowed object of the plaintiff was, to obtain a valid security, but in such a manner, as that the legal interest in the property should remain with Rousmaniere, so that the plaintiff might be under no necessity to take out papers at the custom-house, in his own name, and might not be subject to give bonds for the vessels, or to liabilities for breaches of law, committed by those who were intrusted with the management of them. That the general intention of the parties was, to provide a security, as effectual as a mortgage of the vessels would be, can admit of no doubt; and if such had been their agreement, the insufficiency of the instruments to effect that object, which were afterwards prepared, would

have furnished a ground for the interposition of a court of equity, which the representatives of Rousmaniere could not easily have resisted. But the plaintiff was not satisfied to leave the kind of security which he was willing to receive, undetermined; having finally made up his mind, by the advice of his counsel, not to accept of a mortgage, or bill of sale, in nature of a mortgage. He thought it safest, therefore, to designate the instrument; and having deliberately done so, it met the view of both parties, and was as completely incorporated into their agreement, as were the notes of hand for the sum intended to be secured. In coming to this determination, it is not pretended, that the plaintiff was misled by ignorance of any fact, connected with the agreement which he was about to conclude. If, then, the agreement was not founded in a mistake of any material fact, and if it was executed in strict conformity with itself; we think it would be unprecedented, for a court of equity to decree another security to be given, not only different from that which had been agreed upon, but one which had been deliberately considered and rejected by the party now asking for relief; or to treat the case, as if such other security had in fact been agreed upon and executed. Had Rousmaniere after receiving the money agreed to be loaned to him, refused to give an irrevocable power of attorney, but offered to execute a mortgage of the vessels, no court of equity could have compelled the plaintiff to accept the security so offered. Or, if he had totally refused to execute the agreement, and the plaintiff had filed his bill, praying that the defendant might be compelled to execute a mortgage, instead of an irrevocable power of attorney; could that court have granted the relief specifically asked for? We think not. Equity may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and in its exercise, is highly beneficial to society; the latter is without its authority, and the exercise of it would be not only an usurpation of power, but would be highly mischievous in its consequences.

If the court could not have compelled the plaintiff to accept, or Rousmaniere to execute, any other instrument than the one which had been agreed upon between them, the case is in no respect altered, by the death of the latter, and the consequent inefficiency of the particular security which had been selected; the objection to the relief asked for, being in both cases the same, namely, that the court can only enforce the performance of an agreement, according to its terms, and to the intention of the parties; and cannot force upon them a different agreement. That the intention of the parties to this agreement, was frustrated, by the happening of an event, not thought

of, probably, by them, or by the counsel who was consulted upon the occasion, is manifest. The kind of security which was chosen, would have been equally effectual, for the purpose intended, with a mortgage, had Rousmaniere lived until the power had been executed; and it may, therefore, admit of some doubt, at least, whether the loss of the intended security is to be attributed to a want of foresight, in the parties, or to a mistake of the counsel, in respect to a matter of law. The case will, however, be considered in the latter point of view.

The question, then, is, ought the court to grant the relief which is asked for, upon the ground of mistake arising from any ignorance of law? We hold the general rule to be, that a mistake of this character is not a ground for reforming a deed founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their characters.

The strongest case which was cited and relied upon by the appellant's counsel, was that of *Lansdown v. Lansdown*, reported in Mos. 364. Admitting, for the present, the authority of this case, it is most apparent, from the face of it, that the decision of the court might well be supported, upon a principle not involved in the question we are examining. The subject which the court had to decide, arose out of a dispute between an heir-at-law, and a younger member of the family, who was entitled to an estate descended; and this question the parties agreed to submit to arbitration. The award being against the heir-at-law, he executed a deed in compliance with it, but was relieved against it, on the principle, that he was ignorant of his title. If the decision of the court proceeded upon the ground, that the plaintiff was ignorant of the fact that he was the eldest son, it was clearly a case proper for relief, upon a principle which has already been considered. If the mistake was of his legal rights, as heir-at-law, it is not going too far, to presume, that the opinion of the court may have been founded upon the belief, that the heir-at-law was imposed upon by some unfair representations of his better informed opponent; or that his ignorance of a legal principle, so universally understood by all, where the right of primogeniture forms a part of the law of descents, demonstrated a degree of mental imbecility, which might well entitle him to relief. He acted, besides, under the pressure of an award, which was manifestly repugnant to law, and for aught that is stated in this case, this may have appeared upon the face of it. But if this case must be considered as an exception from the general rule which has been mentioned; the circumstances attending it, do not entitle it, were it otherwise objectionable, to be respected as an authority, but in cases which it closely resembles.

There is a class of cases which, it has been supposed, forms an exception from this

general rule, but which will be found, upon examination, to come within the one which was first stated. The cases alluded to, are those in which equity has afforded relief against the representatives of a deceased obligor, in a joint bond, given for money lent to both the obligors, although such representatives were discharged at law. The principle upon which these cases manifestly proceed, is, that the money being lent to both, the law raises a promise in both to pay, and equity considers the security of the bond as being intended, by the parties, to be co-extensive with this implied contract by both to pay the debt. To effect this intention, the bond should have been made joint and several; and the mistake in the form, by which it is made joint, is not in the agreement of the parties, but in the execution of it by the draftsman. The cases in which the general rule has been adhered to, are, many of them, of a character which strongly test the principle upon which the rule itself is founded. Two or three only need be referred to. If the obligee, in a joint bond, by two or more, agree with one of the obligors, to relieve him from his obligation, and does accordingly execute a release, by which all the obligors are discharged at law, equity will not afford relief against this legal consequence, although the release was given under a manifest misapprehension of the legal effect of it, in relation to the other obligors. So, in the case of *Worrall v. Jacob*, 3 Merv. 271, where a person having a power of appointment and revocation, and, under a mistaken supposition, that a deed might be altered or revoked, although no power of revocation had been reserved, executed the power of appointment, without reserving a power of revocation; the court refused to relieve against the mistake. The case of *Lord Irnham v. Child*, 1 Brown, Ch. 92, is a very strong one in support of a general rule, and closely resembles the present, in most of the material circumstances attending it. The object of the suit was to set up a clause containing a power of redemption, in a deed granting an annuity, which, it was said, had been agreed upon by the parties, but which, after deliberation, was excluded by consent, from a mistaken opinion, that it would render the contract usurious. The court, notwithstanding the omission manifestly proceeded upon a misapprehension of the parties as to the law, refused to relieve, by establishing the rejected clause.

It is not the intention of the court, in the case now under consideration, to lay it down, that there may not be case in which a court of equity will relieve against a plain mistake, arising from ignorance of law. But we mean to say, that where the parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of

such misapprehension, and the insufficiency of such security, in consequence of a subsequent event, not foreseen, perhaps, or thought of, direct a new security, of a different character, to be given, or decree that to be done, which the parties supposed would have been effected by the instrument which was finally agreed upon.

If the court would not interfere in such a case, generally, much less would it do so in favor of one creditor, against the general creditors of an insolvent estate, whose equity is, at least, equal to that of the party seeking to obtain a preference, and who, in point of law, stand upon the same ground with himself. This is not a bill asking for a specific performance of an agreement to execute a valid deed for securing a debt; in

which case, the party asking relief would be entitled to a specific lien; and the court would consider the debtor as a trustee for the creditor, of the property on which the security was agreed to be given. The agreement has been fully executed, and the only complaint is, that the agreement itself was founded upon a misapprehension of the law, and the prayer is to be relieved against the consequences of such mistake. If all other difficulties were out of the way, the equity of the general creditors to be paid their debts equally with the plaintiff, would, we think, be sufficient to induce the court to leave the parties where the law has placed them. The decree is to be affirmed, with costs.

Decree affirmed.

JORDAN v. STEVENS.

(51 Me. 78.)

Supreme Judicial Court of Maine. 1863.

Suit in equity submitted on bill, answers and proofs.

Howard & Strout, for complainant. E. & F. Fox, for respondents.

DAVIS, J. Jonathan Stevens, the father of the parties to this suit, died in November, 1857, leaving personal property valued at about \$3,000, and real estate worth nearly \$5,000. The plaintiff, being a widow, had worked in his family for many years, receiving therefor one dollar a week. A short time before his death he gave her a life lease of his homestead in Portland, worth about \$2,000, to take effect upon his decease. Whether he did this for the reason that he thought that he had not paid her enough for her services, or because she needed a larger share of the property than the other heirs, does not appear, and is immaterial. He died intestate, leaving seven children, and the issue of another not living.

The property leased to the plaintiff was described as situated "on Chestnut street." After the death of her father, the plaintiff had the lease altered so as to read "Wilmot street." This was done at the suggestion of some of the defendants; and besides, as the property was otherwise sufficiently described, the mistake of the street did not affect the lease, and the alteration was immaterial.

It is contended that the lease was void because it was not to take effect until a future day; but, whatever may have been supposed to be the law in regard to the validity of deeds to take effect in futuro, it is now well settled in this state that such deeds are not for that reason void. *Wyman v. Brown*, 50 Me. 139.

But some of the defendants thought the lease to the plaintiff was invalid, and so informed her. Taking their testimony as true, which we do not question, they did not intentionally deceive her on this point. They actually thought there was a defect of which they could take advantage. She was unlearned in every respect, not being able to write her own name. It is evident that she put confidence in them, believing them to be better informed than herself; and supposing, from their representations, that her title to the homestead, by the lease, had failed, she was induced by them to relinquish all her interest in the whole estate of her father, in consideration of a new life lease from them of the same property embraced in her first lease.

One-eighth of the estate, subject to her life interest in the homestead, must have been worth nearly or quite eight hundred dollars. This she conveyed to them. Their new lease to her was of no value whatever; for the title was already in her. Can she obtain relief in equity?

It is claimed that she has no remedy, be-

cause there was no fraud; and the mistake was not one of fact, but of law.

In this state jurisdiction in equity in cases of "mistake" is expressly conferred by statute; nor is it, in terms, limited to mistakes of fact. The legislature may be presumed to have used the word as generally understood in equity proceedings; and therefore we shall have to inquire whether courts of equity have been accustomed to grant relief in cases like the one before us.

This question has frequently arisen in this country and in England, and authorities are not wanting in both countries in support of the doctrine that no distinction should be made between mistakes of law and mistakes of fact.

It is quite true, as Judge Redfield observes (1 Story, Eq. Jur. § 130, note), "that the distinction between mistakes of law and mistakes of fact, so far as equitable relief is concerned, is one of policy rather than of principle"; and yet it may not be the less necessary to maintain and observe it. No government could be administered at all, under which ignorance of the criminal law should be held a sufficient excuse for violating it; and the same principle is applicable to the civil law. This is not on the ground that every one is presumed to know the law; for, though this is often repeated as an axiom, a presumption so variant from the truth cannot be recognized by the law. The ground on which the doctrine rests is this, that it is impossible to uphold the government, and so to maintain its administration as to protect public and private rights, except on the principle that the rights and liabilities of every one shall be the same as if he knew the law.

If all contracts made in ignorance of the law were to be held invalid, there would be no certainty in business and no security in titles. All rights of property would be endangered, and the most important encouragements for industry and enterprise would be taken away. It is indispensable, therefore, that the obligation of contracts should be maintained, unless there is some stronger reason for annulling them than a mere mistake of the law. *Champlin v. Laytin*, 18 Wend. 407.

This question is discussed at length by Judge Story, and nearly all the English and American authorities are referred to, and many of them examined. 1 Story, Eq. Jur. c. 5 (Redf. Ed.). But while the weight of authority is clearly against granting relief merely on account of a mistake of the law, it seems to be conceded in nearly all the cases, and expressly decided in many of them, that there are exceptions to this rule. *Hunt v. Rousmanier*, 1 Pet. 15; *Bank v. Daniel*, 12 Pet. 32.

Instead of saying that there are "exceptions" to the rule, it would probably be more correct to say that, while relief will never be granted merely on account of the mistake of the law, there are cases where there are

other elements, not in themselves sufficient to authorize the court to interpose, but which, combined with such a mistake, will entitle the party to relief. It is important therefore to inquire what it is that, with a mistake of the law, will justify the interposition of the court, where there is no fraud, or accident, or mistake of fact.

If a party, who himself knows the law, should deceive another, by misrepresenting the law to him, or, knowing him to be ignorant of it, should therein take advantage of him, relief would be granted on the ground of fraud. So that such a case is within neither the rule nor the exception.

It has sometimes been said that when money or other property has been obtained under a mistake of the law, which the defendant ought not in good conscience to retain, he should be compelled to restore it. *Northrup v. Graves*, 19 Conn. 548; *Stedwell v. Anderson*, 21 Conn. 139. This is just as a principle, but entirely indefinite as a rule. It proposes nothing but the opinion of the court in each case, on a matter in regard to which there may be great differences of opinion. It overlooks the public interests involved in maintaining the obligation of contracts. Generally, as between the parties, a mistake of law has as equitable a claim to relief as a mistake of fact.

It is believed that in nearly all such cases, where relief has been granted, in addition to the intrinsic equity in favor of the plaintiff, two facts have been found, (1) that there has been a marked disparity in the position and intelligence of the parties, so that they have not been on equal terms; and (2) that the party obtaining the property persuaded or induced the other to part with it, so that there has been "undue influence" on the one side and "undue confidence" on the other. 1 Story's Eq. 120. When property has been obtained under such circumstances, and by such means, courts of equity have never hesitated to compel its restoration, though both the parties acted under a mistake of the law; and there would be still stronger reasons for granting relief in such a case, if the party from whom the property had been obtained had been led into his mistake of the law by the other party. *Sparks v. White*, 7 Humph. 86; *Fitzgerald v. Peck*, 4 Litt. (Ky.) 127.

Thus, in *Pickering v. Pickering*, 2 Beav. 31, Lord Langdale set aside certain agreements entered into under a mistake of the law, on the ground that "the parties were not on equal terms," and that the plaintiff acted under the influence of the defendant; and the same thing was done in *Wheeler v. Smith*, 9 How. 55, because the parties "did not stand on equal ground," and the plaintiff "did not act freely, and with a proper understanding of his rights."

This question has arisen more frequently in cases where parties have been mistaken in regard to their titles to real estate. Thus,

in *Bingham v. Bingham*, 1 Ves. 126, the defendant sold to the plaintiff property which he already owned, and the court compelled a restoration of the purchase money. It may have been, as *Bronson, J.*, suggests, in *Champlin v. Laytin*, 18 Wend. 407, on the ground that the defendant "misled" the plaintiff in regard to his title; but the correctness of the decision is not questioned by Lord Cottenham, in *Stewart v. Stewart*, 6 Clark & F. 964.

Judge Story suggests that such a case "seems to involve, in some measure, a mistake of fact,—that is, of the fact of ownership,—arising from a mistake of the law." 1 Story, Eq. Jur. §§ 122, 130. And, in *King v. Doolittle*, 1 Head, 77, the decision is put on that ground. But, if all the other facts are agreed and known to the parties, the question of "ownership" can be nothing but one of law; and in such cases, as in others, courts of equity should not interfere, unless it appears that there was a difference in the condition of the parties, so that, instead of both acting voluntarily, one was misled or unduly influenced by the other. Nor will the court then interpose, in the absence of fraud, unless the defendant, as well as the plaintiff, can be restored substantially to the same situation as before. *Crocier v. Acer*, 7 Paige, 137.

Nor where there is a real controversy between parties, and the case is one of any doubt, will the court set aside a compromise fairly made by them, though it should afterwards appear that one has thereby received property to which he was not legally entitled. *Steele v. White*, 2 Paige, 478; *Trigg v. Reed*, 5 Humph. 529. On the contrary, courts of equity encourage such compromises; but here, too, as in other cases, if the parties are not on equal terms, and one misleads the other, and obtains property thereby against right and equity, as well as against law, he will be compelled to restore it. "If a party, acting in ignorance of a plain and settled principle of law," says the vice chancellor, Sir John Leach, "is induced to give up a portion of his indisputable property under the name of a compromise, a court of equity will relieve him from the consequences of his mistake." *Naylor v. Winch*, 1 Sim. & S. 564. And though this was a dictum, the principle was fully applied by the supreme court of the United States in *Wheeler v. Smith*, previously cited. And the same doctrine has been recognized by this court in the case of *Freeman v. Curtis*, 51 Me. 140. And, in both of these cases, relief was granted, not on the ground that a mistake of the law alone entitles one to relief, but that, though there be no actual fraud, if one is unduly influenced and misled by the other to do that which he would not have done but for such influence, and he has in consequence conveyed to the other property without any consideration therefor, or purchased what was already legally his own, the court will, if it

can be done, restore both of the parties to the same condition as before.

The case at bar is one of this kind. The parties were not on equal terms. The plaintiff was ignorant, in business affairs, as well as in other respects. Having confidence in the defendants, she relied upon what they told her. It does not appear that she doubted the validity of her father's lease to her, until such doubts were communicated to her from them. The proposition for her to release her interest in all the other property did not originate with her, but with them; and she was induced to accept it by the fear which they had impressed upon her that she otherwise would have to give up the homestead. She acted under their influence. They believed that there was a defect in the first lease, and they meant to take advantage of

it. As was said by the master of the rolls, afterwards Lord Kenyon, in *Evans v. Llewellyn*, 1 Coxe, 333, "though there was no fraud, there was something like fraud, for an undue advantage was taken of her situation. The party was not competent to protect herself, and therefore this court is bound to afford her such protection."

The bill is sustained, with costs; and the defendants must be decreed to pay her a distributive share of the personal estate, with interest from the time of distribution, making her equal with them, and to release to her one-eighth of all the real estate, and account to her for her share of the rents and profits of the portion not occupied by her.

APPLETON, C. J., and KENT, WALTON, and DICKERSON, JJ., concurred.

STAFFORD v. FETTERS.

(8 N. W. 322, 55 Iowa, 484.)

Supreme Court of Iowa. March 23, 1881.

Appeal from circuit court, Warren county.

Action at law against the indorser of a promissory note. Defendant set up an equitable defense, and the relief prayed for therein was granted him by the decree of the circuit court. Plaintiff appeals.

SeEVERS & Sampson, for appellant. H. McNeil, for appellee.

BECK, J. 1. The defendant, being the payee of a negotiable promissory note, transferred it to plaintiff by the following indorsement: "For value received, I assign the within note to James Stafford. [Signed] H. J. Feters." The action was brought at law upon this indorsement. The defendant pleaded an equitable defense, wherein he substantially alleged that, by the agreement under which the note was transferred, the plaintiff was to take the note without recourse upon defendant, and that the parties adopted the form of transfer as expressing such agreement, and neither of them at the time intended that it should have any other effect than to express the agreement between them, and neither knew that it did have the effect which the law gives to such instruments. Defendant, upon this answer, as in a cross-bill, prays that the indorsement be reformed so as to express the true agreement made and intended to be set out by the parties, and that other proper relief be granted. A demurrer to this count of the answer was overruled, and the issues raised by this pleading were tried as an action in chancery. It is triable *here de novo*.

2. The evidence very satisfactorily establishes the facts set up in the equitable defense. The defendant positively and explicitly testifies that the agreement required him to transfer the note without liability; that he had no intention to express any different contract by the indorsement, and was ignorant of the legal effect of the instrument; and that plaintiff expressly disclaimed that he expected or desired defendant to become bound for the payment of the note. Six witnesses positively and strongly corroborated defendant's testimony. They heard the conversation between the parties when defendant signed the indorsement. The plaintiff, in his testimony, denies the statement of defendant. We must accept the facts of the case presented by the testimony of defendant and his witnesses. We are required to determine whether, upon these facts, equity will grant relief to defendant by reforming the indorsement upon the note so that it will express the real contract of the parties.

3. The agreement of the parties, the meeting of their minds upon the conditions and obligations touching the subject contemplat-

ed by them, constitutes their contract. The written instrument is made the evidence of that contract. If it fails to present their agreement, the contract it expresses is not the agreement of the parties, and the true contract remains unexecuted. In such a case equity will reform the writing, causing it to express the intentions of the parties. This relief will be granted without regard to the cause of the failure of the instrument to express the true contract, whether it be from fraud, mistake in the use of language, or any other thing which prevented the expression of the intentions of the parties.

4. But there is another familiar rule of equity upon which plaintiff relies to defeat the application of these doctrines to this case, namely, relief will not be granted to correct mistakes at law.

The rule has no application to mistakes in the language of a contract, or in the choice of the form of an instrument, whereby it has an effect different from the intention of the parties. If parties, intending to sell and purchase lands, should, in ignorance of its legal effect, execute a lease, equity would reform the instrument, though it was a mistake of law which led them to adopt it. This mistake, it will be noticed, affects the very contract the parties intended. They intended a deed, but a lease was made. But where two are bound by a bond, and the obligee releases one, mistakingly believing that the other will remain bound, equity will not grant him relief, for the reason that the release is just what he intended it to be; his mistake related to the effect of the contract in matters not contemplated therein. The mistakes of law against which equity will not relieve are those which pertain to the subject of the contract, and were inducements thereto, or considerations therefor. In such cases the parties intended to make the very contracts which they executed, but were induced to make them by a mistake of law.

Further illustrations taken from the books make our expression of the rules plainer. A tenant for life purchased a reversion under the mistake of law that such purchase would cut off the remainder in tail and vest the fee in him. It was held that he could not have relief. A power of attorney was taken from a debtor as a security; but the debtor died before the power was executed. Equity would not grant relief. In each of these cases the very contracts entered into by the parties were embodied in the instruments. The mistakes were as to the results to be reached which were inducements to the contracts. In the first case the purchaser supposed that the acquisition of the reversion would vest in him the fee-simple title. This was the inducement for the purchase. It was a mistake of law. In the second case it was the purpose of the parties to secure the payment of the debt. They mistakenly chose a power of attorney to effect their

object. But their purpose was defeated by the law which provides that the death of the grantor revokes a power of attorney. In these cases, it will be observed, the instruments were of the character intended by the parties. The mistakes pertained to the effect of the instruments upon the rights of the parties not contemplated by the contracts or provided for therein.

But, on the other hand, when parties enter into an agreement, which, through mistake of law or fact, they reduce to writing, and the instrument fails to express their true agreement, or omits stipulations agreed upon, or contains terms contrary to the intention of the parties, equity will reform the writing, making it conform to the agreement entered into by the parties.

The doctrines we have stated are familiar to the profession. They have ample support in the authorities. See *Noulin v. Pyne*, 47 Iowa, 293; *Hunt v. Rosemaniers*, 8 Wheat. 174, 1 Pet. 1; 1 Story, Eq. Jur. §§ 113, 116, et seq., and cases cited; *Kerr, Fraud & M.* (Am. Ed.) 396 et seq., and page 418 and cases cited; *Reynolds v. Meelick*, 17 Iowa, 585.

In the case before us the parties agreed that plaintiff should take the note without recourse on defendant. They mistakenly supposed that the form of assignment of the note would have that effect, being ignorant

of the provisions of the law of commercial paper which makes the indorser liable in case of default of the maker of the note. This was a mistake of the law, but it pertained to the instrument itself, and, by reason of it, the writing does not express the true agreement of the parties. Equity will reform it.

Glenn v. Statlee, 42 Iowa, 107, and *Moorman v. Collier*, 32 Iowa, 138, are not in conflict with our conclusions just expressed. In each case the mistake was not in expressing the contract, but as to its legal effect. The parties executed an instrument expressing the very contract intended, but the instruments had a legal effect unknown to, and not intended by, the parties.

These decisions are also distinguishable from the case at bar by the fact that in each of them the rights of persons other than the parties to the contracts are involved. They were actions upon delivery bonds. Creditors not parties thereto were beneficiaries. The law will, in such cases, rather impose hardship upon the parties who made a mistake than upon one chargeable with no fault.

We reach the conclusion that the circuit court correctly rendered a decree reforming the assignment indorsed upon the note, and dismissing plaintiff's petition.

Affirmed.

GREEN v. MORRIS & E. R. CO.

(12 N. J. Eq. 165.)

Court of Errors and Appeals. October Term, 1858.

E. W. Whelpley, for demurrer. L. A. Chandler and F. T. Frelinghuysen, contra.

THE CHANCELLOR. The following are the material facts stated in the bill: The complainant is the owner of a farm in the county of Morris. The defendants, in the construction of their railroad, made an excavation through the complainant's farm of about five hundred feet in length, and varying from five to twelve feet deep. Commissioners were called under the charter of the company, who assessed the complainant's damages at six hundred and eighty dollars. From this award the complainant appealed to the inferior court of common pleas of the county of Morris, in which court he was entitled to review the award and to a trial by jury. Before the time for hearing arrived, Samuel B. Halsey and Freeman Wood represented to the complainant that they were acting for and on behalf of the railroad company, and proposed to submit the matters in difference to three arbitrators, to be selected by the parties, to which the complainant assented. The arbitrators were selected, and the submission was reduced to writing. The same matters were submitted to the arbitrators as were before, and acted upon by the commissioners appointed under and by virtue of the charter. By the ninth section of the charter of the company, they are obliged to construct and keep in repair good and sufficient bridges or passages over or under the said railroad or roads, where any public or other road shall cross the same; and also, where the railroad shall intersect any farm or lands of any individual, to provide and keep in repair suitable wagonways over or under said road, so that he may pass the same; and if the company neglect to perform the said duty, after giving twenty days' notice to the company, the owner of the land may do it himself, and recover the valuation by common process of law.

The arbitrators, thus selected, proceeded to discharge the duties imposed upon them in the presence of the complainant, and of Halsey and Wood, who appeared and acted on behalf of the company. During their deliberations, the complainant stated that he should require a suitable wagonway over the railroad, where it crossed his farm. This was assented to, but Halsey and Wood stated that this was a matter with which the arbitrators had nothing to do, and was no part of the submission, but was an independent duty, imposed upon the company by their charter. This view was acquiesced in by the arbitrators and by all parties, and it is admitted to have been a correct view. The arbitrators awarded that the company should pay to the complainant eight hundred

dollars for his damages. In awarding this amount, they did not take into consideration the matter of bridges or crossings. Soon after the award was completed, Halsey and Wood went to the complainant with eight hundred dollars, and with a deed, prepared and ready for execution, from the complainant and his wife to the company. The complainant objected to signing the deed on the ground that it did not, in express words, reserve all his rights as to a crossing or bridges over the railroad. Halsey and Wood assured him that such rights were not at all affected by the deed. The deed was a special one in its character. Mr. Halsey was a lawyer by profession. The complainant knew this, and he relied upon his integrity, as well as his professional learning. Upon Mr. Halsey's reassurances that the deed was a proper one, and did not compromise the complainant's rights to proper crossings over the road, he received the money, and executed and delivered the deed to Halsey and Wood. They delivered it to the company, giving the officers full knowledge of all that had occurred. The complainant gave notice to the company to construct a bridge over their railroad where it crosses his land, and upon the company's neglecting to do so the complainant himself constructed the bridge at an expense exceeding seven hundred dollars. He then instituted a suit in the supreme court against the company, under the ninth section of their charter, to recover the value of the work done. The company set up, as a plea in bar to the recovery, the deed given by the complainant to the company. This bill is brought to relieve the complainant from legal effect of that deed. The bill prays that the deed may be reformed, and that the defendants may be enjoined from setting up the deed in bar to the complainant's action at law. To this bill the defendants have filed a general demurrer.

The principal ground urged in support of the demurrer is that the object of the bill is to correct a mistake of law, and that the maxim is that ignorance of law furnishes no excuse to a person either for a breach or for an omission of a duty, *ignorantia legis neminem excusat*, and that the same principle applies to agreements entered into in good faith, but under a mistake of the law.

Such undoubtedly is the general rule. It has been adhered to with great strictness by some authorities, while by others exceptions have been made to the rule altogether irreconcilable with the principles and reasons upon which it has been established. Some of these conflicting authorities are referred to and commented upon in 1 Story, Eq. Jur. § 113, etc. But that the rule has its proper exceptions is beyond all dispute.

In 1 Story, Eq. Jur. §§ 113, 116, the rule is laid down that agreements made and acts done under a mistake of law are, if not otherwise objectionable, generally held valid and obligatory. The author says that he

lays down the doctrine in this guarded and qualified manner because there are authorities which are supposed to contradict it, or at least to form exceptions to it; and in the case of *Hunt v. Rousmanier*, 1 Pet. 17, 7 L. Ed. 27, a case much relied upon by the defendant's counsel, Mr. Justice Washington, in delivering the opinion of the court, says, "It is not the intention of the court, in the case now under consideration, to lay it down that there may not be cases in which a court of equity will relieve against a plain mistake arising from ignorance of law."

There are several considerations which induce me to consider this case as very properly embraced within the exceptions to the rule. The decision of the case does not rest exclusively upon the mere fact of a mistake in law upon the part of the complainant. This deed does not carry out the intention of the parties; and it is not necessary to resort to parol testimony to establish this fact. It was executed for the sole purpose of carrying into effect the award of the arbitrators. By that award, the complainant's rights and privileges under the ninth section of the defendant's charter were not impaired, nor were they in any manner whatever affected by it. The object of the deed was to give to the company the same rights and privileges in and upon the complainant's lands as the award gave them, and no more. All that is necessary to enable the court to reform this deed, and to make it comply with the intention of the parties, is to have before it the award which it was the design of all parties, by this deed, to carry into execution. The mistake is a mistake of the draftsman, and he acting as the agent of the party who now seeks to take advantage of the mistake. Mr. Halsey prepared the deed, and took it to the complainant to be executed. It was his misapprehension of the law that led to the mistake. It was not the carelessness or ignorance of the complainant, but of the defendants' agent. Mr. Justice Story, in commenting upon the case already referred to in 1 Pet. 1, 13, 7 L. Ed. 27, 14 Story, Eq. Jur. § 115, remarks: If there had been any mistake in the instrument itself, so that it did not contain what the parties had agreed on, that would have formed a very different case, for where an instrument is drawn and executed which professes, or is intended, to carry into execution an agreement previously entered into, but which, by mistake of the draftsman, either as to fact or to law, does not fulfill that intention, or violates it, equity will correct the mistake, so as to produce a conformity to the instrument. Now we have before us an agreement in writing, the award of the arbitrators, to carry which into execution the deed was executed. By a misapprehension of the law on the part of all parties, and more particularly of the defendants' agent, who drew the deed, it releases valuable legal rights of the complainant which are not affected by that award. All the bill asks

is that the deed may be made to conform to the award.

In the case of *Champlin v. Layton*, 1 Edw. Ch. 467, it was decided that a contract entered into under a mutual misconception of legal rights, amounting to a mistake of law in the contracting parties, is as liable to be set aside or rescinded as a contract founded in mistake of matters of fact. In his opinion in that case the vice chancellor says: So, if both parties should be ignorant of a matter of law, and should enter into a contract for a particular object, the result whereof would, by law, be different from what they mutually intended,—here, on account of the surprise or immediate result of the mistake of both,—there can be no good reason why the court should not interfere in order to prevent the enforcement of the contract, and relieve from the unexpected consequences of it. To refuse would be to permit one party to take an unconscientious advantage of the other, and to derive a benefit from a contract which neither of them intended it should produce. In *Stapylton v. Scott*, 13 Ves. 424, the lord chancellor says: I admit, where the contract has proceeded upon the mistake of both parties, that avoids the contract at law as well as here. In *Willan v. Willan*, 16 Ves. 72, an agreement was decreed to be given up upon the ground of surprise, neither party understanding the effect of it. This exception to the rule is recognized in the case of *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589.

The case before the court is entitled to much more favorable consideration than these cases, from the fact, before referred to, that the mutual mistake is to be attributed to the agent of the defendants. He prepared the deed, and he assured the complainant that it was correct. There was no want of ordinary prudence in the complainant's relying upon his judgment. He was a lawyer by profession, and it was natural and becoming that the complainant should have confided in him.

There is another consideration which very properly enters into the case. It is a deed procured from the complainant, by the solicitation of the defendants or their agent, which conveys to them valuable rights and privileges without any consideration. The award gives to the complainant eight hundred dollars as a remuneration for his damages; but the legal effect of the deed is not only a release of the damages, for which the defendant was compensated, but a release of rights and privileges more valuable to the complainant than the pecuniary compensation awarded to him. The relative situation of the parties is a matter of some consideration in a court of equity. One was a plain man, the other a professional man, professing skill and experience as to the matter in which he volunteered to advise. I have no doubt, if this deed does not comport with the award, as to the propriety of the court's reforming it.

But I am embarrassed with another view

of the case. In my judgment, the deed in question does not operate as a release of any rights the complainant may have under the ninth section of the defendants' charter. In other words, it is no legal bar to the complainant's recovery in his suit at law. The bill assumes that it is a bar. The counsel for the defendants raised an objection that the fact of its being a bar to the complainant's recovery was not, with sufficient directness and distinctness, averred in the bill; but it is assumed throughout the bill to be, in connection with the use the defendant is making of the deed, the foundation for the complainant's suit. A distinct averment as to the legal effect of the deed is not necessary. The construction of the deed by the court could not at all depend upon the complainant's opinion of it, nor would the complainant be bound here or elsewhere by such an averment.

The deed recites that the company, by virtue of their act of incorporation, had surveyed their route from Morristown to Dover over and upon the lands of the complainant, giving a description of the land by metes and bounds, and then proceeds as follows: "Now be it known that the said Thomas Green and his wife, in consideration of the sum of eight hundred dollars, to them in hand well and truly paid by the said the Morris and Essex Railroad Company, the receipt whereof is hereby acknowledged, have and by these presents to grant, bargain, sell, convey, and confirm to the said the Morris and Essex Railroad Company, and to their successors and assigns, forever, the right, liberty, and privilege of erecting upon the tract of land above described, by its officers, agents, engineers, superintendents, contractors, workmen, and other persons in their employ, and to take possession of, hold, have, use, occupy, and excavate the same, and to erect embankments, bridges, and all other works necessary to lay rails, and do all other things which shall be suitable or necessary for the completion or repair of said road or roads; to have and to hold the said tract of land and premises unto the said the Morris and Essex Railroad Company, and to its successors and assigns forever, for the purposes above mentioned, and for all the other purposes mentioned in the said act of incorporation and the several supplements thereto. In witness whereof," etc.

The seventh section of the act provides the mode in which the company shall proceed, if they cannot agree with the owner of the land, to acquire the same by assessment. Three commissioners are to be appointed, who are to assess the value of the land and the damages, upon payment of which the company have the right to enter upon and occupy the land for the purposes of the railroad. The provisions of the ninth section are wholly independent of those of the seventh section, and make it obligatory upon the company to construct and keep in repair bridges or passages over or under

the railroad, where it crosses public or private roads, and where it intersects lands of individuals. It is very manifest that the assessment to be made by the commissioners does not include any compensation for such bridges or passages, and that, notwithstanding such assessment, the duty still remains upon the company to construct such bridges and passages over the road. If this is not so, then the ninth section is superfluous. The company cannot take possession of the land except under the provisions of the seventh section; and, if the assessment provided for in that section includes a remuneration to the land owner for bridging, etc., there could be no propriety in imposing that duty by the ninth section. The deed in question conveys to the defendants nothing more than the liberty of erecting upon the land described the necessary superstructure for their railroad, and the necessary embankments, bridges, etc. This is the same right, and neither more nor less than they would have acquired by an assessment under the seventh section of the act. I do not see how, with any propriety, a construction can be put upon this deed that will release the company from the duties imposed by the ninth section. An assessment by commissioners would not have released them, and, in my judgment, this deed confers upon them no additional rights, and releases them from no other duties or obligations. The language used in the deed is the same language used in the sixth section of the act, which defines what rights the company acquire by assessment. The deed confines the company to the same use of the land as the act confines them under the assessment. The language in the deed is an exact copy of the language of the act.

If, then, this construction of the deed is the correct one, there is no necessity of reforming it; but the defendants contend for a different construction, and, upon their construction, insist that it is a bar to the complainant's recovery in his suit at law. If their construction is the correct one, then the complainant is entitled to the protection of the court. Under such circumstances he had a right, when the defendants, by a formal plea at law, contended for such a construction of his deed, to claim the protection of this court. It was not safe for him to risk his case at law. If the court at law should be against him, it would then be too late for him to ask relief in this court. Would it be right, notwithstanding the construction this court has put upon the deed, to dismiss the complainant out of court? The court at law is not bound by the construction this court may put upon the deed. If the complainant's bill should be dismissed, and the court at law should differ from this court, the complainant will be without remedy. It may be asked, how can this court make a decree to reform the deed when it is of opinion that it needs no

reformation? But the court need not adopt any such inconsistency. It can afford to the complainant adequate relief without making a decree to reform the deed. A decree enjoining the defendants from setting up the deed as a bar to the complainant's

recovery in the action at law will afford him all the protection that is necessary.

I have no doubt that, under the circumstances of this case as it is made by his bill, the complainant is entitled to relief.

The demurrer is overruled, with costs.

GRISWOLD v. HAZARD et al. (four cases).
(Nos. 50-53.)

(11 Sup. Ct. 972, 141 U. S. 260.)

Supreme Court of the United States. May 25,
1891.

In error to the circuit court of the United States for the district of Rhode Island.

Appeals from the circuit court of the United States for the district of Rhode Island.

The first of the above suits was brought by Griswold, a citizen of New York, against the appellees, citizens of Rhode Island, to obtain a decree canceling or (if relief of that character could not be granted) reforming a certain bond, for the sum of \$53,735, executed by Thomas C. Durant, as principal, and Griswold and S. D. Bradford, as his sureties. It was heard upon bill, answer, and proofs, and the bill was dismissed.

The action at law, No. 53, was brought by the appellees against Griswold upon the above bond in one of the courts of Rhode Island, and was removed, upon his petition, to the circuit court of the United States for the district of Rhode Island, where a judgment was rendered against him for the sum of \$66,470.

The other two cases, Nos. 51 and 52, were suits in equity brought by Griswold, pending the action at law in the circuit court, to obtain an injunction against its further prosecution. The relief asked, in each of those suits, was denied, and the bills were dismissed.

All of the cases have their origin in a suit in equity brought, August 22, 1868, in the supreme court of Rhode Island, by Isaac P. Hazard, of that state, against Thomas C. Durant, Oliver Ames, Benjamin E. Bates, John Duff, Cornelius S. Bushnell, Sidney Dillon, Henry S. McComb, the Credit Mobilier of America, a Pennsylvania corporation, and the Union Pacific Railroad Company, a corporation created by acts of congress. Hazard sued on behalf of himself and all other stockholders in the first-named corporation who should become parties to his bill. Durant, from an early date in 1864 until May 18, 1867, was president of the Credit Mobilier of America; having, it was alleged, to a great extent, the management of its affairs, and the confidence of its directors and trustees, as well as the control of its finances and disbursements, and of its treasurer, clerks, and servants. The theory of the bill was that he had acquired a large amount of the stock of the Credit Mobilier of America upon which dividends had been paid in money and in the stock and bonds of the Union Pacific Railroad Company, the amount of such bonds exceeding, it was alleged, \$700,000, and the amount of such stock of the last-named corporation being nearly \$2,000,000; and that the shares of stock, bonds, and moneys, so received by him, belonged equitably to the Credit Mobilier of America and its stockholders.

The bill alleged that Durant's pecuniary condition was precarious; that he was, and for a long time had been, largely engaged in hazardous speculations and financial operations, sustaining thereby heavy losses, and liable to sustain others; that any recovery against him, it was feared, could not be enforced by execution or the ordinary process of law; that he was "about to depart out of the state, and out of the jurisdiction of this court;" and that the defendants, (the individual defendants being sued as trustees in a certain contract with the Union Pacific Railroad Company, the profits of which belonged to the Credit Mobilier of America and its stockholders,) "though requested so to do," had wholly neglected and refused to take any steps to compel him to account for said moneys, stocks, and bonds, so received and improperly appropriated.

The principal relief asked was that Durant be required to pay over and deliver to the Credit Mobilier of America and the plaintiff Hazard such sums of money and shares of stock as should appear upon an accounting to be justly due or belonging to that corporation and to Hazard, and to make such transfer of the stock and bonds as would fully protect its and his rights in the premises; that the amounts ascertained to be due be adjudged a lien upon the shares in the stock of each of said corporations, owned or held by or standing in the name of Durant, as well as upon the above contract assigned to the defendant trustees and the dividends, earnings, stocks, and bonds received or to be received by virtue of that contract, to the extent of the shares to which Durant might be entitled under it; and that, on default in the payment and delivery of the moneys, stocks, and bonds so found due, all such stocks and bonds be sold under the direction of the court, or otherwise transferred and apportioned equitably among the rightful owners and claimants thereof; and that such stock, bonds, moneys, interest, and rights, so procured by Durant, be deemed and taken as the rightful property of the Credit Mobilier of America and its stockholders. The bill prayed that Durant be restrained from departing out of the state, and out of the jurisdiction of the court, by writ of ne exeat, issued under its seal and by its order.

A writ of ne exeat was ordered to be issued, August 22, 1868, for \$53,735. It was in these words:

"Whereas, it is represented to our supreme court, sitting in equity, on the part of Isaac P. Hazard and others, complainants, against Thomas C. Durant and others, defendants, that said Thomas C. Durant is greatly indebted to the said complainant, and designs quickly to go into other parts beyond this state, (as by oath made in that behalf appears,) which tends to the great prejudice and damage of the said complainants: Therefore, in order to prevent this injustice, we hereby command you that you do, without

delay, cause the said Thomas C. Durant to come before you and give sufficient bail or security, in the sum of fifty-three thousand seven hundred and thirty-five dollars, that he, said Thomas C. Durant, will not go, or attempt to go, into parts beyond this state without the leave of our said court; and, in case the said Thomas C. Durant shall refuse to give such bail or security, then you are to commit him, the said Durant, to our county jail, in your precinct, there to be kept in safe custody until he shall do it of his own accord; and when you shall have taken such security you are forthwith to make and return a certificate thereof to our said court, distinctly and plainly, under your hand, together with this writ."

Durant was arrested under this writ on the night of August 22, 1868, and on the 24th he executed, with Griswold and Bradford, as his sureties, the following bond, drawn by one of Hazard's attorneys:

"Know all men that we, Thomas C. Durant, as principal, and John N. A. Griswold and S. Dexter Bradford, as sureties, are firmly bound to Isaac P. Hazard, Rowland Hazard, Rowland G. Hazard, Elizabeth Hazard, Elizabeth Hazard, trustee, Anna Hazard, Mary P. Hazard, Lydia Torrey, Sophia Vernon, and Anna Horner in the sum of fifty-three thousand seven hundred and thirty-five dollars, to be paid said obligees, their executors, administrators, or assigns; to which payment we bind ourselves, our several and respective heirs, executors, and administrators, jointly and severally, hereby.

"Sealed with our seals and dated this 24th day of August, A. D. 1868.

"The condition of this obligation is that said Thomas C. Durant shall on his part abide and perform the orders and decrees of the supreme court of the state of Rhode Island in the suit in equity of Isaac P. Hazard and others against said Thomas C. Durant and others, now pending in said court within and for the county of Newport." This is the bond above referred to.

Under the latter date, and presumably before the execution of that bond, the attorneys of Hazard and Durant signed the following agreement: "In the above entitled case it is agreed that said Thomas C. Durant shall file a bond, with surety in the penalty marked in the writ of ne exeat therein, to abide and perform the orders and decrees of the court in said cause, and that thereupon the writ of ne exeat aforesaid shall be discharged, and that the court may enter decree accordingly." The court, under the same date, entered the following order: "Thomas C. Durant, one of the defendants in this suit, having executed and filed a bond, with sureties, to abide and perform the orders and decrees of the court made in this suit, it is now, by consent, ordered that the writ of ne exeat heretofore issued be discharged." For some reason not explained, the writ of ne exeat was not returned to the clerk's office

and filed until October 21, 1868. The sheriff made this return on the writ: "Newport, August 24, 1868. I caused the within-named Thomas C. Durant personally to come before me, as within commanded, on the 22d day of this month, and now the writ is discharged by order of court."

On the 2d day of December, 1882, more than 14 years after the commencement of Hazard's suit, it was ordered, adjudged, and decreed in that suit, among other things, as follows:

"Second. That the defendant Thomas C. Durant is accountable for and do, within 90 days from the date hereof, pay the sum of \$16,071,659.97, with interest from this date, the said sum, with interest thereon, to be deposited in the registry of this court, or be paid, in the first instance, to Rowland Hazard, of South Kingston, in said state, and Henry Martin, of Brooklyn, in the state of New York, who are hereby appointed special commissioners, with authority, jointly and severally, to collect and receive the same, and with power to take such steps to collect the same as may be necessary and according to law, and said fund, or so much thereof as may be collected by process or otherwise, is hereby directed to be paid and deposited in the registry of this court to the credit of this cause.

"Third. Of the aforesaid total sum of \$16,071,659.97, the defendant Thomas C. Durant is hereby allowed and is decreed to be entitled to pay and discharge \$8,816,232.93, or any part thereof pro tanto, by transferring and delivering stock of the Union Pacific Railroad Company and first mortgage and sinking fund bonds of said company, as per Statement G, now exhibited to the court, and directed to be filed in this cause, with all dividends which may have been collected or received by said defendant or his assigns after the date of this decree, together with interest on the same to the date of payment thereof by said defendant, the certificates of said stock, with transfers thereof, and the said bonds to be delivered to the said Rowland Hazard and Henry Martin, who are hereby appointed special commissioners to receive the same, and who are hereby authorized and directed to sell the same, or such portions thereof as may be delivered to them from time to time as they are secured, at public auction, and receive the proceeds thereof, and, after deducting the costs and charges of such sales, deposit the same in the registry of this court to the credit of this cause: provided, however, that the said privilege herein granted to the said defendant Thomas C. Durant to transfer and deliver said stocks and bonds in partial discharge and payment of the sum hereinbefore decreed to be paid by him be exercised by him within thirty days from the date of the entering this decree; and that, in default of such transfer and delivery, or of the transfer and delivery of the entire amount of said stock and bonds within the

said thirty days, the obligation of the defendant Thomas C. Durant to pay the said proportion of the said sum or of the residue of the same, after deducting the amount of such stocks and bonds as may be delivered, as aforesaid, at their face value, shall become, and is hereby declared to be, absolute: and provided further, nevertheless, that the said option or privilege of the said Thomas C. Durant shall not interfere in any manner with any order or decree in the cause touching the transfer, delivery, sale, or other disposition of said stock and bonds.

"Fourth. The defendant Thomas C. Durant is likewise ordered and directed to transfer and deliver, within thirty days from the date hereof, five thousand seven hundred and seven 45-100 (5,707 45-100) shares of the stock of the Credit Mobilier of America, (which stock has been found by the master to have been purchased with the funds of the Credit Mobilier, and which stock, with any dividends or profits accrued or to accrue on the same, is hereby declared to be the property of said corporation, subject to the decrees and orders in this cause,) with any interest, dividends, rights, benefits, and profits which may have accrued to the said Thomas C. Durant as the holder of the said 5,707 45-100 shares of stock, or any part thereof, and not herebefore charged against him, said transfer and delivery to be made to the said Rowland Hazard and Henry Martin, or either of them, as special commissioners, with power, which is hereby granted to said commissioners, forthwith to take such measures, by suit or suits in their own names, or otherwise, as they may be advised is lawful and necessary to enforce such transfer, collection, or delivery, and said stocks to be held by said commissioners subject to the further order of the court in this cause.

"Fifth. All interlocutory injunctions heretofore made in this cause, so far as consistent with this decree, are declared to be and are hereby made perpetual, and the further consideration of the cause, and particularly as to allowances to the complainants for costs, expenses, and services, and as to the distribution of the funds that may be deposited in the registry of the court to the credit of the cause, and also the consideration of any order or decree which may be necessary in the premises against the defendant Thomas C. Durant, by reason of any default which may be made by him touching any portion of this decree, and also the consideration of any other and further decree herein against or concerning the defendants other than the said Thomas C. Durant, be, and they hereby are, directed to stand over, with leave to any party in interest, save parties in contempt or parties who may appear to be for any other cause disqualified, to apply at any time for further orders and directions."

The bill in case No. 50 was filed September 13, 1881. That suit proceeds upon these grounds: That the bond of August 24, 1868,

whereby Griswold became bound, as one of the sureties of Durant, that the latter should "on his part abide and perform the orders and decrees of the supreme court of the state of Rhode Island in the suit in equity of Isaac P. Hazard and others against said Thomas C. Durant and others, now [then] pending in said court," was obtained by fraud, and by concealment from him of facts he was entitled to have communicated to him before he assumed the obligations imposed by that instrument; that he intended to sign, and believed, at the time, that he signed, a bond which simply bound him for the appearance of Durant, so that he should be personally amenable to the process and orders of the court in the suit brought by Hazard; that the execution of the bond in question was the result of mistake; that the agreement whereby, upon the execution by Durant of a bond, the writ of *ne exeat* was to be discharged, was made without his knowledge or consent, as was also the order of court in pursuance of such agreement, and was in derogation of his rights; that his purpose to become surety only for Durant's appearance to answer the process of the court was well known at the time to the plaintiff and his attorneys, who prepared, and supervised the execution of, the bond; and that the writ of *ne exeat* was sued out upon the ground that Durant was about to depart from the state, when, in fact, he only contemplated coming to the state.

Protesting that the legal effect of the bond was that he should be responsible only for the appearance of Durant, so as to be subject to the process of the court in the Hazard suit, and averring his willingness to execute a proper *ne exeat* bond, he prayed that the bond in question be set aside as having been obtained by fraud, imposition, and mistake, or reformed, as indicated, and that the defendants be restrained by injunction from enforcing it in its present shape.

The answers of the defendants put in issue the material allegations of the bill. The plaintiff filed a replication, and proofs being taken, and the cause heard, the bill, as already stated, was dismissed. (C. C.) 26 Fed. 135.

The action at law, being case No. 53, was commenced March 3, 1883, in one of the courts of Rhode Island, and was removed, upon Griswold's application, to the circuit court of the United States. The declaration set out the bond of August 24, 1868, alleged that Bradford, one of the sureties thereon, was dead, and that Durant had not kept its condition, in that he had not performed the above decree of December 2, 1882, in the equity suit brought by Hazard; whereby the plaintiffs Rowland Hazard, Rowland G. Hazard, Anna Hazard, and Lydia Torrey were entitled to have and demand of him the amount of said bond, \$53,735. A copy of that decree was made an exhibit in the declaration. The defendant Griswold filed ten

pleas, each of which was in bar of the action. One of the pleas made a copy of the proceedings in Hazard's suit a part of it. Demurrers and replications were filed to the pleas, those to the second, third, fourth, fifth, and seventh pleas being special demurrers. By an order entered July 1, 1884, the demurrers were sustained to the second, third, fourth, fifth, and seventh pleas, the opinion of the court being delivered by Mr. Justice Gray. (C. C.) 21 Fed. 178.

Pursuant to a stipulation of counsel, dated November 26, 1883, that the plaintiff might demur specially to the second, third, fourth, fifth, and seventh pleas, and, in case the demurrers were overruled, reply to those pleas as if no demurrers had been filed, and that amended pleas, if desired, might be filed by the defendant, and in obedience to the order of court requiring the amended pleas to be filed on or before October 15, 1884, the defendant, on the 14th of October, 1884, filed amended third, fourth, fifth, and seventh pleas. The case was subsequently heard on a motion by plaintiff, made November 19, 1884, that the amended pleas be stricken out, and on the 30th of March, 1885, this order was made: "Plaintiff's motion to strike amended pleas from the files is granted." Certain stipulations were made between counsel; among others, one to the effect "that the plaintiffs were able to prove under the decree of the supreme court of Rhode Island, in the equity suit brought by Hazard, an amount of damage in excess of the penal sum of the bond declared on in this suit." A jury having been waived in writing, the court gave judgment, as of February 12, 1887, against Griswold, for \$66,470.

The suit in equity No. 51 was brought June 12, 1885. The bill in that case, after referring to the suit in equity brought by Isaac P. Hazard in 1868, showed that, on the 17th of November, 1875, Rowland G. Hazard commenced a suit in equity in one of the courts of Pennsylvania, against the Credit Mobilier of America and others, which was subsequently removed to the circuit court of the United States for the eastern district of Pennsylvania, that being the domicile of the corporation; that in such suit Oliver Ames was appointed receiver of all the goods, chattels, rights, and effects of the corporation, and was authorized by the court in Pennsylvania to deliver to Durant a deed of release from all actions, causes of action, suits, bills, bonds, writings obligatory, debts, dues, duties, reckonings, accounts, sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatever, both in law or equity, which the Credit Mobilier of America then had, or might at any time thereafter have, claim, allege, or demand, against said Durant, for or by reason or means of any matter, cause, or thing whatever; that afterwards, on the 27th day of October, 1881, Ames, under the said authority, and in consideration of the

execution by Durant of a deed conveying the title to certain lands mentioned in the order of court authorizing the release, delivered to the latter a deed of release, of the kind above indicated, of all sums of money then due or owing to, or thereafter to become due to, said corporation; that the above equity suit in the supreme court of Rhode Island was, and had been, wholly controlled by Rowland G. Hazard; that, notwithstanding the delivery of the above deed to Durant, the latter suit was proceeded with, and the supreme court of Rhode Island rendered a decree refusing to allow him to set it up as a bar to the entering of such decree, on the ground that he was in contempt of that court for violation of one of its decrees rendered therein; and that after the delivery of the deed of release to Durant the plaintiff requested the defendants to surrender the bond of August 24, 1868, and to abstain from suing him thereon, but they refused to comply with that request. The relief asked was an injunction restraining the defendants from further proceeding in the action at law. Upon a hearing before Judges Colt and Carpenter a demurrer to the bill was sustained, and the bill dismissed, October 28, 1886, Judge Carpenter delivering the opinion of the court. (C. C.) 28 Fed. 597.

The bill in case No. 52 was filed June 12, 1885. It assailed the jurisdiction of the supreme court of Rhode Island over the subject-matter of the suit in equity brought by Hazard, upon the ground that before bringing it neither the plaintiff therein, Isaac P. Hazard, nor any other stockholder of the Credit Mobilier of America, requested the managing committee of the board of directors or the stockholders of that corporation to begin legal or equitable proceedings against Durant. The cause was heard upon demurrer before Judges Colt and Carpenter. The demurrer was sustained, and the bill dismissed, the opinion of the circuit court being delivered by Judge Carpenter. (C. C.) 28 Fed. 578.

James C. Carter, for appellants and plaintiffs in error. Elias Merwin and Sam'l Mad-dox, for appellees and defendants in error.

Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court.

These four cases are so closely connected in their facts, as well as in the questions of law presented for determination, that it is convenient to dispose of them by one opinion.

Our attention will be directed first to case No. 50, in which a decree is sought to cancel, or, in the alternative, to reform, the bond of August 24, 1868, executed by Durant as principal, and by Griswold and Bradford as sureties, and to restrain the defendants from suing upon it in its present form. The granting or refusing of such a decree depends, of course, upon the inquiry whether the plaintiff Griswold has, by evidence sufficiently

clear and convincing, manifested his right to the relief asked.

While in respect to some matters there is a conflict among the witnesses, certain facts and circumstances are clearly established, and may be summarized as follows: Durant, in August, 1868, was a citizen and resident of New York. He went to Newport for a brief stay, and was there on the morning of Saturday, August 22d. About noon of that day the suit in which the writ of ne exeat issued was commenced against him. He was then sailing, with several friends, in his yacht on the high seas. The yacht landed at the Newport wharf shortly before 11 o'clock at night. Upon his stepping ashore he was notified by two officers, who had kept continuous watch for him at the wharf during the afternoon, that they had a writ for his arrest,—meaning the above writ of ne exeat,—and that he must go to jail. He accompanied them to that place, one of the counsel of Hazard, Mr. Peckham, following on foot to the sheriff's office. Information of the arrest having been communicated to Mr. H. W. Gray, also a citizen of New York, temporarily at Newport, that gentleman went to Griswold, who was his uncle, and begged the latter to go to the jail and become bail for Durant's appearance. Griswold had only a slight acquaintance with Durant, never having met him until the spring of 1868, and held no personal or business relations of any kind with him. To oblige his nephew, who was Durant's friend, and merely as an act of kindness and courtesy to a stranger, (Griswold then resided in Newport,) he acceded to the request to become bail for Durant's appearance in court, and for that purpose only went to the jail. Hazard learned, a little before 11 o'clock, that Durant had been arrested as he landed from his yacht, and that owing to the lateness of the hour the sheriff had taken him directly to jail instead of his own office, "as had been previously arranged." He went immediately to the lodgings of one of his attorneys, Mr. Bradley, and caused him "to go and see what could be done to prevent Durant from remaining in jail over Sunday;" authorizing his attorney to use his name "for the purpose of releasing said Durant from jail until Monday, it being regarded as very doubtful whether Durant in the short time then remaining before Sunday would be able to provide the necessary bonds."

Shortly after Griswold, accompanied by Gray, reached the jail, the two counsel of Hazard, namely, Bradley and Peckham, arrived there, and a few moments later Gov. Van Zandt came in obedience to a message from Durant, conveyed by Bradford, to act as his counsel. Hazard, it seems, did not accompany his counsel to the jail. It was now nearly 12 o'clock. All who were at the jail agree that they were there only because of the arrest of Durant under a writ commanding the sheriff to take bail from him, in the sum of \$53,735, that he would not go or

attempt to go into parts beyond the state without the leave of the court, and, if such bail were not given, to commit him to and keep him in jail until he gave bail of his own accord; and, such security being taken, the officer was required by the writ to return a certificate thereof to the court. There is no claim that any one present was ignorant of the terms of the writ, or of the extent of the authority of the officer charged with its execution. It is further agreed by all the witnesses that there was a conversation at the jail between the lawyers and Durant as to what could be done in order to effect the latter's release. But in this discussion or conversation Griswold took no part whatever. That much is distinctly stated by Peckham, one of Hazard's attorneys who drew the bond, and supervised the execution of the writ of ne exeat, although he says that the sureties could not "help hearing, if they paid any attention." It is equally beyond dispute that the object of Griswold's presence at the jail was well known to Hazard's attorneys.

Just here arises the difference among the witnesses as to what took place at the jail. Detailing what occurred according to his recollection at that place, Peckham says: "When I got to the jail I found there Judge Bradley, who had only preceded me there by a minute or two; Mr. Durant; Charles C. Van Zandt, his counsel; Mr. Griswold; Dexter Bradford; and a stranger, who was, I presume, Mr. Gray. Mr. Van Zandt and Judge Bradley were already talking about the release of Mr. Durant from custody. Judge Bradley said: 'That is a simple matter. Let him give the bond called for by the writ.' The nature of that bond was briefly explained. Mr. Durant said that it was out of the question for him to give it; that he couldn't remain any longer in Rhode Island; that his presence was absolutely demanded outside of the state, and forthwith; and that he must leave here Monday morning. It was suggested that he might file his answer, and apply for the discharge of the writ immediately; but he said, 'I know what proceedings in court are, and I can't remain here at all.' It was then proposed that he should give a bond in the same amount marked in the two writs in the two cases, conditioned to abide and perform whatever decrees the court might make against him in those suits. The nature of these proposed bonds was freely discussed by Judge Bradley, Mr. Van Zandt, and Mr. Durant, and the fact that they were bonds which would hold the principal and sureties liable to pay money in case Durant should not perform any decree made by the court was commented on by Mr. Van Zandt and Mr. Durant. During all this interview Judge Bradley did all the talking for the complainants, and Mr. Van Zandt and Mr. Durant spoke about equally for their side." The same witness states: "Mr. Van Zandt having conferred with Mr. Durant, and those two having

conferred with the sureties,—I mean Mr. Griswold and Mr. Bradford,—Mr. Van Zandt then announced that they would give the bonds proposed. As it was then very late, it was further agreed that all should meet at my office on the following Monday morning, soon after midnight, and execute the papers. Besides these bonds, it was also agreed that the respective counsel should sign an agreement that upon the bonds being executed the writs of ne exeat should be absolutely discharged. Just at the close of the interview Judge Bradley addressed himself to all present, saying that he wished to make sure that all understood the arrangement alike, and he stated that Mr. Durant was to give bonds, with Mr. Griswold and Mr. Bradford as sureties, in the sums marked in the writs, to abide and perform all the decrees of the court in the suit; that counsel should sign agreements for the discharge of the writs; that all should meet at my office soon after midnight Monday morning and sign the papers; that in the meantime Mr. Durant would go free from custody upon his word of honor, and he appealed to the sureties, saying: 'We rely upon you, gentlemen, to see that he attends.' We then separated. I prepared the papers, and had them lying upon my table when we met, pursuant to the arrangement. They were read. Mr. Griswold took an active part at this meeting, and, I think, read the papers for himself. The papers were signed without any objection or discussion at that time. Probably we were not together at my office more than ten minutes." Referring to the interview at the jail, Bradley testified that nothing was said, to the best of his recollection and belief, by any one, conveying the idea that the complainants were to obtain from the defendant only a bail-bond for his appearance; and that "the terms of the bond were expressed so as to exclude the idea that it was merely a bail for appearance, and to provide that it should be a bond to abide and perform the order of the court." He further said that the bond "was to be a security," and it was so announced. In all material respects his evidence was in accord with the recollection of Peckham.

But there was other evidence which precludes our accepting the version of the affair given by those gentlemen. Gray, Griswold, Durant, and Van Zandt, with more or less distinctness, but all emphatically, state that neither at the jail Saturday night, nor at the meeting before daylight on Monday morning, was there a hint, suggestion, or proposition, in any form, that Durant should give bond, with sureties, conditioned that he would abide and perform the decrees that might be rendered in the Hazard suit, or that any bond was talked of except one that would make the sureties responsible simply for his appearance in the state, so as to be subject to the orders and process of the court. Gov. Van Zandt testifies, touching

the meeting at the jail: "It was proposed by Judge Bradley that Dr. Durant should give bond, with two sureties, which should be substituted for the writ and the writ withdrawn. I then understood from the conversation that the bond was in the nature of a bail-bond, and that when the sureties delivered Dr. Durant into the custody of the court, to either perform its orders and decrees personally, or to suffer such penalties personally as the court might impose, they would comply with the conditions of the bond. Nothing was said in my presence by any person inconsistent with these views." Again, referring to what took place at the time the bond was actually signed, the same witness says: "A bond, prepared by Messrs. Peckham and Bradley, was handed to me as counsel for Mr. Durant; there was some little discussion as to whether it should be made to the sheriff of Newport county, or to the complainants in the then suit. Judge Bradley preferred the latter, and it was so done. I told Mr. Durant that, in my opinion, it was a proper bond to secure his appearance in the suit, and the bond was then executed. * * * I heard nothing said by Judge Bradley or Mr. Peckham, except what I have already stated; I myself told Mr. Durant that, in my opinion, the instrument was, in effect, a bail-bond." Further: "There was nothing said or intimated by any person in my presence or hearing on that occasion to indicate that the bond was a security instead of a surety." The statements of Gov. Van Zandt are fully sustained by the depositions of Gray, Griswold, and Durant.

In view of this great preponderance of evidence upon the side of the plaintiff, as to what occurred at the jail before the separation of the parties to meet Monday morning for the consummation of the business, the court is not at liberty to accept the account given by the defendants' attorneys of the interview of Saturday night. And we have a strong conviction that the recollection of Griswold, Gray, Durant, and Van Zandt as to that interview, is sustained by all the inherent probabilities of the case. And in saying this we would not be understood as reflecting upon the integrity of Hazard's attorneys. The difference in the recollection of gentlemen, in respect to transactions in which they took part, often happens, without any reason to suspect that any of them would intentionally deviate from the line of absolute truth. Such differences existing, the court can only be guided by the weight of the evidence, where the witnesses are intelligent, of equal credibility, and had equal opportunities to know what occurred. In the first place, it is not at all probable that Griswold would have executed the bond in question, as surety, if he had been informed, or believed, that it bound him absolutely, within the amount specified in such bond, for the payment of any sum adjudged

against Durant,—almost an entire stranger to him. In the next place, we cannot suppose that the counsel who went to the jail to represent the interests of Hazard, had any other purpose in going there except to see that that was, substantially, accomplished which the writ of *ne exeat* authorized, namely, the obtaining of bail that would prevent Durant's departure from the state without the leave of the court, and thus have him, at all times, pending Hazard's suit, subject to its rightful power in respect to any decree to be rendered. That was evidently Bradley's purpose, for, according to Peckham's evidence, he suggested that Durant could effect his release by executing the bond specified in the writ. But when the nature of such a bond was explained, and it appeared that the necessity for Durant's being out of the state on Monday rendered that course entirely impracticable, the latter was then informed—according to the evidence of Peckham—that he could file an answer and apply for the discharge of the writ immediately. What was meant by this suggestion? It could have meant but one thing, namely, that it was in the power of Durant to obtain, without objection, if not of right, a discharge of the writ, after answering, by executing a bond of some kind. A party arrested upon *ne exeat* may obtain the discharge of the writ, upon motion or petition, and after notice, and according to some authorities, "it is a matter of course to order the *ne exeat* to be discharged, upon the defendant's giving security to answer the complainant's bill, and to render himself amenable to the process of the court pending the litigation, and to such process as may be issued to compel a performance of the final decree. * * * Or, where the defendant cannot procure such security as will satisfy the sheriff, or if he wishes to leave the state before the termination of the suit, he may apply to the court to discharge the *ne exeat* upon his giving proper security to answer and be amenable to process; and upon such application the court will take such security as it may deem sufficient, and will discharge the sheriff from liability." 2 Barb. Ch. Prac. 655, 656; *Mitchell v. Bunch*, 2 Paige, 606, 621; *Brayton v. Smith*, 6 Paige, 489, 491; *McNamara v. Dwyer*, 7 Paige, 239, 244. See, also, *Jac. Law Dict. tit. "Ne Exeat Regno;" Johnson v. Clendenin*, 5 Gill & J. 463, 481. In *Re Griswold*, 13 R. I. 126, determined September 20, 1880, *Griswold*, by petition, sought to be discharged from the bond in question on his principal's placing himself within the jurisdiction of the court, and subject to its orders and decrees. He seems to have proceeded, in that case, upon the ground that he was entitled, of right, to the order of discharge asked. But the supreme court of Rhode Island did not accept that view, observing that it could not regard "a bond to abide and perform the decree as equivalent merely to a bond to abide

the event of the suit." To do so, the court said, would be to ignore wholly the word "perform" contained in the bond, which, upon its face, appeared to be given by agreement of the parties. While it was there said, and properly, that the court may require as a condition of the discharge of a writ of *ne exeat* that the respondent give security to perform the decree,—citing *Robertson v. Wilkie*, Amb. 177, and *Atkinson v. Leonard*, 3 Brown, Ch. 218,—it was conceded that "courts will generally discharge a writ of *ne exeat* upon the respondents giving security to abide the decree on the hearing of the suit." If Durant had remained in Newport, and, upon filing his answer, had applied for the discharge of the writ of *ne exeat* upon his giving bond with security simply to abide the decree, and place himself, when required, within the jurisdiction of the court, it is inconceivable that the state court would, under the circumstances, have denied his application. But it was further said in that case—and this is quite significant in its bearing upon another question to be presently adverted to—that, "even if the bond in question was to be considered as having no other effect than a bond to abide the decree made upon hearing the cause, the petition could not be granted in the present stage of the proceedings. No final decree in the cause has yet been reached."

As, therefore, Durant could have filed his answer, and, conformably to the general rule, have obtained a discharge of the writ upon giving bond, with surety, that he would be amenable to the orders and process of the court; as he could not, consistently with his engagements, remain in Rhode Island long enough to have an answer prepared, and to move for the discharge of the writ, upon sufficient bond to be by him given; and as Hazard and his counsel expressed a desire that Durant should not be held in custody over Sunday,—what more natural and equitable than that the parties should, by consent, bring about that which Durant must have understood from Bradley that he could accomplish, through the orders of the court, namely, have a bond executed with surety compelling his presence in the state when required by the orders of the court, or subjecting his sureties to personal liability if he did not render himself amenable to its process. If the suggestion that Durant could file his answer and apply to the court for the discharge of the writ (of course, upon bond securing his amenability to the process of the court) had been adopted, the plaintiff would not have obtained a bond making the surety absolutely responsible, within the penal sum named in the writ and bond, for a money decree against Durant. It is therefore unreasonable to suppose that the parties separated Saturday night under an agreement that Hazard should have from Durant a bond that would subject his sureties to a

larger responsibility than was involved in the suggestion made that Durant could obtain an order of court for the discharge of the writ. On the contrary, it is more reasonable to suppose that the bond which, on Saturday night, was agreed to be executed on the next Monday morning, was one that would accomplish, by agreement of parties, precisely what Hazard's attorney suggested that Durant might accomplish by an order of court. The agreement of the parties was thus made to take the place of an order of court, because Durant assured Hazard's attorneys that he could not remain in Newport long enough to make a formal application for the discharge of the writ upon a proper bond.

We are of opinion that, although the condition of the bond in question was that Durant should "abide and perform the orders and decrees" of the court in suit in which it was given, all the parties, according to the decided preponderance of evidence, intended to, at the time, as an instrument binding the sureties for the appearance of the principal so as to be amenable to the process and decrees of the court, upon default in which, and not before, were they to be liable to pay the penalty. If the bond means, in law, more than that,—and counsel in this court agree that it does,—the case is one of a mutual mistake, clearly established, as to the legal effect of the instrument. There was no mistake as to the mere words of the bond; for it was drawn by one of Hazard's attorneys, and was read by Griswold before signing it. But, according to the great weight of the evidence, there was a mistake, on both sides, as to the legal import of the terms employed to give effect to the mutual agreement. In short, the instrument does not express the thought and intention which the parties had at the time of its execution. And this mistake was attended by circumstances that render it inequitable for the obligees in the bond to take advantage of it. The instrument was drawn by one of Hazard's attorneys, and was presented and accepted as embodying the agreement previously reached. Griswold was unskilled in the law, and took the word "perform" as implying performance in the sense of Durant's becoming amenable to the process of the court. He had no reason—unless the recollection of Gray, Durant, Van Zandt, and himself as to what occurred is wholly at fault—to doubt that the bond expressed the real agreement; especially if he heard Van Zandt's statement to Durant, when the latter was about to sign the bond, that it "was, in effect, a bail-bond." A court of equity ought not to allow that mistake, satisfactorily established and thus caused, to stand uncorrected, and thereby subject a surety to liability he did not intend to assume, and which, according to the decided preponderance of the evidence, there was at the time no purpose to impose upon him. While it is

laid down that "a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts," yet "the rule that an admitted or clearly established misapprehension of the law does create a basis for the interference of courts of equity, resting on discretion and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best-considered and best-reasoned cases upon this point both English and American." Snell v. Insurance Co., 98 U. S. 85, 90, 92, 25 L. Ed. 52; 1 Story, Eq. Jur. (Redf. Ed.) §§ 138e, 138f; Stockbridge Iron Co. v. Hudson Iron Co., 102 Mass. 45, 48; Underwood v. Brockman, 4 Dana, 309, 316; Jones v. Clifford, 3 Ch. Div. 779, 791, 792; Canedy v. Marcy, 13 Gray, 373, 377; Green v. Railroad Co., 12 N. J. Eq. 165, 170; Beardsley v. Knight, 10 Vt. 185, 190; State v. Paup, 13 Ark. 129; 2 Lead. Cas. Eq. pt. 1, 979-984; 2 Pom. Eq. Jur. §§ 843-847.

The conclusion reached upon this branch of the case is the only one consistent with fair dealing towards those who were willing to become sureties for the appearance of Durant. If it be not justified upon the ground of mistake as to the mutual agreement, superinduced by the conduct of the party seeking now to take advantage of it, there could be no escape from the conclusion that the taking of a bond that made Griswold absolutely liable as surety, for any amount adjudged to be due from Durant, and not greater than the penal sum named, was, under all the circumstances disclosed, a fraud in law upon him. If the attorneys of Hazard intended to obtain, by means of a bond, more than he was entitled to by such a bond as the writ of ne exeat called for, and more than the court would ordinarily have given them, upon Durant's application to discharge the writ; if they intended to secure a bond that would make Griswold personally liable, within the penal sum, for any money decree passed against Durant, then a fraud was perpetrated upon him, which entitles him to relief; for, according to the decided preponderance of the evidence it must be assumed that Hazard's attorneys knew that he signed the bond in the belief that, pursuant to the previous understanding, it was one to secure Durant's appearance, nothing more, and yet they failed to inform him, at the time, that it was drawn so as to impose upon him a much larger responsibility. Their silence upon that question was, under the circumstances, equivalent to a direct affirmation that the bond meant what Griswold supposed it did. In view of what passed at the jail on Saturday night, their duty was, by sufficient explanation, to correct the misapprehension under which he evidently labored. Besides, there can be no doubt, under the evidence, that the agreement to discharge the writ was reached without consultation with Gris-

would. No one of the witnesses states that he was consulted about that matter, or that he was informed as to the legal result of an agreement or order to discharge the writ. He testifies that he knew nothing of any such agreement. So that while Hazard's attorney, according to his evidence, was preparing a bond that would bind Griswold absolutely to pay any decree, not in excess of \$53,735, that might be rendered against one who was almost a stranger to him, and who, Hazard stated in his bill, was then engaged in hazardous speculations, and was in a precarious condition pecuniarily, he was, as the representative of Hazard, under an agreement with Durant, of which Griswold had no knowledge, that the writ of ne exeat should be discharged; thus compelling the surety to risk the insolvency of the principal, and putting it out of his power, for his own protection, to surrender the principal, and obtain the cancellation of the bond, as, in that case, the surety might have done, if the bond had been, as he supposed it was, one simply for the appearance of Durant. The concealment of this agreement from Griswold was, under the circumstances, a wrong to him. "The contract of suretyship," says Mr. Story, "imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract." Again: "If a party taking a guaranty from a surety conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of the facts, such a concealment will amount to a fraud, because the party is bound to make the disclosure." 1 Story, Eq. Jur. §§ 324, 215. To the same effect are *Bank v. Cooper*, 36 Me. 180, 196; *Smith v. Bank*, 1 Dow, 272, 292; *Railton v. Mathews*, 10 Clark & F. 934, 943; *Small v. Currie*, 2 Drew. 102, 114; *Phillips v. Foxall*, L. R. 7 Q. B. 666, 672; *Pidecock v. Bishop*, 3 Barn. & C. 605; *Adams' Eq.* 179. But we do not rest our decision upon any ground of fraud in law or fraud in fact. We acquit the attorneys of Hazard of any desire or purpose to do injustice to Griswold, or to commit a fraud upon him. But we are constrained, by the settled rules of evidence, to hold, as already indicated, that their recollection of the circumstances under which the bond of August 24th was executed is materially at fault, and that the alleged mistake is established by convincing proof.

But it is said that Griswold was guilty of such laches in seeking the relief now asked that he is not entitled to the aid of a court of equity. This position is based principally upon what Peckham says occurred

between him and Griswold in the fall of the year after the execution of the bond. Peckham testifies: "About the last of October or the 1st of November, 1868, along that time, I met Mr. Griswold on Thames street, in Newport, near my office. He spoke of this bond as if it were a bail-bond. I said, 'No; it is a bond upon which you may be liable to pay money. If, for example, the court should find a judgment against Durant for any sum of money, and he did not pay it, you could be held for the amount named in these bonds.' He said, 'Well, I guess you are right, but I must see Durant about it. He must do something about it.' I asked him, 'Why, he is rich enough, isn't he?' and Mr. Griswold said, 'Yes; he is rich enough, but he is reckless, and there is no telling how long such a man may stay rich, and he must give me security.' I would like to add here that I mentioned this to Mr. Honey last winter. Mr. Honey said that he was confident, from conversations he had had with his client, Mr. Griswold, that Mr. Griswold had no recollection of any such conversation with me; and I replied that, if Mr. Griswold did not recollect it, I should hesitate about swearing to it, and that I did not think I would swear to it under those circumstances, and that certainly I would not like to do so. Still I have felt bound to state it here, upon further reflection, with these explanations." If this be a correct statement of what passed between Peckham and Griswold, upon the occasion referred to, it is significant as showing that months after the bond was executed Griswold spoke of it as a bail-bond. His declaration, after Peckham's explanation of its terms, "I guess you are right," naturally meant no more than a courteous acquiescence, without discussion, in the opinion expressed by one learned in the law. Griswold, while recalling the fact that he expressed to Peckham his belief that it was a bail-bond, denies explicitly that he, on that or any other occasion, ever admitted that it was other than a bail-bond.

Besides, there was no absolute necessity for Griswold's moving in the matter until after some decree was passed against Durant, and until an attempt was made to hold him personally responsible for the amount of the bond. He made an effort in *Re Griswold*, 13 R. I. 125, to be discharged from his bond upon the principal's placing himself within the jurisdiction of the court. But, as we have seen, the court, after declining to discharge the bond, said that, even if the bond in question was to be considered as having no other effect than a bond to abide the decree made upon hearing the cause, the petition for its discharge would not be considered by it until a final decree was passed. The judgment in that case was passed September 30, 1880. Notwithstanding this announcement, and doubtless because of the intimation that the bond meant more, in law, than he supposed, Griswold

commenced the present suit more than a year before the decree was rendered against Durant, and before the action at law was brought on the bond. Under the peculiar circumstances of this case, we think the defense of laches is without substantial merit. Whether laches is to be imputed to a party seeking the aid of a court of equity depends upon the circumstances of the particular case. There are no circumstances here that would justify a refusal to grant the relief asked because of Griswold's delay in instituting suit to have the bond canceled or reformed.

In the view the court takes of this case, the proper decree to make, if Durant were living, would be one reforming the bond of August 24, 1868, so as to make Griswold liable for the penal sum named only in the event that the principal failed to appear and become subject to the orders and decrees of the court in the suit in which the writ of ne exeat was issued. But such a decree would not now be appropriate. Under the circumstances, the only decree that will accomplish the ends of substantial justice is one perpetually enjoining the prosecution of any action, suit, or proceeding to make him liable in any sum on or by reason of said bond.

We come now to the action at law No. 53, in which there was a judgment against Griswold on the bond of August 24, 1868, for the sum of \$66,470. It is assigned for error that the court sustained the demurrers to the original second, third, fourth, and fifth pleas, ordered the amended third, fourth, and fifth pleas to be stricken from the files, and denied the defendant's motions, at the trial, for judgment on his eighth and ninth pleas. It has been assumed in argument that the record in this case substantially presents, among other questions, the following: (1) Whether the bond of August 24, 1868, was not obtained by such fraud and concealment as rendered it void as against Griswold. (2) Whether upon the face of the record of the equity suit in which the order or decree of December 2, 1882, was rendered the court was not without jurisdiction of the subject-matter of that suit, the essential object of which, it is argued, was to administer the affairs, and distribute the assets, of a Pennsylvania corporation, by means of decrees and orders of a court in Rhode Island. (3) Whether simple duress operating only on the principal in the bond could be taken advantage of by the surety. (4) Whether the plaintiffs, notwithstanding the stipulation of Griswold's counsel, at the trial, that they were able to prove, under the decree of December 2, 1882, "an amount of damage in excess of the penal sum of the bond declared on," could maintain an action on the bond for that or any other sum, until it was ascertained and adjudged in Hazard's equity suit, what distinct part, if any, of the \$16,071,659.97 for which

Durant was adjudged by the supreme court of Rhode Island to be accountable to the Credit Mobilier of America, actually belonged, or would be ultimately awarded, to the obligees in the bond.

These questions have been argued by the counsel of the respective parties with signal ability, and their importance is recognized. But, in view of the present condition of the record of this case, it is not deemed best now to discuss them. The ground upon which the court below ordered the amended pleas to be stricken from the files does not appear. It may be that the motion was treated as a formal demurrer (*Slocomb v. Powers*, 10 R. I. 255), or was granted because, in the judgment of the court, the amended pleas did not materially change the defense as presented in the pleas to which special demurrers were sustained, and were not, therefore, fairly embraced by the stipulation made by counsel for their being filed. But, in our judgment, the amended pleas were much broader, as well as more specific in their averments, than were the original pleas; and the questions arising upon them could have been more appropriately raised by demurrer. *Smith v. Carroll* (R. I. July 19, 1890) 20 Atl. 227. We are the more willing to make this disposition of the case, because of the decision in case No. 50 in respect to Griswold's liability upon the bond sued on. In view of what has been there said, the discussion of the above questions would seem to be unnecessary.

The demurrer to the bill in No. 51 was properly sustained. The error, if any, committed by the supreme court of Rhode Island in not allowing the release, executed to Durant by the receiver in the Pennsylvania court of the Credit Mobilier of America, to be interposed as a defense in the suit brought by Hazard against Durant and others, could not be corrected by bill in equity, filed by a surety on the bond of August 24th; for the reason, if there were no other, that the release was delivered prior to the judgment in the state court constituting the basis of the action at law on the bond.

The demurrer to the bill in case No. 52 was also properly sustained. In that case the validity of the proceedings in the supreme court of Rhode Island, by Hazard against Durant and others, was assailed upon the ground that the bill in that suit did not sufficiently show that any effort had been made by Hazard, the plaintiff therein, and who sued as stockholder, to procure corporate action against Durant by the Credit Mobilier of America. It is only necessary to say that this ground presents only a question of mere error in the judgment of the state court, and does not affect its jurisdiction.

The decree in suit No. 50 must be reversed, with directions to enter a new decree perpetually enjoining the defendants therein, and each of them, from prosecut-

ing any suit, action, or proceeding against Griswold on the bond executed by him on the 24th of August, 1868, as one of the sureties of Thomas C. Durant; the decrees in cases Nos. 51 and 52 must be affirmed; and the judgment in the action at law No. 53 must be reversed with directions for further proceedings not inconsistent with this

opinion. Griswold is entitled to his costs in this court in cases 50 and 53, and the appellees in the other cases are entitled to their costs here as against Griswold. It is so ordered.

BRADLEY and BREWER, JJ., did not participate in the decision of this case.

MARSHALL et al. v. WESTROPE.

(67 N. W. 257, 98 Iowa, 324.)

Supreme Court of Iowa. May 18, 1896.

Appeal from district court, Shelby county; A. B. Thornell, Judge.

Suit in equity to reform a contract of assignment of certain accounts made by defendant to plaintiffs, and to recover on the contract so reformed the sum of \$270, being the value of certain machinery delivered by plaintiffs to defendant in consideration of the assignment. The defendant admitted the receipt of the machinery, the assignment of the accounts, and a certain modification of the contract of assignment, but denied each and every other claim of plaintiffs. He also pleaded an election of remedies on the part of plaintiffs, by which they confirmed and elected to stand on the original contract as made. There was a trial to the court, and judgment and decree for plaintiffs. Defendant appeals. Reversed.

Smith & Cullison, for appellant. Nash, Phelps & Mosier, for appellees.

DEEMER, J. In the year 1891, plaintiffs, a copartnership, were engaged in selling farm machinery at the town of Audubon. Defendant had for a number of years prior thereto been managing and conducting a farm in Audubon county for his father. On or about March 1st, he moved onto a farm of his own, in Shelby county, intending to cultivate it for his own use and benefit. Desirous of purchasing some farm implements, he visited plaintiffs' place of business, with the avowed intention of securing the same. It appears that the defendant was the owner of a stallion, which was "stood" for the season of 1890 in Montgomery or Cass counties, by an agent of defendant, under an arrangement by which the parties who received the services of the stallion were to pay a certain amount therefor in the event the mares bred to him were got with foal; otherwise, nothing should be paid. The defendant was the owner of certain claims for services resulting from the use of the stallion, which he proposed to transfer to plaintiffs for the farm machinery he desired to purchase. No agreement was reached at the first interview, but it was arranged that defendant should see if he could purchase the machinery of some other person at a lower price, and, if not, it was supposed that the negotiations would be renewed. About March 27th, the defendant wrote plaintiffs a letter of which the following is a copy: "Marshall & Sharp: I can make the trade in Harlan, but they are not so low in price as you are. Jones would not make the price he stated and furnish the goods he named. Inclosed find assignment for same. Please sign and date, and keep one, and send me one, and let me know by return mail, because I will want to know at once if the deal is closed. I would come

over, but my house burned to the ground last Saturday night, and I cannot leave. Very truly, O. D. Westrope." In this letter was inclosed a contract for the plaintiffs' signature, the material parts of which are as follows: After stating that plaintiffs had sold certain machinery to defendant, it recites: "That, as payment therefor, the said O. D. Westrope enters into and does hereby assign and transfer to said Marshall & Sharp the following accounts for services of the stallion named General Duke, in the year 1890, to wit: [Here follows a list of the accounts, with the amounts of each set out, aggregating the sum of \$300.] The said Marshall & Sharp taking and accepting said accounts in full satisfaction of said claim; the said O. D. Westrope hereby agreeing that all foals not paid for by July 1st, 1891, that he will pay to said Marshall & Sharp such account remaining unpaid, and said account so paid by him to be reassigned to him. Marshall & Sharp. O. D. Westrope. Dated at Audubon, Ia., March 28, 1891." These contracts were signed by appellees as indicated, and one of them (there being two) was returned to appellant, and the other retained by appellees. Afterwards one of the articles called for by the contract was substituted by another, and all the goods with the substitute named were shipped to the appellant. But three of the mares served to appellant's horse proved to be with foal, and appellees received but \$30 from the accounts so assigned. The other accounts never matured, because the mares did not prove to be with foal. The appellant, being called upon to make payment of the balance of the purchase price, refused, claiming that he had fully performed his contract. The appellees thereupon instituted an action at law against the appellant, alleging (1) that appellant had procured its signature to the contract by fraud and misrepresentation; (2) that there was an implied warranty in the sale of the accounts, to the effect that they were subsisting and enforceable against the parties whose accounts they purported to be; and (3) that appellant received the property without any consideration therefor having been paid by him. The appellant made an issue of fact on the first claim, and demurred to the second and third. The demurrer was sustained as to the third, and overruled as to the second. Defendant thereupon answered the second, pleading that, under the arrangements had with those who secured the services of his stallion, it was agreed that nothing should be paid unless the mares were got with foal; that plaintiffs knew of this arrangement when they accepted the assignment of the accounts. Thereupon plaintiffs amended their petition by adding another count, in which they claimed that, by mutual mistake, or by mistake on their part and fraud on defendant's, the words "foals" was inserted in that part of the contract containing the guaranty, instead of the word "accounts"; and

they asked that the mistake be corrected, and the contract reformed. A motion was then filed by defendant attacking the petition on the ground of misjoinder. This motion was sustained, but plaintiffs were permitted to file this last count as an independent action in equity. Certain pleadings were filed attacking this equitable pleading, which need not be referred to, and finally the defendant answered, admitting the receipt of the goods as alleged, but denying the fraud and mistake. He also pleaded that plaintiffs, by the institution of the law action, had confirmed the contract, and elected to stand thereon, and that they could not now be allowed to repudiate it; and that the contract was merged in a judgment by which the rights of the parties were fully determined. Defendant also pleaded that plaintiffs, with full knowledge of the contents of the written contract, and that the word "foals" was used therein, confirmed the same, and elected to stand by the conditions thereof. The plaintiffs filed a reply, denying this last claim of defendant, and also filed a demurrer to that part of the answer pleading an election and confirmation. This demurrer was submitted with the case, and the court, in rendering the decree, sustained the demurrer, reformed the contract as prayed, and rendered judgment for plaintiffs. Defendant excepted to the rulings, and appeals.

1. The first point relied upon by appellant is that the court erred in sustaining the demurrer to that part of his answer pleading election and confirmation. It is said that plaintiffs, by reason of having commenced their suit at law, elected to rely upon the contract, and that they cannot now be allowed to change front, and seek to have it reformed. The question presented is not open for our consideration. The suit is an equitable one, triable *de novo* in this court, upon the issues of fact presented to the lower court; and, while the appellant might also have the case considered on error, yet, to do so, he must assign the errors of which he complains. *Powers v. O'Brien Co.*, 54 Iowa, 501, 6 N. W. 720; *Patterson v. Jack*, 59 Iowa, 632, 13 N. W. 724; *Hodgin v. Toler*, 70 Iowa, 21, 30 N. W. 1. There is no assignment of errors, and we cannot, therefore, review the action of the trial court in sustaining appellees' demurrer. It may not be inappropriate to say, however, that we do not think the facts as pleaded in defendant's answer constitute such an election of remedies, or such a claim of right, as prevents the appellees from asking for a reformation of the contract upon which the suit is founded.

2. The appellees alleged in their petition that the contract of sale "did not express the real contract entered into between plaintiff and defendant, * * * in that the word 'foals' was, by fraud or mistake of the defendant, used in the place of the word 'accounts,' * * * but that plaintiff, through mistake as to the contents of said instru-

ment, believed that the word 'accounts' was used in the said instrument where the word 'foals' is found, and was thereby induced to sign the said instrument." In an amendment to the petition, the appellees said "that either said instrument did not express the intention and real contract of the parties signing the same by reason of the mistake of both parties or of the scrivener drawing the same, or that the defendant fraudulently presented the same to plaintiffs, intending that plaintiffs should be misled thereby, and knowing that plaintiffs were in error as to the terms and to its sufficiency to express the contract between them." It is now insisted that the evidence does not sustain either claim. It seems to us that this is true in so far as it relates to the alleged mistake of fact recited in the original petition. The evidence conclusively shows that both members of plaintiffs' firm knew when they signed the contract just what it contained. They knew that the word "foals" was used, instead of the word "accounts." They talked about the contract with each other before signing it. The defendant says that there was no mistake; that the language used was just as he intended. Manifestly, there was no such mistake of fact as to justify a reformation of the instrument, for the plain reason that neither party was mistaken in regard to what was in fact in the contract. A mistake, to be such as the law will relieve from, must be mutual and reciprocal. When the contract as executed is just as the parties intended to make it, the court has no power to reform it because of mistake of fact. To do so would be making a new contract for the parties, and would also impose upon one burdens which he did not intend to assume. No court has the power to make a new contract for the parties. It can only do what the parties mutually and manifestly intended at the time they signed the same. The mistake made, if any, was with reference to the efficacy of the terms used to carry out the intent of the parties, and this is the real claim made by the appellees. We have, then, the question: Will a court of equity reform a contract under such circumstances? In the case of *Lee v. Percival*, 52 N. W. 543, we held, following the rule laid down by Prof. Pomeroy in his work on Equity Jurisprudence, that "if, on the other hand, after making an agreement, in the process of reducing it to a written form, the instrument, by means of a mistake of law, fails to express the contract which the parties actually entered into, equity will interfere with the appropriate relief, either by way of defense to its enforcement or by cancellation or reformation, to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance there is no mistake as to the legal import of the contract actually made; but the mistake of law prevents the real contract from being

embodied in the written instrument." The counterpart of this proposition announced by Prof. Pomeroy is: "The doctrine is settled that, in general, a mistake of law, pure and simple, is not adequate ground for relief." Section 842. "The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief. * * * The principle underlying this rule is that equity will not interfere for the purpose of carrying out an intention which the parties did not have when they entered into a transaction, but which they might or even would have had if they had been more correctly informed as to the law,—if they had not been mistaken as to the legal scope and effect of their transaction." Section 843. "If an agreement is what it was intended to be, equity will not interfere with it because the parties have mistaken its legal import and effect." Section 845. We now have the two rules stated as concisely as general principles may be, and it is next important to determine under which of them this case falls. We have seen that if the parties, at the time they made their agreement,—at the time their minds met,—mutually understood that the defendant was to guaranty all the accounts which he transferred to plaintiffs, but that, in the process of reducing their agreement to writing, they used the word "foals" under the mistaken idea that it was as broad as the word "accounts," then equity will afford relief. But if they made an agreement that defendant should guaranty the foals, under the mistaken idea that this would be a guaranty of the accounts, then no relief can be granted. It is also a well-settled and oft-repeated rule of law that, before mistakes of either fact or law can be relieved from either affirmatively or negatively, it is essential that the proofs be clear, strong, convincing, and free from reasonable doubt. *Gelpcke v. Blake*, 15 Iowa, 387; *Clute v. Frazier* (Iowa) 12 N. W. 327. There is another rule which it may be well to note, as it is relied upon by the appellees in this case. It is as follows: "A mistake which will warrant a court of equity in reforming a written contract must be a mistake made by both parties to the agreement, or it must be the mistake of one party by which his intentions have failed of correct expression, and there must be fraud in the other party in taking advantage of the mistake, and obtaining a contract with the knowledge that the one dealing with him is in error as to what are its terms." *Bryce v. Insurance Co.*, 55 N. Y. 243; *Winans v. Huyck*, 71 Iowa, 459, 32 N. W. 422. Another principle which is suggested by appellant may also be stated. It is to the effect that a mistake caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the ab-

sence of which would be a violation of legal duty, will not be relieved from by a court of equity.

Turning now to the evidence, we find that it establishes the following facts: The defendant, desirous of purchasing some farm machinery, visited the plaintiffs, and received from them their lowest and best price therefor. He then offered to exchange some accounts in payment or as collateral security for the purchase price. The plaintiffs would not accept these accounts without a guaranty from the defendant, and they so told him. Defendant then said he would be responsible and pay all accounts that were not paid and turned over to plaintiffs by July 1st. The plaintiffs then said they would accept the proposition. All parties understood at the time the condition of the accounts,—that the parties against whom they purported to be were not to be responsible unless the mares proved to be with foal. The defendant wished to do a little more figuring, and said that he was going over to his farm, and would look the matter up a little further, and would write what he concluded to do about the matter. It was further agreed that, if the trade was consummated, the goods should be shipped to defendant over the Rock Island Railroad. The next plaintiffs heard from defendant was by letter of date March 27, 1891, a copy of which we have already given. When plaintiffs signed the contract which was inclosed in defendant's letter, they understood they were carrying out the arrangements previously made. Some time in September of the year 1891, the plaintiffs ascertained they were not going to receive more than \$30 from the accounts which were assigned them, and they called on defendant for payment. Defendant put them off from time to time, and finally announced that he intended to stand upon his contract. When plaintiffs signed the contract, they knew the words it contained, and their mistake, which we are abundantly satisfied they made, was as to the legal effect thereof. We feel quite certain that the defendant, when he first talked to the plaintiffs, intended to guaranty all the assigned accounts, and not those only which fully matured. It is not so clear, however, that he, in drafting the contract, intended, by the words used, to make himself responsible for the accounts without reference to the foals.

Now, in applying the law to these facts, the first inquiry is, what was the contract as actually entered into by the parties? for it must be remembered that this is not a suit to cancel or set the writing aside, but to make it conform to the real agreement of the parties. If, then, the instrument itself is the contract the parties in fact made, then there is nothing to reform. But if they made a parol contract,—if there was in fact a meeting of the minds of the parties,—and they made a mutual mistake in reducing it to writing, and used terms which did not

express the real contract between them, equity will reform the instrument to make it correspond with the contract as actually made. It is apparent from what we have said, as well as from some other circumstances in the case which we cannot take the space to state, that, while the parties were making propositions and negotiations with each other for a trade, their minds never in fact met until the plaintiffs signed the written instrument which was sent for their signature. This was the contract between the parties; and although it did not, for lack of apt words, express what they thought it did, this was the only agreement they made.

It is well to inquire what other contract did they in fact make which should be given force and vitality. The answer is, none. The whole matter as it stood at the end of the personal interview between the parties was in the form of propositions by one to the other. The acceptance by the defendant was not of the offer made him by the plaintiffs. He in truth sent another proposition when he mailed the contracts signed by himself. These contracts were not in accord with the previous negotiations of the parties; but the plaintiffs, when they signed them, knew full well what they contained, and, if any agreement was made, it was the one expressed in the writing. It may be that, because of a mistake of law, the minds of the parties never met. But, if this be conceded, it will not aid the plaintiffs; for they are insisting upon the performance of a contract which they say they did make. They are not suing to avoid an instrument because they never agreed to it. Moreover, if they were asking cancellation or rescission, their own negligence in signing the contract would seem to be a bar to relief of this kind.

There is no evidence of fraud of any kind on the part of the defendant. He forwarded such an agreement as he proposed to make with the plaintiffs, and they, without any kind of imposition, misrepresentation, con-

cealment, or other inequitable conduct on defendant's part, signed the instrument with full knowledge of what it contained. The most that can be claimed from the evidence is that the defendant forwarded the instrument with intent to induce plaintiffs to believe that it was in accord with the previous negotiations, but this is a mere inference, which is squarely denied by the defendant. The presumptions are with the defendant, and the rule is well settled that fraud will not be presumed, but must be proved by him who alleges it.

An insuperable objection to relief on the ground of fraud is the negligence of the plaintiffs in signing the instrument. They had the same means of knowledge as to the legal effect of the words used as the defendant; and, if they were mistaken as to the proper legal construction thereof, it was not due, so far as we can learn from the record, to any fault of the defendant. The case, then, is one of mistake of law, pure and simple, and a court of equity cannot reform it. If we should attempt to do so, we would make a new contract for the parties, and impose upon one of them burdens to which he has never assented. While it may seem like a hardship to say that plaintiffs shall not recover for the machinery delivered defendant, yet the case is one of mistake of law, in which some person must suffer; "and the law wisely, though sometimes with great apparent hardship, leaves it for him to suffer who committed the mistake."

These conclusions are supported by the following, among other, authorities: *Reed v. Root*, 59 Iowa, 359, 13 N. W. 323; *Moorman v. Collier*, 32 Iowa, 138; *Stafford v. Fetter*, 55 Iowa, 484, 8 N. W. 322; *Baker v. Massey*, 50 Iowa, 399; *Nowlin v. Pyne*, 47 Iowa, 293; *Hallam v. Corlett*, 71 Iowa, 446, 32 N. W. 449. See, also, the cases cited in the first part of this opinion.

It follows from what we have said that the judgment must be reversed.

RENARD v. CLINK et al.

(51 N. W. 692, 91 Mich. 1.)

Supreme Court of Michigan. March 18, 1892.

Appeal from circuit court, Charlevoix county, in chancery; Jonathan G. Ramsdell, Judge.

Suit to foreclose a mortgage by Louisa Renard against Alice A. Clink, Eliza S. Fogg, John Nichols, and Walter L. French. Bill dismissed. Complainant appeals. Reversed.

Norton & Keat, for appellant. S. H. Clink, for appellees.

MONTGOMERY, J. The bill in this cause was filed to foreclose a mortgage executed by the defendant Alice A. Clink to one A. H. Van Dusen, and by him assigned to complainant. The other defendants are subsequent purchasers with notice, after the mortgage became due. A foreclosure at law was attempted, a sale made, and a deed executed to complainant; but, owing to the fact that the assignment of the mortgage to complainant was not of record at the time of said attempted foreclosure, that proceeding proved ineffectual. After the complainant had obtained her deed on the foreclosure at law, and before the filing of the present bill, the defendant Clink tendered to complainant the amount due upon the mortgage, exclusive of the costs of such former foreclosure; and in this proceeding it is claimed that such tender operated to discharge the lien of the mortgage. The court below sustained this defense, and dismissed the bill.

It is made clear by the testimony that the complainant, at the time she refused the tender, supposed that she had acquired title by her former foreclosure, and that, notwithstanding this, she was ready to accept the amount of the mortgage, interest, and costs. It also appears that she offered to take the money tendered so far as it would go, but that defendant refused to permit this unless she would accept it in full payment and discharge of the mortgage. Under these circumstances, we think the court below erred in dismissing the bill. Under the repeated rulings of this court, a tender of the full amount due upon the mortgage will operate to discharge the lien of the mortgage if the tender be refused without adequate excuse. *Moynahan v. Moore*, 9 Mich. 9; *Eslow v. Mitchell*, 26 Mich. 500; *Sager v. Tupper*, 35 Mich. 134; *Stewart v. Brown*, 48 Mich. 383, 12 N. W. 499. But in the present case it appears beyond question that the complainant had no purpose of exacting from the defendant any sum beyond what she believed to be her legal due.

While it is a general rule that equity will not relieve against a mistake of law, this rule is not universal. Where parties, with knowledge of the facts, and without any inequitable incidents, have made an agreement or other instrument as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, equity will not allow a defense, or grant a reformation or rescission, although one of the parties may have mistaken or misconceived its legal meaning, scope, or effect. *Martin v. Hamlin*, 18 Mich. 354; *Lapp v. Lapp*, 43 Mich. 287, 5 N. W. 317. But where a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interest, or estate, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or estates, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact. 2 Pom. Eq. § 849, p. 314; *Reynell v. Sprye*, 8 Hare, 222; *Blakeman v. Blakeman*, 39 Conn. 320; *Whelen's Appeal*, 70 Pa. St. 410; *Hearst v. Pujol*, 44 Cal. 230; *Morgan v. Dod*, 3 Colo. 551; *Cooper v. Phibbs*, L. R. 2 H. L. 149; *Lansdowne v. Lansdowne*, 2 Jac. & W. 205. In *Myer v. Hart*, 40 Mich. 517, the mortgagor filed his bill to set aside a mortgage sale, and asked that the premises be relieved from the mortgage lien. The court found that the mortgagee was mistaken as to his legal rights, but was acting in good faith, and refused to enforce the statutory penalty, and decreed that the mortgagor pay the mortgage debt as a condition to relief. In *Canfield v. Conkling*, 41 Mich. 371, 2 N. W. 191, a bill was filed to set aside a mortgage, and to recover the penalty for refusal to discharge it on tender of the amount due. The court found that the tender was sufficient, and say: "He [defendant] was bound to accept the tender, and complainant had made out a sufficient case for relief. But the question was one on which he might be mistaken without any serious fault, and we do not think it one where the mortgage ought to be held canceled without payment; nor is it a case calling for the statutory penalty for a willful and knowing wrongful refusal to discharge the mortgage." The decree below should be reversed, and a decree entered in this court providing for a sale of the mortgaged premises to satisfy the amount due and unpaid upon the mortgage. The defendant will recover the costs of the court below, and the complainant will be entitled to the costs incurred in this court. The other justices concurred.

TITUS v. ROCHESTER GERMAN INS. CO.
(31 S. W. 127, 97 Ky. 567.)

Court of Appeals of Kentucky. May 24, 1895.

Appeal from circuit court, Jefferson county.

"To be officially reported."

Action by U. S. Titus against the Rochester German Insurance Company for rescission of a contract. From a judgment for defendant, plaintiff appeals. Reversed.

Simrall, Bodley & Doolan, for appellant. Gibson, Marshall & Lochre, for appellee.

EASTIN, J. This equitable action was brought by appellant to rescind a contract made with appellee by which, as alleged, he was induced to accept, in satisfaction of a loss under a policy of insurance issued to him by appellee, an amount equal to one-half of that loss and to one-half of the amount of insurance named in the policy. As grounds of rescission, the petition charges that appellant was ignorant of his legal rights under the policy, and that, through fraud and imposition practiced upon him by appellee's agents, and by willful misrepresentations made by them as to his rights under the contract of insurance, he was induced to accept a part of his claim in satisfaction of the whole. The chancellor sustained a general demurrer to the petition, and, appellant declining to plead further, his petition was dismissed, from which ruling this appeal is prosecuted; so that the only question for consideration here is whether or not the facts alleged in the petition, and admitted by the demurrer, are sufficient in equity to entitle appellant to the relief sought.

The petition charges, in the fullest and strongest terms, appellant's ignorance of the rights and obligations of the parties under the policy of insurance, and full knowledge on part of appellee both as to the rights of the parties and as to appellant's ignorance of them, as well as false and fraudulent misrepresentations made by appellee's agents for the purpose of deceiving, and which did deceive, appellant, as to the validity of his claim under the policy. It charges, among other things, that appellee fully understood its liability to appellant for the full amount of his loss; that he was ignorant of the law governing his rights and appellee's obligations, while appellee both knew his rights and knew that he was ignorant of them, and with this knowledge, and intending to deceive and defraud him, fraudulently represented to him that, by reason of an incumbrance on a part of the insured property, his entire claim under the policy was forfeited; that these false representations were made to him by appellee for the purpose of deceiving and defrauding him; and that by these false and fraudulent representations, and through ignorance of his legal rights, he was induced to accept the sum of \$400 in

satisfaction of a loss of \$800, when, except for these fraudulent representations and his ignorance, he would not have done so. These charges being admitted, it seems to us that the case presented involves something more than an effort to obtain relief purely on the ground of a mistake of law, or mere ignorance on part of appellant as to his legal rights under the contract of insurance. It becomes, in addition to this, a case of actual fraud, where, by fraudulent misrepresentations, made for the purpose and with the intent to deceive, the known ignorance of one of the parties to the contract has been willfully taken advantage of, and he has thereby been induced to surrender a valid, subsisting right without consideration. It is true that the ignorance relied upon is an ignorance of law, rather than of facts, and that this is not always or perhaps generally, and when standing alone, available as a ground of relief against an executed contract, no matter how inequitable it may be. On this point the decisions of the courts of this country, as well as the English courts, are by no means uniform; but, in our opinion, the weight of authority and the decisions of this court would now forbid that a party who, with full knowledge of the ignorance of the other contracting party, has not only encouraged that ignorance, and made it the more dense by his own false and fraudulent misrepresentations, but has willfully deceived and led that other into a mistaken conception of his legal rights, should shield himself behind the general doctrine that a mere mistake of law affords no ground for relief. This view seems to be upheld by many, if not all, of the modern text writers who are recognized as authority on the question. Mr. Kerr, in his well-known work, in treating of this subject, says: "But if it appear that the mistake was induced or encouraged by the misrepresentations of the other party to the transaction, or was perceived by him, and taken advantage of, the court will be more disposed to grant relief than in cases where it does not appear that he was aware of the mistake." Kerr, *Fraud & M.* pp. 399, 400. And, in his work on Equity, Mr. Bispham lays down this doctrine in even stronger and less uncertain terms. He says: "Where ignorance of the law exists on one side, and that ignorance is known and taken advantage of by the other party, the former will be relieved. More particularly will this be so if the mistake was encouraged or induced by misrepresentations of the other party." Bisp. Eq. § 188. Under the admitted facts of this case and the circumstances surrounding and leading up to the mistake relied on here, it is clearly brought within the text above quoted; and many other authorities to the same effect, including reported cases in many of the states of this Union, might be cited, if it were necessary.

We fully recognize the wisdom of that rule

which always inclines the courts to uphold and enforce the validity of voluntary compromises and adjustments between parties of their legal differences, when fairly arrived at. Nor would any mere ignorance of or mistake in the law governing any doubtful and disputed legal proposition, on part of either of the parties to the compromise, in the absence of evidence tending to show that he has been overreached or unfairly dealt with or taken advantage of, and where supported by a good consideration, be sufficient, in our judgment, to justify the rescission of a compromise settlement deliberately made between parties, standing upon an equal footing, and with full knowledge of all the facts. If every mistake of law were sufficient to warrant the interference of the courts, then no compromise of a disputed legal proposition would be final, for in every such case one party or the other to the controversy is mistaken as to the law of the case. Upon the record before us, there may be some question as to how far there was a controversy between these parties over any doubtful legal question that might have been litigated in court, or exactly what was the nature and extent of the same. It is alleged in the petition that appellee claimed that all rights of appellant under his policy of insurance were forfeited by reason of the existence of an incumbence upon a part of the insured property; but it is further alleged that appellee, at the time the contract of insurance was made, "had full knowledge of the same, and, having such knowledge, made the contract, and issued the policy aforesaid." This allegation is admitted to be true, and, in the absence of anything further in the pleading pertaining to this point, we are unable to see in this the basis of a doubtful disputed legal proposition which might have been litigated in the courts, or to know exactly what controversy was settled by the parties. But waiving the question as to the nature and extent of the controversy between appellant and appellee, and reverting to the character of the compromises which courts will uphold, we now quote from another text writer, who uses this language, to wit: "Voluntary settlements are so favored that if a doubt or dispute exists between parties with respect to their rights, and all have the same knowledge or means of obtaining knowledge concerning the circumstances involving these rights, and there is no fraud, misrepresentation, concealment, or other misleading incident, a compromise into which they thus voluntarily enter must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by the parties in their agreement may not be that which the court would have decreed had the controversy been brought before it for decision. Of course, there must not only be no misrepresentation, imposition,

or concealment; there must also be a full disclosure of all material facts within the knowledge of the parties, whether demanded or not by the others." Pom. Eq. Jur. § 850. Under the authorities quoted, it is manifest that the compromise contract sought to be rescinded here is within the control of a court of equity, and may be set aside. And now, referring to the decisions of this court, and to the doctrine established in this state, it seems to us still clearer that the contract complained of, and which was made under the circumstances set forth in the petition and admitted by appellee, cannot be sustained. In an exhaustive opinion, in which the authorities were ably reviewed, by Judge Robertson, after referring to the difficulty of determining in every case when a contract was, in fact, made under a mistake of law, it is said: "When it can be made perfectly evident that the only consideration of a contract was a mistake as to the legal rights or obligations of the parties, and when there has been no fair compromise of bona fide and doubtful claims, we do not doubt that the agreement might be avoided on the ground of a clear mistake of law, and a total want, therefore, of consideration or mutuality." Underwood v. Brockman, 4 Dana, 309. In the case of Ray v. Bank, 3 B. Mon. 510, this court referred to and approved the above case, and said: "Upon the whole, we would remark that whenever, by a clear and palpable mistake of law or fact, essentially bearing upon and affecting the contract, money has been paid without cause or consideration, which in law, honor, or conscience was not due and payable, and which in honor or good conscience ought not to be retained, it was and ought to be recovered back." Both of these cases are cited with approval in the case of Louisville & N. R. Co. v. Hopkins Co., 87 Ky. 613, 9 S. W. 497, and the doctrine laid down therein has not been departed from by this court. It will be seen that the question of fraud did not enter into the decision of either of those cases, but that they are almost entirely based upon the fact that there was no good consideration to uphold the contracts; that it was not a fair compromise of bona fide and doubtful claims; and that the money was not in law, honor, or conscience payable, and ought not in honor or good conscience to be retained. If, for these reasons, a contract made under a clear mistake of law may be set aside, then how much stronger reason is there for annulling the contract under consideration? Not only was this contract, according to this record, as it comes before us, wholly without consideration, and not only was the money surrendered by appellant on his claim not due in law, honor, or conscience, and surrendered only under a clear mistake of law, but it is further admitted by the demurrer that this contract was obtained, and that appellant was induced to surrender one-

half of his claim, by the actual false and fraudulent misrepresentations of appellee, knowingly made for the purpose of deceiving and defrauding appellant. We are clearly of the opinion that the chancellor erred in sustaining the demurrer to the petition,

and, for the reasons indicated, his judgment dismissing appellant's petition is reversed, and the action is remanded, with directions to set aside that order, and to overrule the demurrer, and give appellee leave to file an answer.

ERKENS v. NICOLIN.

(40 N. W. Rep. 587, 39 Minn. 461.)

Supreme Court of Minnesota. Nov. 28, 1888.

Appeal by defendant from an order of the district court for Scott county, Edson, J., presiding, refusing a new trial after a trial by the court.

Peck & Brown, for appellant. E. Southworth, for respondent.

MITCHELL, J. Action to recover back the money paid by plaintiff to defendant for a quitclaim deed of a piece of land in the village of Jordan. The facts, as disclosed by the evidence, are that defendant platted into lots a tract of land, of which he was the owner, lying between Water street and Sand creek. As shown upon the plat, the north and south lines of the lots extend from Water street to the creek. The distance marked on the plat gave the length of these lines as 80 feet, but the actual distance from Water street to the creek was 110 feet. One of these lots, and the adjoining 35 feet of another, had been conveyed by defendant, according to the plat, to plaintiff or plaintiff's grantor. Subsequently defendant claimed and stated to plaintiff, in substance, that the lots only extended back 80 feet, according to the distance indicated on the plat, and hence that he still owned the strip of 30 feet next to the creek. Plaintiff knew that defendant's claim was based wholly upon the theory that the distance given on the plat would control, and hence that his claim of title was in fact but expressions of opinion as to the legal effect and construction to be given to the plat. So far as the evidence shows, defendant made this claim in good faith, and honestly supposed that his deeds of the lots only conveyed 80 feet. Plaintiff took the matter under consideration for nearly a month, and went to the register's office and examined the plat for himself. He then obtained from defendant and wife a quitclaim deed of all the land down to the creek, and paid therefor the money which he now seeks to recover. When he paid the money he knew all the facts, and had the same means of knowledge of them which defendant had. The transaction was unaffected by any fraud,

trust, confidence, or the like. The parties dealt with each other at arm's length. Plaintiff was not laboring under any mistake of facts. He took the deed and paid his money under a mistake of law as to his antecedent existing legal rights in the property, supposing that, according to the proper legal construction of the plat, the lots were only 80 feet deep. However, under the doctrine of *Nicolin v. Schneiderhan*, 37 Minn. 63, 33 N. W. Rep. 33, since decided by this court, it is now settled that a deed of lots according to this plat would cover all the land down to the creek, under the rule that distances must yield to natural boundaries called for in a deed. We are unable to see that this case differs in principle from *Perkins v. Trinka*, 30 Minn. 241, 15 N. W. Rep. 115, and *Hall v. Wheeler*, 37 Minn. 522, 35 N. W. Rep. 377.

It is unnecessary to enter into any discussion of the question (left in great confusion in the books) when, if ever, relief will be granted on the ground of mistake in law alone, or whether there is any difference between mistake of law and ignorance of law, or between ignorance or mistake as to a general rule of law and ignorance or mistake of law as to existing individual rights in the property which is the subject-matter of the contract. We hold that money paid under mistake of law cannot be recovered back where the transaction is unaffected by any fraud, trust, confidence, or the like, but both parties acted in good faith, knew all the facts, and had equal means of knowing them, especially where, as was evidently the fact in this case, the transaction was intended to remove or settle a question of doubt as to title. It would be impossible to foresee all the consequences which would result from allowing parties to avoid their contracts in such cases on the mere plea of ignorance or mistake of law affecting their rights. It would be difficult to tell what titles would stand, or what contracts would be binding, if grantors and grantees were at liberty to set up such a plea. This may seem to work inequitably in the present case, but more mischief will always result from attempting to mould the law to what seems natural justice in a particular case than from a steady adherence to general principles.

Order reversed.

GRYMES v. SANDERS et al.

(93 U. S. 55.)

Supreme Court of the United States. Oct. Term, 1876.

Appeal from the circuit court of the United States for the eastern district of Virginia.

Conway Robinson and Mr. Leigh Robinson, for appellant. Edwin L. Stanton and George M. Dallas, for appellees.

Mr. Justice SWAYNE. The appellant was the defendant in the court below. The record discloses no ground for any imputation against him. It was not claimed in the discussion at the bar, nor is it insisted in the printed arguments submitted by the counsel for the appellees, that there was on his part any misrepresentation, intentional or otherwise, or any indirection whatsoever. Nor has it been alleged that there was any intentional misrepresentation or purpose to deceive on the part of others.

The case rests entirely upon the ground of mistake. The question presented for our determination is whether that mistake was of such a character, and attended with such circumstances, as entitle the appellees to the relief sought by their bill and decreed to them by the court below.

Peyton Grymes, the appellant, owned two tracts of land in Orange county, Va., lying about twenty-five miles from Orange court-house. The larger tract was regarded as valuable, on account of the gold supposed to be upon it. The two tracts were separated by intervening gold-bearing lands, which the appellant had sold to others. Catlett applied to him for authority to sell the two tracts, which the appellant still owned. It was given by parol; and the appellant agreed to give, as Catlett's compensation, all he could get for the property above \$20,000. Catlett offered to sell to Lanagan. Lanagan was unable to spare the time to visit the property, but proposed to send Howel Fisher to examine it. This was assented to; and Catlett thereupon wrote to Peyton Grymes, Jr., the son of the appellant, to have a conveyance ready for Fisher and himself at the court-house upon their arrival. The conveyance was provided accordingly, and Peyton Grymes, Jr., drove them to the lands. They arrived after dark, and stayed all night at a house on the gold-bearing tract. Fisher insisted that he must be back at the court-house in time to take a designated train east the ensuing day. This involved the necessity of an early start the next morning. It was arranged that Peyton Grymes, Jr., should have Peyton Hume, who lived near at hand, meet Fisher on the premises in the morning and show them to him, while Grymes got his team ready for their return to the court-house. Hume met Fisher accordingly, and showed him a place where there had been washing for surface-gold, and then took him to an abandoned shaft, which he

supposed was on the premises. There Fisher examined the quartz and other debris lying about. But a very few minutes had elapsed when Grymes announced that his team was ready. The party immediately started back to the court-house. Arriving too late for the train, they drove to the house of the appellant; and Fisher remained there until one o'clock that night. While Fisher was there, considerable conversation occurred between him and the appellant in relation to the property; but it does not appear that any thing was said material to either party in this controversy. Fisher proceeded to Philadelphia, and reported favorably to Lanagan, and subsequently, at his request, to Repplier, who became a party to the negotiation. He represented to both of them that the abandoned shaft was upon the premises. Catlett went to Philadelphia, and there he sold the property to the appellees for \$25,000. Fisher was sent to the court-house to investigate the title. He employed Mr. Williams, a legal gentleman living there, to assist him. A deed was prepared by Mr. Williams, and executed by the appellant on the 21st of March, 1866. On the 7th of April ensuing, the appellees paid over \$12,500 of the purchase-money, and gave their bond to the appellant for the same amount, payable six months from date, with interest. The deed was placed in the hands of a depository, to be held as an escrow until the bond should be paid. Catlett, under a power of attorney, received the first installment, paid over to the appellant \$10,000, and retained the residue on account of the compensation to which he was entitled under the contract between them. The vendees requested Hume to hold possession of the property for them until they should make some other arrangement. He occupied the premises until the following July, when, with their consent, he transferred the possession to Gordon. In that month, Lanagan and Repplier came to see the property. Hume was there washing for gold. He began to do so with the permission of the appellant before the sale, and had continued the work without intermission. The appellees desired to be shown the boundary-lines. Hume said he did not know where they were, and referred them to Johnson. Johnson came. The appellees desired to be taken to the shaft which had been shown to Fisher. Johnson said it was not on the premises. Hume thought it was. Johnson was positive; and he was right. The appellees seemed surprised, but said little on the subject. They proceeded to examine the premises within the lines, and, before taking their departure, employed Gordon to explore the property for gold. Subsequently this arrangement was abandoned, and they paid him for the time and money he had expended in getting ready for the work. In September, they sent Bowman as their agent to make the exploration. On his way, he stopped at the court-house, and told the appel-

lant that the shaft shown to Fisher as on the land was not on it. The appellant replied instantly, "that there was no shaft on the land he had sold to Repplier and Lanagan, and that he had never represented to any one that there was a shaft on the land, and that he had never authorized any one to make such a representation, nor did he know or have reason to believe that any such representation had, in fact, been made by any one." It does not appear that his attention had before been called to the subject, or that he was before advised that any mistake as to the shaft had occurred. Bowman spent some days upon the land, and made a number of cuts, all of which were shallow. The deepest was only fifteen feet in depth. It was made under the direction of Embry and Johnson, two experienced miners living in the neighborhood. It reached a vein of quartz, but penetrated only a little way into it. They thought the prospect very encouraging, and urged that the cut should be made deeper.

Bowman declined to do anything more, and left the premises. No further exploration was ever made. Johnson says, "I know the land well, and know there has been gold found upon it, and a great deal of gold, too,—that is to say, surface-gold,—but it has never been worked for vein-gold. The gold that I refer to was found by the defendant, Grymes, and those that worked under him." He considered Bowman's examination "imperfect and insufficient." He had had "twenty-three years' experience in mining for gold."

Embry's testimony is to the same effect, both as to the surface-gold and the character of the examination made by Bowman. The premises lie between the Melville and the Greenwood Mines. Before the war, a bucket of ore, of from three to four gallons, taken from the latter mine, yielded \$2,400 of gold. This, however, was exceptional. In the spring of 1869 a vein was struck, from forty to fifty feet below the surface, yielding \$500 to the ton. Work was stopped by the influx of water. It was to be resumed as soon as an engine, which was ordered, should arrive. Ore at that depth, yielding from eight to ten dollars a ton, will pay a profit. Embry says he is well acquainted with the courses of the veins in the Melville and the Greenwood Mines, and that "the Greenwood veins do pass through the land in controversy, and some of the Melville veins do also." Speaking of Bowman and his last cut, he says:—

"At the place I showed him where to cut he struck a vein, but just cut into the top of it; he did not go down through it, or across it. From the appearance of the vein, I was very certain that he would find gold ore, if he would cut across it and go deep into it, and I told him so at the time; but he said that they had sent for him to return home, and he couldn't stay longer to make

the examination, and went off, leaving the cut as it was; and the exploration to this day has never been renewed. I am still satisfied, that, whenever a proper examination is made, gold, and a great deal of it, will be found in that vein; for it is the same vein which passes through the Greenwood Mine, which was struck last spring, and yielded \$500 to the ton. His examination in other respects, as well as this, was imperfect and insufficient. I don't think he did anything like making a proper exploration for gold. I don't think he had more than three or four hands, and they were not engaged more than eight or ten days at the utmost."

In September, 1866, Repplier instructed Catlett to advise the appellant, that, by reason of the mistake as to the shaft, the appellees demanded the return of the purchase-money which had been paid. In the spring of 1867, Lanagan, upon the same ground, made the same demand in person. The appellant replied, that he had parted with the money. He promised to reflect on the subject, and address Lanagan by letter. He did write accordingly, but the appellees have not produced the letter. This bill was filed on the 21st of March, 1868.

A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied, that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved. *Kerr on Mistake and Fraud*, 408; *Trigg v. Read*, 5 *Humph.* 529; *Jennings v. Broughton*, 17 *Beav.* 241; *Thompson v. Jackson*, 3 *Rand.* 507; *Harrod's Heirs v. Cowan*, *Hardin*, 553; *Hill v. Bush*, 19 *Barb. (Ark.)* 522; *Juzan v. Toulmin*, 9 *Ala.* 662.

Does the case in hand come within this category?

When Fisher made his examination at the shaft, it had been abandoned. This was *prima facie* proof that it was of no account. It does not appear that he thought of having an analysis made of any of the debris about it, nor that the debris indicated in any wise the presence of gold. He requested Hume to send him specimens from the shafts on the contiguous tracts, and it was done. No such request was made touching the shaft in question, and none were sent. It is neither alleged nor proved that there was a purpose at any time, on the part of the appellees, to work the shaft. The quartz found was certainly not more encouraging than that taken from the last cut made by Bowman under the advice of Embry and Johnson. This cut he refused to deepen, and abandoned. When Lanagan and Repplier were told by Johnson that the shaft was not on the premises, they said nothing about abandoning the contract, and nothing which

manifested that they attached any particular consequence to the matter, and certainly nothing which indicated that they regarded the shaft as vital to the value of the property. They proceeded with their examination of the premises as if the discovery had not been made. On his way to Philadelphia, after this visit, Lanagan saw and talked several times with Williams, who had prepared the deed. Williams says, "I cannot recollect all that was said in those conversations, but I do know that nothing was said about the shaft, and that he said nothing to produce the impression that he was dissatisfied or disappointed in any respect with the property after the examination that he had made of it." Lanagan's conversation with Houseworth was to the same effect.

The subsequent conduct of the appellees shows that the mistake had no effect upon their minds for a considerable period after its discovery, and then it seems to have been rather a pretext than a cause.

Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence "which may be fairly expected from a reasonable person." *Kerr on Fraud and Mistake*, 407.

Fisher, the agent of the appellees, who had the deed prepared, was within a few hours' travel of the land when the deed was executed. He knew the grantor had sold contiguous lands upon which veins of gold had been found, and that the course and direction of those veins were important to the premises in question. He could easily have taken measures to see and verify the boundary-lines on the ground. He did nothing of the kind. The appellees paid their money without even inquiring of any one professing to know where the lines were. The courses and distances specified in the deed show that a surveyor had been employed. Why was he not called upon? The appellants sat quietly in the dark, until the mistake was developed by the light of subsequent events. Full knowledge was within their reach all the time, from the beginning of the negotiation until the transaction was closed. It was their own fault that they did not avail themselves of it. In *Shirley v. Davis*, 6 Ves. 678, the complainant, being desirous to become a freeholder in Essex, bought a house which he supposed to be in that county. It proved to be in Kent. He was compelled in equity to complete the purchase. The mistake there, as here, was the result of the want of proper diligence. See also *Seton v. Slade*, 7 Ves. 269; 2 Kent's Com. 485; 1 Story's Eq. sects. 146, 147; *Attwood v. Small*, 6 Cl. & Fin. 338; *Jennings v. Broughton*, 17 Beav. 234; *Campbell v. Ingilby*, 1 De G. & J. 405; *Garrett v. Burleson*, 25 Tex. 44; *Warner v. Daniels et al.*, 1 Woodb. & M. 91; *Ferson v. Sanger*, id. 139; *Lamb v. Harris*, 8 Ga. 546;

Trigg v. Read, 5 Humph. 529; *Haywood v. Cope*, 25 Beav. 143.

Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value. *Thomas v. Bartow*, 48 N. Y. 200; *Flint v. Woodin*, 9 Hare, 622; *Jennings v. Broughton*, 5 De G., M. & G. 139; *Lloyd v. Brewster*, 4 Paige, 537; *Saratoga & S. R. R. Co. v. Row*, 24 Wend. 74; *Minturn v. Main*, 3 Seld. 220; 7 Rob. Prac., c. 25, sect. 2, p. 432; *Campbell v. Fleming*, 1 Ad. & El. 41; *Sugd. Vend.* (14th ed.) 335; *Diman v. Providence, W. & B. R. R. Co.*, 5 R. I. 130.

A court of equity is always reluctant to rescind, unless the parties can be put back in statu quo. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it. Here the appellant received the money paid on the contract in entire good faith. He parted with it before he was aware of the claim of the appellees, and cannot conveniently restore it. The imperfect and abortive exploration made by Bowman has injured the credit of the property. Times have since changed. There is less demand for such property, and it has fallen largely in market value. Under the circumstances, the loss ought not to be borne by the appellant. *Hunt v. Silk*, 5 East, 452; *Minturn v. Main*, 3 Seld. 227; *Okill v. Whittaker*, 2 Phill. 340; *Brisbane v. Dacres*, 5 Taunt. 144; *Andrew v. Hancock*, 1 Brod. & B. 37; *Skyring v. Greenwood*, 4 Barn. & C. 289; *Jennings v. Broughton*, 5 De G., M. & G. 139.

The parties, in dealing with the property in question, stood upon a footing of equality. They judged and acted respectively for themselves. The contract was deliberately entered into on both sides. The appellant guaranteed the title, and nothing more. The appellees assumed the payment of the purchase-money. They assumed no other liability. There was neither obligation nor liability on either side, beyond what was expressly stipulated. If the property had proved unexpectedly to be of inestimable value, the appellant could have no further or other claim. If entirely worthless, the appellees assumed the risk, and must take the consequences. *Segur v. Tingley*, 11 Conn. 142; *Haywood v. Cope*, 25 Beav. 140; *Jennings v. Broughton*, 17 id. 234; *Attwood v. Small*, 6 Cl. & Fin. 497; *Marvin v. Bennett*, 8 Paige, 321; *Thom-*

as *v. Bartow*, 48 N. Y. 198; *Hunter v. Goudy*, 1 Ham. 451; *Hall v. Thompson*, 1 Sm. & M. 481.

The bill, we have shown, cannot be maintained.

In our examination of the case, we have assumed that those who are alleged to have spoken to the agent of the appellees upon the subject of the shaft, before the sale, had the requisite authority from the appellant.

Considering this to be as claimed by the appellees, our views are as we have expressed them. We have not, therefore, found it necessary to consider the question of such authority; and hence have said nothing upon that subject, and nothing as to the aspect the case would present if that question were resolved in the negative.

Decree reversed, and case remanded with directions to dismiss the bill.

RIEGEL v. AMERICAN LIFE INS. CO.

(25 Atl. 1070, 153 Pa. St. 134.)

Supreme Court of Pennsylvania. Feb. 13, 1893.

Appeal from court of common pleas, Philadelphia county; THAYER, Judge.

Bill by E. Theresa Riegel, administratrix of Jacob Riegel, deceased, against the American Life Insurance Company, asking the reinstatement of a surrendered policy. Decree sustaining a demurrer to the bill, and dismissing it, from which plaintiff appeals. Reversed.

William W. Porter and Frederick J. Geiger, for appellant. H. Hazelhurst, for appellee.

STERRETT, J. When this cause was here two years ago, on appeal from decree sustaining the general demurrer, and dismissing the bill, an amendment, for the purpose of clearly expressing what at most was only implied, was moved, and allowed at bar, by adding to the fifth paragraph of the bill these words: "Both of the parties acting in respect to the transaction on the basis that the said Leisenring was then alive." That defect in the bill, however, did not appear to be the ground on which the demurrer was sustained in the court below. The plaintiff's equity, grounded on averments of fact contained in the bill, and admitted by the pleading, was then fully considered, and emphatically sustained, in a clear and convincing opinion by our Brother WILLIAMS, reported in 140 Pa. St. 201, and 21 Atl. Rep. 392. The decree was accordingly reversed, and record remitted, with direction that the defendant plead or answer, etc. After full consideration of the facts and circumstances, the opinion referred to concluded thus: "Upon these facts, if the attention of the learned judge had not been diverted from them, we feel sure he would have reached the same conclusion that we have reached,—that it would be grossly inequitable to hold the plaintiff to a bargain made under the influence of a mistake of fact like that before us. This mistake the demurrer admits. If there had been any circumstance which the defendant could have set up to show that a correction of this mistake at this time would be inequitable, it should have been shown to the court by answer. If such circumstances do exist, they may yet be presented, as the case goes back to enable the defendant to take defense upon the merits." The defendant company, having been declared insolvent, was duly dissolved, on application of the attorney general, more than a year before the answer was filed by Mr. Ritchie, the then president of the Real-Estate Title Insurance Company, which, in the interim, appears to have been appointed receiver of the defunct company. No plea or answer was ever filed by any officer of said company, nor by any one, on its behalf, who had any knowledge, otherwise than by information obtained from others, of the facts averred in the bill. Mr. Ritchie and his company were entire strangers to the transaction, and neither of them appears to have had any knowl-

edge of the facts upon which plaintiff's equity is grounded; and of course it was impossible for him, as president of the receiver company, to answer otherwise than upon information and belief. In the jurat to his answer he swears the allegations thereof are true "so far as they are therein stated as of his own knowledge," etc.; but the answer contains not a single allegation that purports to be "as of his own knowledge."

The special evidential efficacy of a responsive answer in equity is due to the fact that the plaintiff, by calling on the defendant to answer the allegations of the bill, appeals to his conscience, accredits him, and *pro hac* makes him his own witness. The plaintiff in this case never called upon Mr. Ritchie, or any other stranger to the transactions alleged in the bill, to make answer thereto. The officers of the insurance company, who were cognizant of those transactions, were the proper persons to deny, if they could of their own knowledge, the averments of the bill, and thus make the answer responsive. The answer of Mr. Ritchie in this case is in no sense a responsive answer. It is merely pleading; and, as such, put in issue the facts in dispute, without more. Eaton's Appeal, 66 Pa. St. 490; Burke's Appeal, 99 Pa. St. 361; Socher's Appeal, 104 Pa. St. 609; Coleman v. Ross, 46 Pa. St. 185; Story, Eq. Jur. §§ 1528, 1529; 3 Greenl. Ev. §§ 287-259; Daniell, Ch. Pr. 846. In note to the latter it is said that an answer which alleges as facts what the defendant could not personally know, though responsive to the bill, simply puts plaintiff upon proof of his own allegations. So, too, in 3 Greenl. Ev. § 287, it is said that, if the fact asserted by the defendant is such that it is not and cannot be within his own knowledge, but is in truth only an expression of his strong conviction of its existence, or is what he deems an infallible deduction from facts which were known to him, his answer is not responsive, in the sense of being evidence in his own favor. The nature of his testimony cannot be changed by the positiveness of his assertion. The answer of an infant by his guardian *ad litem*, though it be responsive to the bill, and sworn to by the guardian, is not evidence in his favor.

But whether the answer be regarded as responsive or not, the proofs were quite sufficient to warrant the learned master in finding, as he did, the truth of every material averment in the bill. His findings of fact are in strict accord with the uncontradicted testimony, and his conclusions of law are so manifestly correct that his report should have been unhesitatingly approved, and decree made in accordance therewith. No testimony, either written or oral, was introduced by or on behalf of the defendant. All the material facts on which plaintiff's equity is grounded were as clearly and conclusively established as if they had been admitted by answer, or by demurrer to the bill; so that practically we have now before us substantially the same questions that were fully considered and determined when the case was here before. In that appeal the fourth and fifth specifications

of errors are quotations from the opinion of the learned president of the court below dismissing the bill, wherein, speaking of the new contract, he says: "(4) It was not a contract induced by a mistake about facts, but a contract made in view of doubtful facts, and because of the doubtful facts. (5) It was in the nature of a compromise, founded upon the doubts which existed, not upon any mistake of the facts." In this appeal the third specification, quoted from the opinion of same learned judge, again dismissing the bill, is that "the new contract was not a contract induced by mutual mistake about the facts, but a contract made in view of doubtful facts, and because of the doubtful facts." The second specification in this is in effect the same as the fifth in the former appeal. These propositions go to the very heart of the plaintiff's case. They substantially involve the only cardinal questions that are or ever have been in it, and about which there is the slightest room for doubt. They are the very questions that were considered and decided by this court when the case was here before. That clearly appears in the opinion, wherein, after reciting the facts averred in the bill, it is said: "The case presented on these facts was that of a contract entered into under the influence of a mutual mistake, and a claim for relief from such contract. The mistake was in relation to the fact of Leisenring's death. Both parties evidently supposed and acted on the supposition that he was alive, and that the annual premiums upon his life, which had become burdensome to Mrs. Riegel, must be continued indefinitely until his death should take place. As it had become difficult for her to pay these premiums, the only way in which she could be relieved from them was to surrender her policy, and accept a paid-up policy for such smaller sum as the premiums already paid would purchase. Rather than take the risk of losing the entire amount of the policy, by her inability to keep up the annual payments, she surrendered her policy for \$6,000, and accepted in lieu of it a paid-up policy for \$2,500. This was the contract she made while in ignorance of Leisenring's death. At the time she made it she was already relieved from the burdensome premiums, and the entire amount of the policy was honestly due her from the company. What was the effect of the mistake upon her? Simply to take from her the difference between the two policies, and give her absolutely nothing for it. She surrendered a policy for \$6,000, on which the liability of the company was already fixed, and received one for \$2,500, to secure relief from a burden already removed. The company parted with nothing. She secured nothing. The whole transaction was a mistake, and, if the decree of the court stands, the result will be to take \$3,500 from Mrs. Riegel and give it to the insurance company. These facts seem to us to present a clear and a strong case for equitable relief, so strong, indeed, that a mere statement of them is the only argument necessary for its support. The duty of a chancellor to relieve in cases of mutual mistake is so well settled that no

citation of authorities can be needed. * * * The learned judge who heard this case in the court below, and who is thoroughly familiar with the principle to which we have referred, seems to have been misled in regard to the facts set up in the bill. He treats the arrangement made between Mrs. Riegel and the company on the 20th of March as a compromise of a claim against the company for the alleged death of Leisenring, which Mrs. Riegel was unable to establish, because unable to show the death. As the fact of the death, and the consequent liability of the company on the policy, were uncertain, it was a case for the application of the doctrine that the adjustment of a doubtful claim constituted a valid consideration for the surrender of the policy and the acceptance of the new one, and upon this theory the decree was entered. But it nowhere appears that Mrs. Riegel made any claim on the company, or supposed that she had any. She was asking relief from future payments of premiums on a policy on which she supposed future payments would have to be made, and, to get this relief, she was willing to sacrifice more than one half of the sum insured. The company was willing, in consideration of the large reduction of its liability, to give her a policy for what her payments would purchase, and relieve her in future. This is an exchange often made, and adjusted by well-settled rules. It was a compromise of nothing. We do not doubt the correctness of the rule applied by the learned judge in cases to which it is fairly applicable, but this is not one of them. The plaintiff distinctly avers that she did not know of the death of Leisenring until some 10 days after the exchange of policies was effected, and that 'both parties to the transaction were acting, in respect thereto, on the basis that Leisenring was alive.' She distinctly avers that the object of the arrangement was to secure relief for herself from the indefinite payment of premiums that had become burdensome to her; that the new policy was accepted for that reason, and the old one surrendered, at a time when, had she known the fact, she was entitled to demand the entire sum upon which she had so long and so steadily paid the burdensome premiums."

Little, if anything, can be profitably added to what is so clearly and forcibly said in the foregoing quotations in support of our former decree. The error into which the learned judge of the common pleas appears to have unintentionally fallen in the outset, and to which he seems to cling so pertinaciously, is not so much in regard to the well-settled principles of equity, upon which relief is granted in cases of mutual ignorance or mistake of material facts, as in the construction which he put upon the undisputed acts and declarations of the parties to this contention, and the circumstances connected therewith. Sufficient reference to those principles is made in our former opinion, but it may not be amiss to revert to some of them. The general rule is that an act done or a contract made under a mistake of a material fact is voidable and relievable in equity. The fact must of course be

material to the act or contract; for, though there may be an accidental mistake or ignorance of the fact, yet, if the act or contract is not materially affected by it, relief will not be granted. Thus, A. buys from B. an estate to which the latter is supposed to have an unquestionable title. It turns out, upon due investigation of the facts unknown at the time to both parties, that B. has no title; as, if there be a nearer heir than B., who was supposed to be dead, but is in fact living. In such a case equity would relieve the purchaser and rescind the contract. But suppose A. buys from B. an estate the location of which was well known to each of them, and they mutually believed it contained 20 acres, when in fact it contained only 19½ acres, and the difference would not have varied the purchase in the view of either party; in such a case the mistake would not be ground for rescission of the contract. 1 Story, Eq. Jur. §§ 140, 141. It makes no difference in application of the principle that the subject-matter of the contract be known to both parties to be liable to a contingency which may destroy it immediately; for, if the contingency has, unknown to the parties, already happened, the contract will be avoided, as founded on a mutual mistake of a matter constituting the basis of the contract. 1 Story, Eq. Jur. §§ 143a, 143b. The principle is illustrated by familiar examples, employed by text writers, thus: A. agrees to buy a certain horse from B. It turns out that the horse is dead at the time of the bargain, though neither party was then aware of the fact. The agreement is void. A. agrees to buy a house belonging to B. The house was previously destroyed by fire, but the parties dealt in ignorance of that fact. The contract, not being for sale of the land on which the house stood, was not enforceable. So, too, A., being entitled to an estate for the life of B., agreed to sell it to C. B. was dead, but both parties were ignorant of the fact. The agreement was avoided. For similar reasons, a life insurance cannot be revived by payment of a premium within the time allowed for that purpose by the original contract, but after the life had dropped, unknown to both insurer and assured, although it was in existence when the premium became due, and although the insurer has waived proof of the party's health, which, by the terms of the renewal, it might have required. The waiver applies to the proof of health, not to the fact of his being alive. Pritchard v. Society, 3 C. B. (N. S.) 622. Mr. Pollock, in his excellent treatise on the Principles of Contract, (page *441.) states the general principle thus: "An agreement is void if it relates to a subject-matter (whether a material subject of ownership, or a particular title or right) contemplated by the parties as existing, but which in fact did not exist." This is followed by an interesting discussion of the subject, with numerous illustrations of the principles involved. See *Cochrane v. Willis*, 1 Ch. App. 58; *Allen v. Hammond*, 11 Pet. 71; *Hitchcock v. Giddings*, 4 Price, 135; *Hore v. Becher*, 12 Sim. 465; *Couturier v. Hastie*, 5 H. L. Cas. 673. In many of the cases prominence is given to failure of consideration,

resulting from mutual mistake or ignorance of material facts, but entire failure of consideration is not an essential ingredient in any case.

It cannot be doubted that in exchanging the old for the new policy both parties acted on the basis that Leisenring was then alive. Their every act in the transaction was predicated of that as an assumed fact. The new policy, like the old one, was a risk on a life assumed to be then in being. The difference between them was that the one carried with it an obligation on the part of the holder to pay annual premiums during the life of Leisenring; the other exempted her from that obligation. She purchased that exemption by surrendering seven twelfths of the original insurance, or \$3,500. If the exchange was not made on the assumption by both parties that Leisenring was then alive, the company stultified itself by issuing a paid-up policy on the life of one who was then in his grave; and the plaintiff was guilty of the supreme folly of paying \$3,500 for exemption from a liability which, by the previous death of Leisenring, had *ipso facto* ceased. In other words, at the time the exchange of policies was made, the plaintiff had a perfectly valid claim upon the defendant for the full amount of the insurance, \$6,000, and surrendered \$3,500 of that to secure exemption from a liability that had ceased to exist; but she and the company were both at that time ignorant of the fact that the life on which the original risk was taken had previously dropped. The supposed element of doubt as to whether Leisenring was then dead or not never entered into the contemplation of either party; nor did it form any part of the consideration for exchange of policies. The positive and uncontradicted proof by the actuary of the company was that the amount of the paid-up policy was ascertained and fixed, according to the established rules of the company, at the very sum that would have been required if Leisenring had been personally present in the office when the terms of exchange were settled. The central fact underlying the transaction, and to which every circumstance connected therewith clearly points, was the assumption by both parties that Leisenring was then in full life. When last theretofore heard from he was alive, and the presumption was that he continued to live. In the absence of any knowledge to the contrary, it was quite natural and reasonable that the parties, in making the exchange, should act upon that presumption, and assume, as they evidently did, that he was still alive. Of course they could not know positively that he was then alive, any more than any one can certainly know that a friend from whom he is far separated by distance is now living. In view of the undisputed facts as to the acts of both parties, and everything connected with the transaction, it would be wholly unreasonable and unwarranted to hold that the parties treated upon the basis that the fact which was the subject of their agreement was doubtful, or that the contract was made "in view of doubtful facts, and because of the doubtful facts." In the light of the proofs upon

which the findings of the master are based, and of all the circumstances, the acts of the parties are not susceptible of any such construction as has been put upon them by the learned judge of the common pleas. In short, the facts established by the uncontradicted proofs, and found by the master, are essentially the same as those admitted by the demurrer, and upon which our former decree was based. Certainly they are not less favorable to the plaintiff now than then. It therefore appears to us that a proper consideration of the orderly administration of justice should have resulted in a decree in accordance with the views expressed in our former opinion.

This proceeding is not grounded upon a previous rescission of the agreement under which the exchange of policies was made, but is for the purpose of enforcing a rescission by decree of this court, etc.

It is therefore adjudged that the decree of the court of common pleas be reversed and set aside, and exceptions to master's report dismissed; and it is now adjudged and decreed that the contract under which said exchange of insurance policies was made be rescinded; that the paid-up policy for \$2,500 be surrendered and canceled; and that the original policy of insurance be reinstated, as of date of its surrender; and it is further adjudged and decreed that the defendant company pay to the plaintiff the sum of \$6,000, with interest from October 4, 1889, and also all the costs of this proceeding.

PAXSON, C. J. I dissent, and would affirm the decree, upon the clear and able opinion of the learned judge below.

MITCHELL, J. I concur with the chief justice in his dissent.

NEWTON v. TOLLES.

TOLLES v. NEWTON.

(19 Atl. 1092, 66 N. H. 136.)

Supreme Court of New Hampshire. Hillsborough. March 14, 1890.

Bill in equity for the rescission of a contract for the purchase of a farm and other property, and for the return of money paid as a part of the purchase money. Facts found by the court: The defendant, Sophia A. Tolles, employed R., a real-estate agent in Nashua, to sell her farm. In May, 1886, Newton, seeking to buy a farm, applied to R., who informed him of the Tolles farm, told him it contained 200 acres, took him to see it, and there pointed out to him such of the courses and boundaries as he knew; but he did not know, or undertake to point out, all of them. Afterwards, R., as agent of Tolles, and Newton executed an agreement by which Tolles agreed to sell, and Newton to buy, the Tolles farm for \$5,400, to be paid \$200 on the execution of the agreement, \$1,000 on the delivery, on or before June 1, 1886, of a bond for a deed, \$1,000 on or before July 10, 1886, and \$3,200 on the delivery, on or before October 20, 1886, of a good and sufficient deed, "said Newton to have all the stock, tools, hay, grain," etc. On the margin of the agreement, "farm contains about 200 acres" was written. Newton paid \$200 May 15, Tolles executed and delivered to Newton a bond conditioned to convey to him "a certain lot or parcel of land situated in Nashua," and particularly described by metes and bounds, "meaning and intending to convey all the homestead farm, containing about two hundred acres, as by deed of heirs of Horace C. Tolles, to me, and all other land and right in said homestead farm," upon Newton's payment of \$1,000 on the delivery of the bond, \$1,000 on or before July 10, 1886, and \$3,200 on the delivery, on or before October 20, 1886, of a good and sufficient deed. On the margin of the deed was written: "It is agreed, for the above consideration, that said Newton is to have all the stock, tools, hay, grain, &c., and that said Tolles is to remove only household furniture and family stores from said premises." Prior to 1879 the Tolles farm comprised about 203 acres, of which the defendant and her husband owned a part in common, and each a part in severalty. In that year the heirs of Horace C., then deceased, conveyed a parcel of about 25 acres to Xenophon Tolles, and all their interest in the rest of the farm to the defendant. In January, 1886, the defendant sold about 18 acres to C., who sold to Roby. A parcel of about 25 acres, called the "Salmon Brook Meadow," was half a mile distant from, and had no connection with, the rest of the farm, except in its use as a part of it. These parcels were not shown to Newton by R., and are not covered by the particular description given in the bond. Newton at the time of the bargain did not understand that they were included in his purchase, but he un-

derstood that he was buying the Tolles farm, and that it contained 200 acres. The defendant did not intend to convey, nor understand that she agreed to convey, the three parcels, or any of them; but she understood and believed that the farm, as described in the bond, contained about 200 acres. It in fact contains about 135 acres. In June, 1886, Newton discovered that Tolles owned the Salmon Brook meadow, and learned of its connection with the farm. He thereupon claimed possession of it, and that it was included in the bargain, but his claim was denied. He refused to pay the installment due July 10th and August 21st. Tolles brought a suit at law to recover it, which is the record of the above-named actions. About the 1st of August, Newton found by a survey that the farm as described in the bond contains only 135 acres. October 20, 1886, Tolles tendered to Newton a warranty deed of the premises of which he is in possession, and demanded payment of the balance of the purchase money. Newton refused to accept the deed, and on the same day filed his bill, in which he offers to restore the real and personal property to the defendant, and give up and cancel the bond, and to account for the rents and profits while he has been in possession. He has consumed the hay and grain, but has other hay and grain out of which he can return an equivalent. He sold four cows in August, but replaced them with four others of greater value. The farm has not deteriorated in value. Evidence to show that the property which Tolles by her bond was obliged to convey was of the value of \$5,400 or more was excluded, subject to the defendant's exception.

G. B. S. French and *H. B. Cutter*, for Newton. *C. W. Hiott* and *E. S. Cutter*, for Tolles.

CARPENTER, J. There was a mutual mistake in the quantity of land. The defendant understood she was selling, and the plaintiff that he was buying, a farm of 200 acres. It in fact contains only 135 acres. The defendant, believing that the farm contained 200 acres, informed the plaintiff that it did contain that number. The plaintiff relied on her statement. Under the influence of the error common to both parties, the transaction was consummated. The mistake was one of fact in a material point affecting the value of the property. *Boynton v. Hazelboom*, 14 Allen, 107, 108. Its prejudicial consequences to the plaintiff are the same as if the defendant's statement had been designedly fraudulent. *Spurr v. Benedict*, 99 Mass. 463, 467. The deficiency is so great that it would "naturally raise the presumption of fraud, imposition, or mistake in the very essence of the contract," if the mistake were not affirmatively found. *Stebbins v. Eddy*, 4 Mason, 414, 420. A material mistake in the quantity does not, in its effect upon the equitable rights of the parties, differ from a like mistake in the character, situation, or title of the

bargained property. It is equivalent to a mistake in the existence of a material part of the subject of the contract. The case is as if before the contract was executed, and without the knowledge of either party, a parcel containing 65 acres of the 200 contracted for had sunk in the sea. *Allen v. Hammond*, 11 Pet. 63, 71, 72; *Hitchcock v. Giddings*, 4 Price, 135; *Story*, Eq. Jur. §§ 141, 142. The error is as injurious to the plaintiff as if 200 acres were comprised in the state boundaries, and the defendant had no title to a parcel of 65 acres, or as if she had title to only 135-200 of the whole in common with a stranger. *Hooper v. Smart*, L. R. 18 Eq. 683. The defendant could not sustain a bill to compel a specific performance of the contract by the plaintiff, because it would be inequitable. *Pickering v. Pickering*, 38 N. H. 400, 407, 408; *Eastman v. Plumer*, 46 N. H. 464, 479. The party against whom a contract, made under a mutual mistake of material facts, will not be specifically enforced, is in general entitled to rescind. *Pom. Spec. Perf.* § 250. If there are exceptions to the rule, this case does not fall within them. It is inequitable, in the highest degree, that the defendant, by reason of her negligent and erroneous, though not fraudulent, representation, should make a profit of the sum at which the parties valued 65 acres of land, and that the plaintiff, without fault on his part, should lose that sum. Equity will prevent such a result by rescinding the contract, or decreeing a specific performance with compensation in behalf of the injured party, at his election, or by refusing specific performance on the application of the other party. *Hill v. Buckley*, 17 Ves. 395; *Price v. North*, 2 Younge & C. 620; *Dalby v. Pullen*, 3 Sim. 29; *Leslie v. Tompson*, 9 Hare, 268; *Barnes v. Wood*, L. R. 8 Eq. 424; *Whittemore v. Whittemore*, Id. 603; *Iron-Works v. Wickens*, L. R. 4 Ch. 101; *Denny v. Hancock*, L. R. 6 Ch. 1; *Torrance v. Bolton*, L. R. 8 Ch. 118; *In re Turner*, 13 Ch. Div. 130; *Belknap v. Sealey*, 14 N. Y. 144; *Paine v. Upton*, 87 N. Y. 327; *Couse v. Boyles*, 4 N. J. Eq. 212; *Thomas v. Perry*, 1 Pet. C. C. 49; *Daniel v. Mitchell*, 1 Story, 172; *Doggett v. Emerson*, 3 Story, 700; *Smith v. Babcock*, 2 Woodb. & M. 246; *Quesnel v. Woodlief*, 2 Hen. & M. 173; *Lawrence v. Staigg*,

8 R. I. 256; *Noble v. Googins*, 99 Mass. 231. Neither of the parties understood that the contract to convey "about" 200 acres was performed by conveying 135 acres. *Wilson v. Randall*, 67 N. Y. 338, 341, 342, and cases above cited.

No laches can be imputed to the plaintiff. He had a right to rely on the defendant's statement of the quantity. He could not discover the mistake by examining the external boundaries. *Paine v. Upton*, 87 N. Y. 327, 337. When, by the defendant's tender of a deed and demand of payment, he ascertained that she would not voluntarily correct the mistake, he immediately filed his bill.

The personal property formed no substantial part of the consideration. It is not named in the body of the bond, but is mentioned, apparently as an afterthought, on the margin. Upon the rescission, for any cause, by a vendee in possession of a sale of farm lands, there must in most cases, necessarily, be an accounting, in order to restore the parties to the situation they occupied prior to the contract. Upon such an accounting, all the property, the possession of which passed from the defendant to the plaintiff, or its full equivalent, together with the income derived from it, may be fully restored to her. It is no objection to a rescission, in a case of this character, that such articles as are necessarily consumed in the proper and ordinary management of a farm cannot be restored *in specie*. It does not appear that the plaintiff, after his discovery of the mistake, took any action by which he intended to affirm the contract, (*Montgomery v. Pickering*, 116 Mass. 227,) or that he did anything with the property not reasonably necessary for its preservation, or which equity would not require to be done. The plaintiff is to be relieved upon such terms as justice to both parties requires. *Wiswall v. Harriman*, 62 N. H. 671, 672; 2 *Story*, Eq. Jur. § 707. The offered evidence of value was immaterial, and was properly excluded. In the suit at law, there must be judgment for the defendant. The details of the decree will be settled at the trial term. Decree for the plaintiff.

ALLEN, J., did not sit. The others concurred.

DAMBANN v. SCHULTING.

(75 N. Y. 55.)

Court of Appeals of New York. 1878.

Action to set aside a release under seal, and to recover a balance for money lent defendant by the firm of C. F. Dambmann & Co., of which firm plaintiff was a partner, and to whose rights he succeeded. The facts are set forth in the opinion. Judgment for plaintiff.

C. Bainbridge Smith, for appellant. William Watson, for respondent.

EARL, J. Prior to 1866, the defendant had for many years been a merchant extensively engaged in business in the city of New York. In February of that year he had become financially embarrassed, and contemplated an assignment for the benefit of his creditors. He was finally dissuaded from making an assignment by the promise of his creditors to loan him the sum of \$100,000 to aid him in meeting his obligations. There was evidence tending to show that the sums thus to be loaned were to be repaid when he became able; but he testified that it was to be optional for him to repay them, in case he paid the debts, which he then owed, in full. The court at special term found that the arrangement was that he was to repay these sums when he became able. In pursuance of this arrangement, the firm to which plaintiff belonged, and to whose rights he had succeeded, loaned defendant \$10,000. On the 7th day of March, 1867, defendant had paid in full all the debts he owed when the money was loaned to him, and then, at his request, all the creditors who made the loans executed and delivered to him an instrument, of which the following is a copy, to-wit: "We the undersigned agree, in consideration of one dollar paid to us, to discharge H. Schulting from the legal payment of the money loaned to him February 1, 1866, said Schulting giving his moral obligations to refund the said money, in part or whole, as his means will allow in future." This was not a sealed instrument, and was executed upon the request of the defendant, upon the claim by him that he had done as he had agreed when the money was advanced to him. It was the clear intention of the parties, by this instrument to discharge the defendant from all legal obligation to pay the money advanced, leaving an obligation simply binding upon his conscience, but not enforceable at law, to pay when he became able, in whole or in part. If this instrument had been under seal or based upon a sufficient consideration, no proceedings in law or equity could have been thereafter taken to enforce payment against the defendant.

But according to the finding of the special term, before the execution of this instrument, the defendant was legally liable to pay when he became able, and this liability was not

discharged by this instrument, for the simple reason that it was not based upon any consideration. It was not in the nature of a composition of a debtor with his creditors, and cannot be sustained upon the principles applicable to composition agreements. It does not even appear that each creditor signed it upon the consideration that other creditors would also sign it. It was a mere agreement to discharge debts without payment, and such an agreement cannot be upheld.

Down to this period of time there is no claim that there was any fraud or mistake which influenced the conduct of the plaintiff and the other creditors, and the position of the plaintiff and the defendant was as follows: While the plaintiff could legally enforce the payment of the \$10,000 (the defendant being able to pay), he was under a moral obligation not to do so; and the defendant intending not to be legally bound to pay, was yet under both a legal and moral obligation to pay.

The defendant continued in business until August, 1868, when on account of failing health and despondency, he sold out his whole stock of goods to the firm of H. & A. Strousburgh & Co. for the sum of \$225,000, they agreeing to pay the most of that sum upon certain of his debts, and also to pay him one-third of what the goods should sell for above the sum of \$275,000. The value of the goods was not known to the defendant or his vendees, and there is no claim that this sale was not made in good faith. Soon after this sale the plaintiff, having heard thereof, called upon the defendant, and was duly informed of the sale and the terms thereof, and of the amount of his property at that time aside from his interest in the one-third of the surplus. As to that one-third, the defendant informed him that that was not worth much, and that he had offered to sell it for \$18,000 or \$20,000. There is no evidence or claim that in this conversation the defendant made any intentional misstatement. He had offered to several parties to sell his one-third interest for the sum named, and there is no evidence that he then believed it to be worth more. He actually made an arrangement to sell it for \$20,000 to one Von Keller. A few days after however he repudiated this arrangement, but Von Keller claimed it was valid.

Defendant's vendees went on and sold the goods, and they brought \$576,981; and his one-third interest amounted to about \$100,000. The defendant knew as early as the 8th day of October, 1868, that goods to the amount of \$400,000 had been sold, and that some yet remained to be sold. On the last-named day he went to the plaintiff and said to him that he understood that the previous paper signed by him—the discharge above set out—was not a legal release, because he had not paid any thing on account of the \$10,000, and he wanted to know if the plaintiff would sign a legal release upon payment of \$5,000.

The plaintiff said he would. Nothing more was said, and defendant paid him \$5,000; and then the plaintiff executed to him, under seal, a full and absolute discharge from all liability. This action was brought to set aside this release, and to recover the balance of the \$10,000.

The plaintiff seeks to impeach this release on account of fraud, and the court at special term decided in plaintiff's favor that the release was inoperative, as obtained by misrepresentation and concealment of material facts. The court did not find that there was any fraudulent misrepresentation, and there was none in fact. So far as I can discover, there was no misrepresentation of any kind. Neither did the court find that there was any fraudulent concealment of any facts; and there was no evidence to justify such a finding. The plaintiff had executed a discharge of his claim, which was illegal, and the defendant went to him and informed him of this fact, and stated that he wanted a legal release, and that he would pay him \$5,000 if he would give it; and he gave it. He stated to the plaintiff that he was not discharged, that he wanted to be, and the plaintiff discharged him. He made no statement and used no artifice to throw him off from his guard or to entrap or mislead him. There was no reluctance on the part of the plaintiff, and the defendant had no reason to suppose there would be, as the plaintiff had already agreed in writing to discharge him. The prior instrument shows that it was the understanding of the parties that the defendant should, so far as concerned any legal liability, have just such a discharge.

The claim, under these circumstances, is that the defendant was bound to disclose to the plaintiff the change in his pecuniary circumstances since the prior conversation in August, above alluded to, and that he had no right to leave him under the erroneous impression occasioned by that conversation. It must be borne in mind that the declarations made by the defendant in that conversation were made in entire good faith, and that they were not made in any business transaction with the plaintiff, and that they had no reference to or connection with the release. The plaintiff, in executing the release, had no right to rely upon them.

The general rule is, that a party engaged in a business transaction with another can commit a legal fraud only by fraudulent misrepresentations of facts, or by such conduct or such artifice for a fraudulent purpose as will mislead the other party or throw him off from his guard, and thus cause him to omit inquiry or examination which he would otherwise make. A party buying or selling property, or executing instruments, must by inquiry or examination gain all the knowledge he desires. He cannot proceed blindly, omitting all inquiry and examination, and then complain that the other party did not volunteer all the information he had. Such

is the general rule. But there are exceptions to this rule. Where there is such a relation of trust and confidence between the parties that the one is under some legal or equitable obligation to give full information to the other party—information which the other party has a right, not merely in *foro conscientiae*, but *juris et de jure*, to have, then the withholding of such information purposely may be a fraud. *Story, Eq. Jur. § 207 et seq.; Hadley v. Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454; Bench v. Sheldon, 14 Barb. 66; Paul v. Hadley, 23 Barb. 521.*

It is not always easy to define when this relation of trust and confidence exists; and no general rule can be formulated by which its existence can be known. It is sufficient for this case to say that it did not exist here. The defendant had no reason to make the disclosure which it is claimed he should have made, and the plaintiff had no right to expect it. The defendant had no reason to suppose that the plaintiff would be under the influence of the casual conversation which was had some two months before. And further, if the defendant thought upon the subject, he had no reason to suppose that if he stated all the facts within his knowledge, it would prevent the plaintiff from giving a discharge which he had agreed to give. While he would have stated that unexpectedly his share in the proceeds of the goods was much larger than \$20,000, yet he would also have stated that he had contracted to sell the share for \$20,000, and that the vendee claimed to hold him to the contract. That the claim was a serious one is shown by the fact that in January, 1869, Von Keller sued him, and in April, 1870, after a trial before a referee, sustained the contract and recovered a judgment for upward of \$100,000, which defendant was able to defeat finally only after a litigation of several years and a decision by this court. *Von Keller v. Schulting, 50 N. Y. 108.* In October, 1868, the defendant could have informed the plaintiff what his interest in the proceeds of the goods was, subject to the chances of a litigation, but what it was actually worth no one could then have told.

Without therefore questioning the facts found by the court at special term, we are of opinion that there was error in the legal conclusion that plaintiff was entitled to any relief on account of fraud.

It is further claimed that the plaintiff ought to be entitled to relief on account of mistake. He testified that he would not have executed the release if he had known the defendant's financial condition. But as already shown, the defendant was in no way responsible for his ignorance, and was under no legal or equitable obligation to disclose the facts as to his pecuniary circumstances. The plaintiff could have learned the facts by inquiry of the defendant or his vendees. There was no mistake as to any fact intrinsic to the release. Plaintiff knew that the defendant

had not been legally discharged from his liability, and that for the \$5,000 he was to give him an absolute release; and he gave him just such a release as he intended to. There was no mistake of any intrinsic fact essential to the contract or involved therein. The defendant's financial condition was an extrinsic fact, which might have influenced the plaintiff's action if he had known it. But ignorance of or mistake as to such a fact is not ground for affirmative equitable relief. The following illustrations of mistakes as to intrinsic facts essential to contracts, against which courts of equity will relieve, are found in the books. A. buys an estate of B. to which the latter is supposed to have an unquestionable title. It turns out, upon due investigation of the facts, that B. has no title; in such a case equity will relieve the purchaser and rescind the contract. *Bingham v. Bingham*, 1 Ves. Sr. 126. If a horse should be purchased, which is by both parties believed to be alive, but is, at the time, in fact dead, the purchaser would, upon the same ground, be released by rescinding the contract. *Allen v. Hammond*, 11 Pet. 71. If a person should execute a release to another party upon the supposition, founded on a mistake, that a certain debt or annuity had been discharged, although both parties were innocent, the release would be set aside. *Hore v. Becher*, 12 Sim. 465. If one should execute a release so broad in its terms as to release his rights in property, of which he was wholly ignorant, and which was not in contemplation of the parties at the time the bargain for the release was made, a court of equity might either cancel the release or restrain its application as intended. *Cholmondeley v. Clinton*, 2 Mer. 352; *Dungers v. Angove*, 2 Ves. Jr. 304. On the other hand, if the vendee is in possession of facts which will materially enhance the price of the commodity and of which he knows the vendor to be ignorant, he is not bound to communicate those facts to the vendor, and the contract will be held valid. *Laidlaw v. Organ*, 2 Wheat. 178. In such a case the facts unknown to the vendor are extrinsic to the contract and are

not of its substance; and hence there is no ground for the interference of a court of equity.

It is clear from these and other illustrations which might be given, that a court of equity will not give relief in all cases of mistake. There are many extrinsic facts surrounding every business transaction which have an important bearing and influence upon its results. Some of them are generally unknown to one or both of the parties, and if known, might have prevented the transaction. In such cases, if a court of equity could intervene and grant relief, because a party was mistaken as to such a fact which would have prevented him from entering into the transaction if he had known the truth, there would be such uncertainty and instability in contracts as to lead to much embarrassment. As to all such facts, a party must rely upon his own circumspection, examination and inquiry; and if not imposed upon or defrauded, he must be held to his contracts. In such cases, equity will not stretch out its arm to protect those who suffer for the want of vigilance.

Judge Story lays it down as a general rule "that mistake or ignorance of facts in parties is a proper subject of relief only when it constitutes a material ingredient in the contract of the parties, and disappoints their intention by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference." Story, Eq. Jur. § 151.

We are therefore of opinion that upon the facts disclosed in the record before us, the plaintiff was not entitled to any relief, and the judgment must be reversed and a new trial granted, costs to abide event. All concur except MILLER, J., not voting.

Judgment reversed.

CONNER v. WELCH et al.

(8 N. W. 260, 51 Wis. 431.)

Supreme Court of Wisconsin. March 2, 1881.

Appeal from circuit court, Dane county.

The case established by the pleadings and evidence is correctly stated in the brief of counsel for the plaintiff, as follows: "This action was brought to foreclose four certain mortgages made by Martin Osborne and wife upon 80 acres of land in Dane county, three of which mortgages had been satisfied of record before the commencement of the action. The facts are that on November 11, 1871, Martin Osborne was seized in fee of the W. ½ of N. W. ¼ of section 25, town 8, range 9, Dane county. November 11, 1871, Osborne and wife gave a mortgage thereon to John W. Allen for \$800 and interest. This is still in force as a first mortgage on the property, and is not one of the four mortgages for the foreclosure of which the action was brought. It confers a right of property prior to the rights of all parties hereto, and further reference to it in the case is unnecessary. November 23, 1871, Osborne and wife gave a mortgage thereon to Patrick Duffy for \$200 and interest. This mortgage bears date prior to the Allen mortgage, but was executed later, and in terms made subject thereto. October 1, 1875, Osborne and wife gave another mortgage thereon to Patrick Duffy for \$250 and interest. December 2, 1876, Osborne and wife gave a mortgage thereon to Elizabeth Duffy for \$135 and interest. February 21, 1878, Osborne and wife gave a mortgage thereon to Michael C. Conner, the plaintiff, for \$229 and interest, which mortgage has never been satisfied of record. March 1, 1878, the defendant Christian R. Stein caused judgment to be entered against Martin Osborne in the circuit court for Dane county upon a judgment note, with warrant of attorney, by his attorneys, Welch & Botkin, a law firm of which the defendant William Welch was a member. March 2, 1878, the defendant Stein assigned said judgment to said William Welch. March 4, 1878, the said mortgages, numbers two, three, and four, for \$200, \$250, and \$135, were assigned to the defendant Stein. March 5, 1878, the defendant Stein, by his attorneys, the said Welch & Botkin, brought suit to foreclose the said mortgages, numbers two and three, for \$200 and \$250, making parties defendant thereto Osborne and wife, the mortgagors, and Conner, the plaintiff herein, holding the subsequent mortgage, number five, above mentioned, but not making a party defendant the said Welch, holding by assignment the said judgment number six. March 8, 1878, Osborne and wife, by deed of quitclaim, conveyed said premises to the plaintiff, Conner, who, at the time, had an actual knowledge of the Stein judgment and its assignment to Welch. April 9, 1878, at the office of Welch & Botkin, in the presence of Botkin, the plaintiff, Conner, paid to the de-

fendant Stein the amount, principal and interest, of the mortgages in suit, (Nos. 2 and 3,) together with about \$115, costs of suit. At the time of payment he was still without knowledge of the Stein judgment. Neither Stein nor Botkin spoke of it. Botkin, when asked if he had told Conner of the existence of the Stein judgment, testified: 'I do not think I did. He (Conner) paid the money, and then said that he wanted the mortgages satisfied, and asked Mr. Stein to come right up with him and satisfy the mortgages, at the register of deeds' office, and get done with it; and he and Mr. Stein went out of the office for that purpose. It was at Conner's request. Not a word was said by me or Stein in regard to satisfying. There was not a syllable or whisper in regard to it.' The two mortgages were then satisfied by Stein. April 29, 1878, the plaintiff, Conner, paid Stein the amount, principal and interest, of the mortgage for \$135, number four, which, with the accompanying note, was delivered to him. Thereupon, at plaintiff's instance and request, Stein went to the register's office, accompanied by plaintiff, and satisfied the mortgage; Stein knowing, and the plaintiff not knowing, of the judgment. About December, 1878, the plaintiff first learned of the existence of the judgment from the officer having an execution thereon against this property." The complaint prays that the discharges of the three Duffy mortgages be cancelled, and for the usual judgment of foreclosure and sale in respect to those mortgages, and the mortgage for \$229 to the plaintiff, dated February 21, 1878.

It is claimed in the complaint that 40 acres of the mortgaged land was the homestead of Osborne, and an injunction was prayed against the sale of such 40 acres, on execution issued upon Stein's judgment. As to the agreement between the plaintiff and Osborne, pursuant to which the latter conveyed to the plaintiff the land mortgaged, the plaintiff testified as follows: "I bought the place of Osborne. I was to pay the mortgages. I did not give him any money besides the mortgages. * * * I gave him an account I held against him, more or less. * * * He had no money, and I paid for the making out of these papers. Forget how much that was. That is all I paid for his deed to me, except that I released him from his liability on the note of \$229. Think it was agreed that I should let Osborne have his note and mortgage. Have no further claim on him or his land for that." The witness testified later that he understood he took the property in satisfaction of his claims, but that it was no part of the consideration of the deed; and, further, to the question, "Didn't you regard the giving to you by Osborne of the quitclaim deed as, between you and Osborne, a settlement of your note and mortgage against him for \$229?" the plaintiff answered: "I presume so, but that was omitted in putting the amount in the deed." This is

the substance of all the evidence on the subject.

The court found—"First, that all the facts stated in the complaint are true, except that no part of the mortgaged premises was the homestead of Osborne when Stein recovered his judgment, and that Stein is not the owner of such judgment; second, that the defendant Welch purchased said judgment from the defendant Stein, and took the assignment thereof absolutely, for full value, and without notice, fraud, or collusion, and that he paid therefor by crediting the said Stein on the account of the firm of Welch & Botkin, of which the defendant Welch was then and still is a member, with the face amount thereof, towards the payment for legal services theretofore rendered by the said Welch & Botkin for the said Stein, and that, as between the said Welch and the said Botkin, it was agreed that the amount of said judgment should be received by the said Welch on his individual account; third, that Mr. Botkin, the law partner of the said defendant Welch, transacted the business in the foreclosure suits set out in said complaint, and that said Welch had no knowledge of the details of said foreclosure, and of the satisfaction of the mortgages as set out in said complaint; fourth, that the cancellation of the mortgages as set out in said complaint was founded upon a mistake upon the part of the plaintiff. That mistake was the supposition that the several mortgages of record, including his own, to the amount in all of the full value of the premises, were the only liens prior to his deed from said Osborne."

As conclusions of law, the court found that the mortgage for \$229, executed by Osborne to the plaintiff, is a valid subsisting lien on the land; that the discharge of the three Duffy mortgages should be cancelled, and those mortgages adjudged to be valid and subsisting liens; and that the plaintiff is entitled to a judgment of foreclosure in respect to all four mortgages, and to a sale of the land mortgaged, but not to a personal judgment against either defendant. The defendants have appealed from the judgment entered pursuant to such findings.

S. W. Botkin, for appellants. Sloan, Stevens & Morris, for respondent.

LYON, J. As we understand the testimony of the plaintiff he accepted the quitclaim deed of the mortgaged premises from Osborne pursuant to an express agreement between them that the note and mortgage of February 21, 1878, for \$229, was thereby satisfied and discharged. His testimony seems to admit of no other construction. By this agreement the \$229 mortgage was discharged, and the satisfactions of the Duffy mortgages by Stein, in the proper records of the county, at the request of the plaintiff, discharged those mortgages. Hence, by the acts and procurement of the plaintiff, the four

mortgages in controversy were cancelled and cease to be liens upon the land covered by them. Were these subsisting mortgages, we might not find it very difficult to hold, under the authorities cited, that the interest represented by the \$229 mortgage was not merged in the legal title conveyed to the plaintiff by Osborne, and that the plaintiff should be subrogated to the rights of the mortgagees in the Duffy mortgages, so that all of these mortgages could be made available to protect the plaintiff against the lien of the Stein judgment, which is junior thereto. But before the questions of merger and subrogation can be raised at all, the mortgages now cancelled and discharged must be restored and vitalized. This can only be done by cancelling and holding for naught the satisfactions of the Duffy mortgages, which the plaintiff caused to be entered of record, and his express agreement with Osborne to accept the conveyance of the legal title in full satisfaction and discharge of the \$229 mortgage.

The precise question is, therefore, whether, under the circumstances of the case, the plaintiff is entitled to be relieved of those satisfactions and of such agreement. Has he shown himself entitled to have them set aside, cancelled, and held for naught? The circuit court found (no doubt correctly) that there was no fraud or collusion on the part of the defendant Welch, the owner of the Stein judgment, and granted the relief prayed on the sole ground that plaintiff acted in ignorance of the existence of that judgment, in the matter of the satisfaction and discharge of the mortgages. Undoubtedly the plaintiff knew nothing of the judgment, and, presumably, (although he has not so testified,) had he known of its existence he would not have had the mortgages discharged, or made the contract he did with Osborne for the conveyance. But that alone is not sufficient to entitle him to have the discharged mortgages reinstated as valid liens upon the land. He must also have exercised reasonable diligence to ascertain whether subsequent liens had been put upon the property. A court of equity never relieves a man from the consequences of his own culpable negligence. Discussing the rules upon which courts of equity proceed in relieving, or refusing to relieve, against contracts made or acts done through mistake, or in ignorance of material facts, Judge Story says that "where an unconscionable advantage has been gained by mere mistake or misapprehension, and there was no gross negligence on the part of the plaintiff in falling into the error, or in not sooner claiming redress, and no intervening rights have accrued, and the parties may still be placed in statu quo, equity will interfere, in its discretion, in order to prevent intolerable injustice." 1 Story, Eq. Jur. § 138i. In section 146 the learned author says: "It is not, however, sufficient in all cases to give the party relief, that the

fact is material; but it must be such as he could not by reasonable diligence get knowledge of when he was put upon inquiry. For if, by such reasonable diligence, he could obtain knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence." In a note to the section last cited is the following: "If a court of equity is asked to give relief in a case not fully remediable at law, or not remediable at all at law, then it grants it upon its own terms and according to its own doctrines. It gives relief only to the vigilant and not to the negligent; to those who have not been put upon their diligence to make inquiry, and not to those who, being put upon inquiry, have chosen to omit all inquiry, which would have enabled them at once to correct the mistake, or to obviate all ill effects therefrom. In short, it refuses all its aid to those who, by their own negligence, and by that alone, have incurred the loss, or may suffer the inconvenience."

In *Mamlock v. Fairbanks*, 46 Wis. 415, 1 N. W. 167, this court made an application of the rule above stated. That was an action to rescind a contract of sale of a certain note and mortgage by the defendant to the plaintiff, and to recover the money paid therefor. The ground upon which relief was claimed, was that the defendant misrepresented the identity of the debtors, which misrepresentation affected the value of the securities. It was held that if, by the exercise of reasonable diligence, the plaintiff had the present means of ascertaining the identity of the debtors, and was not prevented from doing so by any artifice of the vendor, there could be no recovery. The opinion contains some of the authorities for the rule, not specially cited herein, and the case is a very strong one against the plaintiff.

Levy v. Martin, 48 Wis. 198, 4 N. W. 35, is not in point. There the mortgage sought to be revived was discharged without the consent of the plaintiff, and against an express agreement between him and the personal representatives of the deceased mortgagor that it should be assigned to him. Under these circumstances we found no difficulty in cancelling the satisfaction, and subrogating the plaintiff to the rights of the original mortgagor. There was no question of diligence in the case.

We have examined the cases cited by the learned counsel for the plaintiff on the subject of the rescission of contracts or instruments for ignorance or mistake of material facts, but in none of them, so far as we have perceived, is the question of diligence raised or passed upon.

We are now to consider the question whether the present plaintiff used proper diligence to ascertain the condition of the title when he made his agreement with Osborne, and when he paid and procured the discharge of the Duffy mortgages.

The plaintiff is a man of some wealth,

and is apparently familiar with the usual modes of transacting ordinary business. He evidently knew that a judgment against Osborne would be a lien upon the mortgaged premises, and also the effect upon the title of a discharge of the mortgages. He knew also that Osborne was utterly insolvent and thriftless. The number and amount of mortgages which the latter had put upon his land during the preceding seven years, absorbing its whole value, was sufficient notice to him of Osborne's pecuniary condition. The known insolvency of Osborne would naturally make an ordinarily prudent man more cautious when dealing with the title to his land. Then, again, the mortgage of Allen represented nearly or quite one-half of the value of the land, and was paramount to all the others. Stein is a merchant in Madison, and plaintiff knew him well. It does not appear that he is a dealer in real estate to any considerable extent. The very fact that he had purchased the Duffy mortgages, which were junior to the Allen mortgage, would seem to suggest to a reasonable mind that he must have had some special reason for doing so, and that such reason might well be that he became interested in some way in the land. But these circumstances, suggestive as they were, failed to open the lips of the plaintiff. He made no inquiry concerning the title either of Stein or Botkin or Osborne. Had he done so, and been told that no encumbrance had been placed upon the land subsequent to his mortgage for \$229, he might stand in a very different position in this action.

But this is not all. A month after he took the conveyance from Osborne, he went with Stein to the office of the register of deeds to have the latter discharge the two oldest Duffy mortgages, and some weeks later went again to the same office to have the other Duffy mortgages discharged. Of course, he was in close proximity to the office of the clerk of the circuit court, and could easily have gone there and ascertained whether any judgments had been entered against Osborne. It seems to us that common prudence required him to do so, or else to interrogate Stein or Osborne or Botkin as to the condition of the title. Yet he made the agreement, and took the conveyance from Osborne, and procured Stein to discharge the Duffy mortgages, without doing either. He suffered the matter to rest in statu quo until an execution was issued on the judgment, and, so far as it appears, first asserted the rights claimed in this action on the day the land was sold by the sheriff under the execution, which was about 10 months after the last Duffy mortgage was discharged. Our minds are impelled to the conclusion that, under these circumstances, the plaintiff was guilty of most culpable negligence in failing to inform himself of the existence of the Stein judgment, and hence that he has no standing in a court of equity to obtain the

relief he seeks. If there is any case in the books which grants such relief, where the act sought to be relieved against was the result of negligence so gross and inexcusable, we have failed to find it. Certainly, no such case is cited by counsel. The application of this rule may work hardship in some cases; perhaps it does in this case. But the rule requires nothing unreasonable and is a most salutary one. It is infinitely better that men should be held to the consequences of their own culpable carelessness, than that courts of equity should undertake to relieve there-

from. The rule requires reasonable caution and prudence in the transaction of business, and is deeply imbedded in our jurisprudence. It is within the principle and reason of *caveat emptor*. *Mamlock v. Fairbanks*, *supra*. The abrogation of the rule would tend to encourage negligence, and to introduce uncertainty and confusion in all business transactions.

The judgment of the circuit court must be reversed, and the cause remanded, with directions to that court to dismiss the complaint.

PARK BROS. & CO., Limited, v. BLODGETT & CLAPP CO.

(29 Atl. 133, 64 Conn. 28.)

Supreme Court of Errors of Connecticut. Feb. 8, 1894.

Appeal from court of common pleas, Hartford county; Taintor, Judge.

Action by Park Bros. & Co., Limited, against the Blodgett & Clapp Company for damages for breach of contract. Judgment for defendant. Plaintiff appeals. Affirmed.

Albert H. Walker, for appellant. Edward S. White, for appellee.

TORRANCE, J. This is an action brought to recover damages for the breach of a written contract, dated December 14, 1888. The contract is set out in full in the amended complaint. It is in the form of a written proposal, addressed by the plaintiff to the defendant, and is accepted by the defendant in writing upon the face of the contract. Such parts of the contract as appear to be material are here given: "We propose to supply you with fifteen net tons of tool steel, of good and suitable quality, to be furnished prior to January 1, 1890, at" prices set forth in the contract for the qualities of steel named therein. "Deliveries to be made f. o. b. Pittsburgh, and New York freight allowed to Hartford. To be specified for as your wants may require." The contract was made at Hartford, by the plaintiff through its agent A. H. Church, and by the defendant through its agent J. B. Clapp. After filing a demurrer and an answer, which may now be laid out of the case, the defendant filed an "answer, with demand for reformation of contract," in the first paragraph of which it admitted the execution of said written contract. The second, third, and fourth paragraphs of the answer are as follows: "The defendant avers that on or about December —, 1888, it was agreed by and between the plaintiff and defendant, the plaintiff acting by its said agent, A. H. Church, that the plaintiff should supply the defendant prior to January 1, 1890, with such an amount of tool steel, not exceeding fifteen tons, as the defendant's wants during that time might require, and of the kinds and upon the terms stated in said contract, and that the defendant would purchase the same of the plaintiff on said terms. (3) That by the mistake of the plaintiff and defendant, or the fraud of the plaintiff, said written contract did not embody the actual agreement made as aforesaid by the parties. (4) That the defendant accepted the proposal made to it by the plaintiff, and contained in said written contract, relying upon the representations of the plaintiff's said agent, then made to it, that by accepting the same the defendant would only be bound for the purchase of such an amount of tool steel of the kinds named therein as its wants prior to Janu-

ary 1, 1890, might require, and the defendant then believed that such proposal embodied the terms of the actual agreement made as aforesaid by and between the plaintiff and defendant." The fifth and last paragraph of the answer is not now material. The answer claimed, by way of equitable relief, a reformation of the written contract. In reply the plaintiff denied the three paragraphs above quoted; denied specifically that the written contract did not embody the actual agreement made by the parties; and denied the existence of any joint mistake or fraud. Thereupon the court below, sitting as a court of equity, heard the parties upon the issues thus formed, found them in favor of the defendant, and adjudged that the written contract be reformed to correspond with the contract as set out in paragraph 2 of the answer. At a subsequent term of the court, final judgment in the suit was rendered in favor of the defendant. The present appeal is based upon what occurred during the trial with reference to the reformation of the contract. Upon that hearing the agent of the defendant was a witness, on behalf of the defendant, and was asked to state "what conversation occurred between him and A. H. Church in making the contract of December 14, 1888, at and before the execution thereof, and relevant thereto." The plaintiff "objected to the reception of any parol testimony, on the ground that the same was inadmissible to vary or contradict the terms of a written instrument, or to show any other or different contract than that specified in the instrument, or to show anything relevant to the defendant's prayer for its reformation." The court overruled the objection, and admitted the testimony, and upon such testimony found and adjudged as hereinbefore stated.

The case thus presents a single question, — whether the evidence objected to was admissible under the circumstances; and this depends upon the further question, which will be first considered, whether the mistake was one which, under the circumstances disclosed by the record, a court of equity will correct. The finding of the court below is as follows: "The actual agreement between the defendant and the plaintiff was that the plaintiff should supply the defendant, prior to January 1, 1890, with such an amount of tool steel, not exceeding fifteen tons, as the defendant's wants during that time might require, and of the kinds and upon the terms stated in said contract, and that the defendant would purchase the same of the plaintiff on said terms. But by the mutual mistake of said Church and said Clapp, acting for the plaintiff and defendant respectively, concerning the legal construction of the written contract of December 14, 1888, that contract failed to express the actual agreement of the parties; and that said Church and said Clapp both intended to

have the said written contract express the actual agreement made by them, and at the time of its execution believed that it did." No fraud is properly charged, and certainly none is found, and whatever claim to relief the defendant may have must rest wholly on the ground of mistake. The plaintiff claims that the mistake in question is one of law, and is of such a nature that it cannot be corrected in a court of equity. That a court of equity, under certain circumstances, may reform a written instrument founded on a mistake of fact is not disputed; but the plaintiff strenuously insists that it cannot, or will not, reform an instrument founded upon a mistake like the one here in question, which is alleged to be a mistake of law. The distinction between mistakes of law and mistakes of fact is certainly recognized in the text-books and decisions, and to a certain extent is a valid distinction; but it is not practically so important as it is often represented to be. Upon this point Mr. Markby, in his "Elements of Law" (sections 268 and 269), well says: "There is also a peculiar class of cases in which courts of equity have endeavored to undo what has been done under the influence of error and to restore parties to their former position. The courts deal with such cases in a very free manner, and I doubt whether it is possible to bring their action under any fixed rules. But here again, as far as I can judge by what I find in the text-books and in the cases referred to, the distinction between errors of law and errors of fact, though very emphatically announced, has had very little practical effect upon the decisions of the courts. The distinction is not ignored, and it may have had some influence, but it is always mixed up with other considerations, which not unfrequently outweigh it. The distinction between errors of law and errors of fact is therefore probably of much less importance than is commonly supposed. There is some satisfaction in this, because the grounds upon which the distinction is made have never been clearly stated." The distinction in question can therefore afford little or no aid in determining the question under consideration. Under certain circumstances a court of equity will, and under others it will not, reform a writing founded on a mistake of fact; under certain circumstances it will, and under others it will not, reform an instrument founded upon a mistake of law. It is no longer true, if it ever was, that a mistake of law is no ground for relief in any case, as will be seen by the cases hereinafter cited. Whether, then, the mistake now in question be regarded as one of law or one of fact is not of much consequence; the more important question is whether it is such a mistake as a court of equity will correct; and this perhaps can only, or at least can best, be determined by seeing whether it falls within any of the well-recognized classes of cases in which such relief is furnished. At the same time

the fundamental equitable principle which was specially applied in the case of *Northrop v. Graves*, 19 Conn. 548, may also, perhaps, afford some aid in coming to a right conclusion. Stated briefly and generally, and without any attempt at strict accuracy, that principle is that in legal transactions no one shall be allowed to enrich himself unjustly at the expense of another through or by reason of an innocent mistake of law or fact, entertained without negligence by the loser, or by both. If we apply this principle to the present case, we may see that, by means of a mutual mistake in reducing the oral agreement to writing, the plaintiff, without either party intending it, gained a decided advantage over the defendant, to which it is in no way justly entitled, or at least ought not to be entitled, in a court of equity.

The written agreement certainly fails to express the real agreement of the parties in a material point; it fails to do so by reason of a mutual mistake, made, as we must assume, innocently, and without any such negligence on the part of the defendant as would debar him from the aid of a court of equity. The rights of no third parties have intervened. The instrument, if corrected, will place both parties just where they intended to place themselves in their relations to each other; and, if not corrected, it gives the plaintiff an inequitable advantage over the defendant. It is said that if, by mistake, words are inserted in a written contract which the parties did not intend to insert, or omitted which they did not intend to omit, this is a mistake of fact which a court of equity will correct in a proper case. *Sibert v. McAvoy*, 15 Ill. 106. If, then, the oral agreement in the case at bar had been for the sale and purchase of 5 tons of steel, and, in reducing the contract to writing, the parties had, by an unnoticed mistake, inserted "15 tons" instead of "5 tons," this would have been a mistake of fact entitling the defendant to the aid of a court of equity. In the case at bar the parties actually agreed upon what may, for brevity, be called a conditional purchase and sale, and upon that only. In reducing the contract to writing, they, by an innocent mistake, omitted words which would have expressed the true agreement, and used words which express an agreement differing materially from the only one they made. There is perhaps a distinction between the supposed case and the actual case, but it is quite shadowy. They differ not at all in their unjust consequences. In both, by an innocent mistake mutually entertained, the vendor obtains an unconscionable advantage over the vendee, a result which was not intended by either. There exists no good, substantial reason, as it seems to us, why relief should be given in the one case and refused in the other, other things being equal. It is hardly necessary to say that, in cases like the one at bar, courts of equity ought to move with-

great caution. Before an instrument is reformed, under such circumstances, the proof of the mistake, and that it really gives an unjust advantage to one party over the other, ought to be of the most convincing character. "Of course the presumption in favor of the written over the spoken agreement is almost resistless; and the court has wearied itself in declaring that such prayers (for relief of this kind) must be supported by overwhelming evidence, or be denied." *Palmer v. Insurance Co.*, 54 Conn. 501, 9 Atl. 248. We are not concerned here, however, with the amount or sufficiency of the proofs upon which the court below acted, nor with the sufficiency of the pleadings; we must, upon this record, assume that the pleadings are sufficient, and that the proofs came fully up to the highest standard requirements in such cases. Upon principle, then, we think a court of equity may correct a mistake of law in a case like the one at bar, and we also think the very great weight of modern authority is in favor of that conclusion. The case clearly falls within that class of cases where there is an antecedent agreement, and, in reducing it to writing, the instrument executed, by reason of the common mistake of the parties as to the legal effect of the words used, fails, as to one or more material points, to express their actual agreement. It is perhaps not essential in all cases that there should be an antecedent agreement, as appears to be held in *Benson v. Markoe*, 37 Minn. 30, 33 N. W. 38; but we have no occasion to consider that question in the case at bar. The authorities in favor of the conclusion that a court of equity in such cases will correct a mistake, even if it be one of law, are very numerous, and the citation of a few of the more important must suffice.

In *Hunt v. Rousmanier's Adm'rs*, 1 Pet. 1, decided in 1828, it is said: "Where an instrument is drawn and executed which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into, but which by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates, the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement." It was said in the argument before us that this was a mere obiter dictum, but that is hardly correct. It is true the case was held not to fall within the principle, but the principle was said to be "incontrovertible" (page 13), and was applied to the extent at least of determining that the case then before the court did not come within it. In *Snell v. Insurance Co.*, 98 U. S. 85, the court applied the principle so clearly stated in the case last cited, and reformed a policy of insurance, though the mistake was clearly one as to the legal effect of the language of the policy. In numerous other decisions of that court the same principle has been cautiously but repeatedly applied, but it is not necessary to

cite them. On the general question, whether a court of equity will relieve against a mistake as to the legal effect of the language of a writing, the case of *Griswold v. Hazard*, 141 U. S. 260, 11 Sup. Ct. 972, 999, is a strong case, though perhaps hardly an authority upon the precise question in this case. *Canedy v. Marcy*, 13 Gray, 373, was a case where the oral contract was for the sale of two-thirds of certain premises, but the deed, by mistake of the scrivener, conveyed the entire premises. The words used were ones intended to be used in one sense, the error being that all concerned supposed those words would carry out the oral agreement. This was clearly a mistake "concerning the legal construction of the written contract," but the court, by Chief Justice Shaw, said: "We are of the opinion that courts of equity in such cases are not limited to affording relief only in cases of mistake of fact, and that a mistake in the legal effect of a description in a deed, or in the use of technical language, may be relieved against upon proper proof." In *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228, decided in 1891, the court says: "The only question argued is raised by the defendant's exception to the refusal of a ruling that, if both parties intended that the description should be written as it was written, the plaintiff was not entitled to a reformation. It would be a sufficient answer that the contrary is settled in this commonwealth,"—citing a number of cases. In *Kenard v. George*, 44 N. H. 440, the parties, by mistake as to its legal effect, supposed a mortgage deed to be valid when it was not. The court relieved against the mistake, and said: "It seems to us to be a clear case of mutual mistake, where the instrument given and received was not in fact what all the parties to it supposed it was and intended it should be; and in such a case equity will interfere and reform the deed, and make it what the parties at the time of its execution intended to make it; and in this respect it makes no difference whether the defect in the instrument be in a statutory or common-law requisite, or whether the parties failed to make the instrument in the form they intended, or misapprehended its legal effect." In *Eastman v. Association*, 65 N. H. 176, 18 Atl. 745, decided in 1889, the mistake was as to the legal effect of an insurance certificate, but the court granted relief by way of reformation. The court says: "Both parties intended to make the benefit payable to Gigar's administrator. That it was not made payable to him was due to their mutual misapprehension of the legal effect of the language used in the certificate. * * * Equity requires an amendment of the writing that will make the contract what the parties supposed it was, and intended it should be, although their mistake is one of law, and not of fact." In *Trusdell v. Lehman*, 47 N. J. Eq. 218, 20 Atl. 391, the marginal note is as follows: "Where it clearly appears that a deed drawn professedly to carry out the

agreement of the parties, previously entered into, is executed under the misapprehension that it really embodies the agreement, whereas, by mistake of the draughtsman either as to fact or law, it fails to fulfill that purpose, equity will correct the mistake by reforming the instrument in accordance with the contract." In a general way, the same rule is recognized and applied with more or less strictness in the following cases: *Clayton v. Freet*, 10 Ohio St. 544; *Bush v. Hicks*, 60 N. Y. 298; *Andrews v. Andrews*, 81 Me. 337, 17 Atl. 166; *May v. Adams*, 58 Vt. 74, 3 Atl. 187; *Griffith v. Townley*, 69 Mo. 13; *Benson v. Markoe*, 37 Minn. 30, 33 N. W. 38; *Gump's Appeal*, 65 Pa. St. 476; *Cooper v. Phibbs*, L. R. 2 H. L. 170. See, also, 2 Pom. Eq. Jur. § 845, and *Bisp. Eq. §§ 184-191*. And, whatever the law may be elsewhere, this is certainly the law of our own state. *Chamberlain v. Thompson*, 10 Conn. 243; *Stedwell v. Anderson*, 21 Conn. 144; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 518; *Palmer v. Insurance Co.*, 54 Conn. 488, 9 Atl. 248; and *Hausman v. Burnham*, 59 Conn. 117, 22 Atl. 1065. Indeed, since the time of *Northrop v. Graves*, supra, it is difficult to see how our law could have been otherwise. We conclude then that by our own law, and by the decided weight of authority elsewhere, the defendant was entitled to the relief sought. If this is so, then clearly he was entitled to the parol evidence which the plaintiff objected to; for in no other way, ordinarily, can the mistake be shown. "In such cases parol evidence is admissible to show that the party is entitled to the relief sought." *Wheaton v. Wheaton*, 9 Conn. 96. "It is settled, at least in equity, that this particular kind of evidence, that is to say, of mutual mistake as to the meaning of words used, is admissible for the negative purpose we have mentioned. And this principle is entirely consistent with the rule that you cannot set up prior or contemporaneous oral dealings to modify or override what you knew was the effect of your writing." *Goode v. Riley*, 153 Mass. 585, 28 Atl. 228; *Reyn. Theory Ev. § 69*; 1 *Greenl. Ev. (15th Ed.) § 269a*; *Steph. Dig. Ev. § 90*.

The view we have taken of this case renders it unnecessary to notice at any length the cases cited by counsel for the plaintiff

in his able argument before us. Upon his brief, he cites five from Illinois, two from Indiana, and one from Arkansas. After an examination of them, we can only say that most of them seem to support the claims of the plaintiff. If so, we think they are opposed to the very decided weight of authority, and do not state the law as it is held in this state.

Before closing, however, we ought to notice the case of *Wheaton v. Wheaton*, supra, upon which the plaintiff's counsel seems to place great reliance. The case is a somewhat peculiar one. Even in that case, however, the court seems to recognize the principle governing the class of cases within which we decide the case at bar falls, for it says: "It is not alleged that the writings were not so drawn as to effectuate the intention of the parties, through the mistake of the scrivener. On the contrary it is alleged that the scrivener was not even informed what the agreement between the parties was." From the statement of the case in the record and in the opinion, it clearly appears that the mistake was not mutual; indeed, it does not even appear that at the time when the note was executed the other party even knew that there was any mistake at all on the part of anybody. Upon the facts stated, the plaintiff in this case did not bring it within the class of cases we have been considering. The case was correctly decided, not on the ground that the mistake was one of law, but on the ground that the mistake of law was one which, under the circumstances alleged, a court of equity would not correct. The court, however, in the opinion, seems to base its decision upon the distinction between mistakes of law and mistakes of fact; holding in general and unqualified terms, as was once quite customary, that the latter could be corrected and the former could not. The court probably did not mean to lay the law down in this broad and unqualified way; but if it did, it is sufficient to say that it is not a correct statement of our law, at least since the decision of *Northrop v. Graves*, supra. On the whole, this case of *Wheaton v. Wheaton* can hardly be regarded as supporting the plaintiff's contention. There is no error apparent upon the record. In this opinion the other judges concurred.

WALDEN v. SKINNER.

(101 U. S. 577.)

Supreme Court of the United States. October, 1879.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

Benjamin H. Hill, for appellant. A. R. Lawton, for appellee.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Trusts are either express or implied, the former being such as are raised or created by the act of the parties, and the latter being such as are raised or created by presumption or construction of law. Cook v. Fountain, 3 Swanst. 585, 592.

Implied trusts may also be divided into two general classes: First, those that rest upon the presumed intention of the parties. Secondly, those which are independent of any such express intentions, and are forced upon the conscience of the party by operation of law. 2 Story, Eq. Jur. § 1195.

Sufficient appears to show that Sarah S. Walden, the complainant, on the sixth day of May, 1874, filed her bill of complaint in the court below against the respondents, to wit, Darius S. Skinner and John N. Lewis and Charles S. Hardee, executors of Charles S. Henry, deceased, who in his lifetime was the trustee of Penelope W. Tefft and her three children. Preliminary to the charging part of her complaint she alleges and states that on the 28th of October, 1847, she intermarried with William P. Tefft, who on the 9th of August, five years later, departed this life intestate and without children, leaving the complainant as his sole heir and legal representative; that on the 4th of June, six years subsequent to the death of her first husband, she intermarried with Charles C. Walden, who, on the eighth day of December of the next year, departed this life testate, leaving no children by the complainant, and that he by his will bequeathed to her all the property and rights owned and possessed by her at the date of their marriage; and that the father of her first husband died intestate on the 30th of June, 1862, but that no administration was ever had upon his estate, and that his widow, the mother of her first husband, departed this life testate on the 11th of September eleven years later; that her first husband had two brothers at the date of her marriage neither of whom ever married and both of whom died without children; that at the death of the elder of the two he had a life policy of insurance for \$5,000, which his administrator collected and paid to his two living brothers.

Allegations then follow in the bill of complaint which relate more immediately to the subject-matter of the controversy, from which it appears that Elias Fort, June 28,

1831, conveyed a certain tract of land to Charles S. Henry and Stephen C. Greene, as trustees and in trust for Penelope W. Tefft and her three sons, William P. Tefft, Henry D. Tefft, and Charles E. Tefft, and it is therein declared that the said property is for the use of the mother during her lifetime and the three sons, and that after the death of the mother it shall be for the use of the three sons alone as tenants in common, and that in case of sale "the proceeds to be reinvested upon the same uses and trusts as aforesaid, and if not sold, then the property, after the death of the mother, was to be distributed by said trustees to each of the said sons as shall survive and attain the age of twenty-one years."

Greene, one of the trustees, subsequently died, leaving Charles S. Henry the sole surviving trustee under the trust-deed, and she charges that on the 19th of July, 1848, the mayor and aldermen of the city of Savannah conveyed to him as such trustee a certain lot of land numbered five, Monterey Ward, in said city, the lot being then subject to certain annual ground-rents, as specified in the conveyance, and the complainant avers that the conveyance is informal and incomplete, inasmuch as the trustee never signed it, as it was intended, and that it fails to set forth and express the trust interests of the three children as it should do. Wherefore she alleges that it should be reformed and be made to conform to the purposes of the trust as created and set forth in the original trust-deed.

Persuasive and convincing reasons in support of that request are alleged which will hereafter be reproduced when the merits of the controversy are considered.

Relief specific and general is prayed, as is more fully set forth in the transcript. Process was served and the respondents appeared, and after certain interlocutory proceedings filed separate answers.

All of the defenses to the merits are set up in the answer of the first-named respondent, who admits all of the preliminary matters alleged in the bill of complaint. He also admits that there was in existence at the time of the first marriage of the complainant the trust estate held by the surviving trustee arising under the conveyance from Elias Fort to the said two trustees, which, as he alleges, was held for the sole and separate use of the mother during her life, and remainder at her death to her three sons as tenants in common.

Prior to that transaction there is no controversy between the parties as to the facts, and he also admits that the authorities of the city conveyed the lot called Monterey Ward to the surviving trustee, but he alleges that by the terms of the conveyance the legal title to the lot vested in the trustee in trust for the sole and separate use of the mother, the trust being executory only so long and for such time as the cestui que trust should

remain a feme covert; and he denies that the conveyance is informal and incomplete in any particular, or that it was ever expected or intended by any one that the trustee should sign the same, and he avers that it was accepted by the trustee for the purposes therein set forth.

Attempt is also made to enforce that view by a specific denial of most of the reasons assigned in the bill of complaint in support of the request that the conveyance to the trustee of the lot called Monterey Ward may be reformed so as to conform to the trusts created and expressed in the antecedent trust-deed.

Both of the other respondents allege that they are citizens of the state where the suit is brought, and deny that the circuit court had any jurisdiction to make or execute any order, judgment, or decree against them in the premises.

Proofs were taken, the parties heard, and the circuit court entered a decree in favor of the respondents, dismissing the bill of complaint. Prompt appeal was taken by the complainant to this court, and since the appeal was brought up she has filed the assignment of errors set forth in the brief of her counsel. They are ten in number, all of which will be sufficiently considered in the course of the opinion, without giving each a separate examination.

Before examining the questions presented in respect to the second deed, it becomes necessary to ascertain the true construction and meaning of the original trust-deed so far as respects the second trust therein created and defined. Eight hundred dollars constituted the consideration of the conveyance, and it was made upon the trust that if, during the lifetime of the mother of the three sons, it should be deemed advisable by her to sell and convey the premises, then upon this further trust that the trustees as aforesaid, or the survivor of them, upon her application and with her consent, signified by her being a party to the conveyance, will sell and convey the lot and improvements for the best price which can be obtained for the same, to any person or persons whatsoever, without applying to a court of law or equity for that purpose to authorize the same, and the proceeds thereof upon the same trusts as aforesaid to invest in such other property or manner as the mother of the sons shall direct and request for the same use, benefit, and behalf.

Explicit and unambiguous as that provision is, it requires no discussion to ascertain its meaning; nor is it necessary to enter into any examination of the third trust specified in the conveyance, as it is conceded that the trust property was sold by the surviving trustee for reinvestment during the lifetime of the mother at her request, she joining in the conveyance as required by the terms of the instrument creating the trust.

Twenty-four hundred dollars were received

for the conveyance of the trust property, and all of that sum, except \$600 turned over to the mother, was invested in buildings then being erected upon lot numbered five, called the Monterey Ward. Purchase of that lot had previously been made by the surviving trustee named in the original trust-deed, and it appears that the parties understood that it was to be upon the same uses and trusts as were contained in the trust-deed by which the title to the lot sold was acquired.

Proof that the new lot numbered five, called Monterey Ward, was purchased by the father and the three sons during the lifetime of the father seems to be entirely satisfactory, and it is equally well established that each contributed one-fourth part of the sum of \$240 paid for the purchase-money of the lot. Satisfactory proof is also exhibited that Henry D. Tefft, one of the three brothers, died Aug. 13, 1849, unmarried and intestate, and that he had a valid subsisting insurance upon his life in the sum of \$5,000, which his administrator collected and paid to his surviving brothers.

Eighteen hundred dollars of the proceeds arising from the sale of the property acquired by virtue of the first trust-deed were appropriated towards erecting buildings on the new lot purchased by the father and the three sons while in full life, and when the one whose life was insured deceased, the two survivors appropriated each his proportion of the money received to the same purpose, with the understanding that the property was subject to the same uses and trusts as the property previously acquired and sold.

Competent proofs of a convincing character are also exhibited in the transcript that the first husband of the complainant contributed other sums towards completing the buildings, leaving no doubt that he paid his full proportion for the improvements as well as for the lot purchased of the city authorities.

Enough appears to show that the buildings were completed more than two years before the first husband of the complainant died intestate and without children, when it is obvious that she became the sole heir to all the interest he possessed in the said estate, whatever it might be. Two years elapsed after the buildings were completed before the father of the three sons died, and the proofs show that during that period the complainant resided with the parents of her husband, and that her rights as his heir-at-law were uniformly recognized by the family; that she continued to reside there with her mother-in-law after the death of the senior Tefft, until the decease of his widow, and that throughout that period she paid one-half of all repairs, taxes, insurance, and other expenses of the property as if she were equally interested in the same with her mother-in-law, and was liable to bear an equal proportion of all such expenses.

Opposed to that is the proof that the mother-in-law, one year before her death, when in a low and depressed frame of mind, bequeathed the whole of the lot in question to the first-named respondent, who is her nephew, and on the same day executed a deed to him of the entire property, to take effect in possession after her death. Sole title to the premises in fee-simple is claimed by the respondent under those instruments, and he brought ejectment against the complainant to dispossess her of the premises, and it appears that she was at great disadvantage in attempting to defend the suit, because the trustee had omitted to see that the title was conveyed in trust for the benefit of the cestuis que trust as in the prior trust deed, as he should have done, to carry into effect the understanding of all the parties to the sale of the prior trust premises and the purchase of the lot in question. What she alleges is that the purchase of the new lot was made for the same cestuis que trust as those described in the deed of the old lot, and that the understanding of all was that the deed of the new lot should contain and declare the same uses and trusts in favor of the same persons, and the proofs to that effect are full and entirely satisfactory.

Support to that view is also derived from the fact that the surviving trustee in the old deed is the grantee in the new deed, and that he is therein more than once described as trustee, and in the introductory part of the instrument is denominated trustee of Mrs. Penelope W. Tefft, wife of Israel K. Tefft, of the city and state previously mentioned in the same instrument.

Ten years before the suit was instituted the trustee in the new deed departed this life, and the other two respondents were appointed and qualified as his executors. Unable to obtain complete redress at law, the complainant prays that the deed of conveyance from the city of the lot and improvements in question may be reformed and be made to conform to the true intent and purpose for which the lot was purchased, and to that end that it may be made to include the same uses and trusts raised, created, and declared in the prior deed from Elias Fort, according to the understanding and agreement of all the parties.

Besides that she also prays that her equities in and to the property, including the improvements, may be set forth, decreed, and allowed by the court, including such as are in her favor from the payment of taxes, insurance, and repairs upon the property during the lifetime and since the death of her mother-in-law, and that the first-named respondent may be enjoined from further proceeding in his ejectment suit to recover possession of the premises.

Courts of equity afford relief in case of mistake of facts, and allow parol evidence to vary and reform written contracts and in-

struments, when the defect or error arises from accident or misconception, as properly forming an exception to the general rule which excludes parol testimony offered to vary or contradict written instruments. Where the mistake is admitted by the other party, relief, as all agree, will be granted, and if it be fully proved by other evidence, Judge Story says, the reasons for granting relief seem to be equally satisfactory. 1 Story, Eq. Jur. § 156.

Decisions of undoubted authority hold that where an instrument is drawn and executed that professes or is intended to carry into execution an agreement, which is in writing or by parol, previously made between the parties, but which by mistake of the draftsman, either as to fact or law, does not fulfill or which violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement, the reason of the rule being that the execution of agreements fairly and legally made is one of the peculiar branches of equity jurisdiction, and if the instrument intended to execute the agreement be from any cause insufficient for that purpose, the agreement remains as much unexecuted as if the party had refused altogether to comply with his engagement, and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case as well as in the other, by compelling the delinquent party to perform his undertaking according to the terms of it and the manifest intention of the parties. *Hunt v. Rousmaniere's Adm'rs*, 1 Pet. 1, 13; *Id.*, 8 Wheat. 174, 211.

Even a judgment when confessed, if the agreement was made under a clear mistake, will be set aside if application be made, and the mistake shown while the judgment is within the power of the court. Such an agreement, even when made a rule of court, will not be enforced if made under a mistake, if seasonable application be made to set it aside, and if the judgment be no longer in the power of the court, relief, says Mr. Chief Justice Marshall, may be obtained in a court of chancery. *The Hiram*, 1 Wheat. 440, 444.

Equitable rules of the kind are applicable to sealed instruments, as well as to ordinary written agreements, the rule being that if by mistake a deed be drawn plainly different from the agreement of the parties, a court of equity will grant relief by considering the deed as if it had conformed to the antecedent agreement. So if a deed be ambiguously expressed in such a manner that it is difficult to give it a construction, the agreement may be referred to as an aid in expounding such an ambiguity; but if the deed is so expressed that a reasonable construction may be given to it, and when so given it does not plainly appear to be at variance with the agreement, then the latter is not to be re-

garded in the construction of the former. *Hogan v. Insurance Co.*, 1 Wash. C. C. 419, 422, Fed. Cas. No. 6,582.

Rules of decision in suits for specific performance are necessarily affected by considerations peculiar to the nature of the right sought to be enforced and the remedy employed to accomplish the object. Where no question of fraud or mistake is involved, the rule with respect to the admission of parol evidence to vary a written contract is the same in courts of equity as in those of common law, the rule in both being that when an agreement is reduced to writing by the act and consent of the parties, the intent and meaning of the same must be sought in the instrument which they have chosen as the repository and evidence of their purpose, and not in extrinsic facts and allegations. Proof of fraud or mistake, however, may be admitted in equity to show that the terms of the instrument employed in the preparation of the same were varied or made different by addition or subtraction from what they were intended and believed to be when the same was executed.

Evidence of fraud or mistake is seldom found in the instrument itself, from which it follows that unless parol evidence may be admitted for that purpose the aggrieved party would have as little hope of redress in a court of equity as in a court of law. Even at law, all that pertains to the execution of a written instrument or to the proof that the instrument was adopted or ratified by the parties as their act or contract, is necessarily left to extrinsic evidence, and witnesses may consequently be called for the purpose of impeaching the execution of a deed or other writing under seal, and showing that its sealing or delivery was procured by fraudulently substituting one instrument for another, or by any other species of fraud by which the complaining party was misled and induced to put his name to that which was substantially different from the actual agreement. *Thoroughgood's Case*, 4 Coke, 4.

When the deed or other written instrument is duly executed and delivered, the courts of law hold that it contains the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol; but courts of equity, says Chancellor Kent, have a broader jurisdiction and will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself. Pursuant to that rule, he held it to be established that relief can be had against any deed or contract in writing founded on mistake or fraud, and that mistake may be shown by parol proof and the relief granted to the injured party whether he sets up the mistake affirmatively by bill or as a defense. *Gillespie v. Moon*, 2 Johns. Ch. 585, 596.

Parol proof, said the same learned magistrate, is admissible in equity to correct a

mistake in a written contract in favor of the complainant seeking a specific performance, especially where the contract in the first instance is imperfect without referring to extrinsic facts. *Keisselbrack v. Livingston*, 4 Johns. Ch. 144; *Cathcart v. Robinson*, 5 Pet. 264.

Many cases support that proposition without qualification, and all or nearly all agree that it is correct where it is invoked as defence to a suit to enforce specific performance. Little or no disagreement is found in the adjudged cases to that extent, but there are many others where it is held that the rule is unsound when applied in behalf of a complainant seeking to enforce a specific performance of a contract with variations from the written instrument. Difficulty, it must be admitted, would arise in any attempt to reconcile the decided cases in that regard, but it is not necessary to enter that field of contest and conflict in the case before the court for several reasons: 1. Because by comparing the original trust deed with the deed of the lot in question, in view of the attendant circumstances, the inference is very cogent that the second was designed and intended as a complete substitute for the first. 2. Because the proof shows to a demonstration that the consideration for the purchase of the second lot was paid in equal proportions by the father and each of the three sons. 3. Because it appears that the expensive improvements made upon the lot in question were made from the moneys of each of the three sons, advanced at the request of the father. 4. Because it appears that the family and every member of it understood from the first and throughout that the trustee held the property in trust for the mother and the three sons. 5. Because the father, from the date of the deed to the time of his death, recognized the premises as acquired and held for the benefit of his wife and their three sons. 6. Because the mother of the three sons, after the decease of the first husband of complainant, recognized her as interested in the property, and continued to do so at all times throughout her life until about the time she conveyed the lot in question to the respondent.

Both the deed and her will bear date Sept. 28, 1872, and the proofs show that she was at the time in a low, depressed state of mind, and that she departed this life within one year subsequent to the execution of those instruments. Prior to that, and throughout the whole period subsequent to the death of her husband, the proofs show that she uniformly recognized the complainant as the owner of a moiety of the lot and the improvements, and always required her to pay one-half of all repairs, taxes, insurance, and other expenses of the property.

By the terms of the original deed the property was conveyed to the trustees, subject to the payment of taxes, assessments, and ground-rent, to and for the sole and separate

use, benefit, and behoof of the mother and her three sons during her lifetime, and after her death to the three sons as tenants in common in equal parts, with the provision that if the mother during her lifetime should deem it advisable she might sell and convey the premises, and that in that event the further trust was raised and created that the trustees or the survivor of them, upon her application and with her consent signified by becoming a party to the conveyance, might sell and convey the lot and improvements for the best price which could be obtained for the same, without any application to a court of law or equity for that purpose, and to invest the proceeds thereof upon the same trusts in such other property or manner as the mother should direct, and for the same use, benefit, and behalf.

Provision was also made that if no such sale and re-investment was made during the lifetime of the mother, then the trustees were to sell the same for the sole use and benefit of the three sons or the survivor or survivors of them, share and share alike, until the youngest should arrive at the age of twenty-one years, when the trustees might sell and convey the same at the request of such survivor or survivors, and divide the proceeds to the survivor or survivors, share and share alike.

Taken as a whole the proofs show to the entire satisfaction of the court that the lot in question was purchased and conveyed to the surviving trustee upon the same trusts as those raised and created in the first deed, and that the trustee, through mistake, failed to have those trusts properly declared in the deed of trust to him as he should have done, and that the prayer of the bill of complainant, that the deed of the lot and improvements in question ought to be reformed and the rights of the complainant be ascertained and adjudged as if the deed in question contained the same trusts as those raised and created in the original trust deed is reasonable and proper and should be granted.

Courts of equity, beyond all doubt, possess the power to grant such relief, and the proofs, in the judgment of the court, are such as to entitle the complainant to such a decree, unless the remaining defence set up by the respondent must prevail. *Cooper v. Phibbs*, L. R. 2 Ch. App. 149, 186; *Cochrane v. Willis*, 34 Beav. 359, 366. Such a decree, of course, cannot now be made against the trustee, as he is not living; but the executors, as contended by the complainant, are competent to perform that duty, and she prays that the decree may be adapted to the present state of the parties.

Suppose all that is true, still it is contended by the principal respondent that the decree below is correct, because the claim is barred. Much discussion of that defence will not be necessary, beyond what is required to ascertain the facts.

When the father died, the complainant was

living on the premises, and she continued to reside there most or all the time during the widowhood of the mother of her first husband, except while she lived with her second husband, and when he died she returned to live with her mother-in-law. During all that time the proofs show that she was constantly recognized as the lawful heir to the estate of her deceased husband, until about a year before the decease of the mother, who also resided on the premises. Prior to that, the rights of the complainant were unmistakably recognized, and nothing of consequence had occurred to indicate any intent to call her just right in question. Soon after that, however, the respondent commenced an action of ejectment against her to recover possession of the entire lot and improvements, she still being in possession, and doubtless hoping and expecting that her rights would yet be acknowledged without the necessity of expensive litigation. Expectations of the kind not being realized, she filed the present bill of complaint. Laches are imputed to her; but the court, in view of the circumstances and of the embarrassments growing out of the obvious defects in the conveyance intended to secure her rights, is of the opinion that the evidence of laches is not sufficient to bar her right to recover in the present suit. Without more, these remarks are sufficient to show that the defence cannot be sustained, and it is accordingly overruled.

Two or three remarks will be sufficient to show that the objection that the circuit court has no jurisdiction to enter the required decree against the executors of the deceased trustee cannot be sustained. Jurisdiction as between the complainant and respondent is unquestionable; and, if so, it is clear that the fact that the trustee if living was a citizen of the same state with the complainant would not defeat the jurisdiction in a case where he is a mere nominal party, and is merely joined to perform the ministerial act of conveying the title if adjudged to the complainant. Where that is so, the executor, in case of the decease of the trustee, if authorized by the law of the state to execute such a conveyance, may also be joined in the suit under like circumstances merely to accomplish the like purpose. Where the real and only controversy is between citizens of different states, or an alien and a citizen, and the plaintiff is by some positive rule of law compelled to use the name of another to perform merely a ministerial act, who has not nor ever had any interest in or control over it, the courts of the United States will not consider any others as parties to the suit than the persons between whom the litigation before them exists. *McNutt v. Bland*, 2 How. 9, 15; *Browne v. Strode*, 5 Cranch, 303; *Coal Company v. Blatchford*, 11 Wall. 172, 177.

Cases arise in the federal courts in which nominal or even immaterial parties are joined, on the one side or the other, with those who have the requisite citizenship to give the court

jurisdiction in the case; and where that is so, the rule is settled that the mere fact that one or more of such parties reside in the same state with one of the actual parties to the controversy will not defeat the jurisdiction of the court. Decisive authority for that proposition is found in a recent ruling of Mr. Justice Miller, in which he states to the effect that mere formal parties do not oust the jurisdiction of the court, even if they are without the requisite citizenship, where it appears that the real controversy is between citizens of different States. *Arapahoe Co. v. Kansas Pac. Ry. Co.*, 4 Dill. 277, 283, Fed. Cas. No. 502.

Nothing is claimed of the executors in this case except that they shall perform the ministerial act of conveying the title, in case the power to do so is vested in them by the law of the state, and the court shall enter a decree against the principal respondent to that effect. From all which it follows that the complainant is entitled as between herself and the principal respondent to the relief prayed in the bill of complaint; but the court, in view of all the circumstances, will not proceed to determine either the proportion of the trust property which belongs to the complainant or the amount she is entitled to recover of the said respondent. Instead of that, those matters are left to be ascertained and determined by the circuit court, with au-

thority, if need be, to refer the cause to a master to report the facts, with his opinion thereon, subject to the confirmation of the circuit court.

Executors of the trustee, in such a case as the complainant alleges, are under the law of the state the successors of the deceased trustee, and that as such they may execute whatever remains executory in the trust at the time of his decease; from which it would follow, if that be so, that it will be the duty of the executors of the deceased trustee in this case, when the rights of the complainant are fully ascertained, to make the necessary conveyance to perfect her title to the same extent as the trustee might do if in full life. Express authority is reserved to the circuit court to ascertain the rights of the complainant as if the trust-deed was reformed, and to make the necessary decree to perfect her title in such mode and form as the law of the state and the practice of the state courts authorize and provide. *Crafton v. Beal*, 1 Ga. 322; *Brown v. Tucker*, 47 Ga. 485.

Costs in this court will be taxed to the principal respondent in favor of the complainant, but no costs will be allowed against the other two respondents.

Decree will be reversed and the cause remanded for further proceedings in conformity with the opinion of the court.

So ordered

**METROPOLITAN LUMBER CO. v. LAKE
SUPERIOR SHIP-CANAL, RAIL-
WAY & IRON CO. et al.**

(60 N. W. 278, 101 Mich. 577.)

Supreme Court of Michigan. Sept. 25, 1894.

Appeal from circuit court, Iron county, in chancery; John W. Stone, Judge.

Bill by the Metropolitan Lumber Company against the Lake Superior Ship-Canal, Railway & Iron Company and others. From a decree for complainant, defendants appeal. Affirmed.

Ball & Ball, for appellants. Mead & Jennings (E. E. Osborn, of counsel), for appellee.

HOOKER, J. Complainant's bill is filed to correct a contract for the purchase of timber, by adding to it the description of certain lands which is claimed to have been omitted by mistake. The negotiations took place in Chicago, between the presidents of the corporations, complainant and defendant. The contract conveying the timber was subsequently prepared by defendants' counsel in Michigan, and was afterwards signed by the respective parties. Upon discovering the omission, which discovery was made some time after the contract was signed by complainant's president, defendants were asked to correct the mistake, but declined to do so without suit. Some time afterwards this suit was instituted. The learned circuit judge who heard the cause filed a written opinion, in which he quotes the testimony at length, which, we think, is as fair a review of the case as could be made. We agree with him that the evidence shows that the parties who negotiated the deal, both understood that the "Perch Lake Group" of lands was included in the purchase. It appears to have been omitted because defendants' president, Mr. Davis, did not specifically mention it in his telegram of instructions,—if it can be called such,—which he sent to Mr. Longyear, who was agent for the defendants at Marquette, from whom the attorney received the information upon which he prepared the contract. The telegram read as follows, viz.: "Chicago, June 6th, 188—. J. M. Longyear: Have sold to Atkinson all groups under refusal to him; also the Felch group. [Signed] Theo. M. Davis." It appears that complainant had written options on all the land covered by the negotiations, except the Felch group and the Perch lake group. The latter, not being mentioned in the telegram, was omitted. All of the witnesses who were present at the Chicago interview agree that this group was talked about, and specifically mentioned as one of the tracts to be included. Davis himself concedes this, but claims that he was figuring upon the basis of the amount of timber upon the groups, for which the complainant had written options, and that he

supposed the Perch lake group was one of these. He admitted, however, that he consented to take \$500,000 for the timber, exclusive of the Perch lake group, and that he asked \$250,000 for that. As these sums aggregate \$750,000,—the exact amount paid,—there seems little doubt of the justice of complainant's claim. We are satisfied that the complainant is justly entitled to relief.

It remains to inquire whether there is any legal obstacle to granting it. It is opposed upon several grounds, viz.: (1) The mistake was not mutual. (2) The mistake on part of complainant was committed through gross negligence, and equity will not relieve in such cases. (3) Delay in attempting to enforce complainant's claim, and going on to carry out the contract after refusal by the defendants to correct the contract, until it was impossible to put the parties in statu quo, constitutes a waiver of complainant's claim. (4) The addition of more land to the description, upon evidence of a parol contract, is contrary to the statute of frauds. We are satisfied that the omission was the result of the mistake of defendant's president in sending the telegram, supposing it to be full enough to cover the Perch lake group. There is no reason to believe that he intentionally caused this omission. We cannot accede to the proposition that complainant's president was so negligent in executing the contract without discovering the omission as to deprive the complainant of property worth \$250,000. He had no reason to anticipate an attempt to cheat his company, and therefore had no occasion to be more than ordinarily careful. He was dealing with a concern whose business was methodically conducted, and he knew that it was in possession of accurate descriptions. The contract was drawn by a reputable and able lawyer. To hold that he was negligent would be to say that acceptance of a deed or writing without a comparison and verification of descriptions is such negligence as to preclude relief against mistake, no matter how serious the consequences. Atkinson died before these proceedings were commenced, and we have not the light that his testimony might throw upon the question of caution. From the testimony of Mr. Barrett, one of the defendants' witnesses, it would seem that he took the trouble to bring the contract to defendants' office, to make a comparison of the descriptions, which was done, and he went away satisfied. During this time he was ill, with a malady from which he died soon after. The claim that a mistake had been made was asserted as soon as it was discovered, and was insisted on at all times afterwards. It is true that suit was not immediately commenced, but complainant never gave the defendants reason to suppose that it had abandoned or intended to waive its claim. No injury resulted to the defendants from the delay, and the complainant was justified in exhausting persua-

sion, before resorting to litigation, especially in view of Davis' repeated admission that he understood the Perch lake land a part of that contract. It is strenuously urged that the statutes of frauds preclude the relief sought by complainant, the negotiations having been oral. There is conflict in the books upon the question of the effect of the statute of frauds upon the jurisdiction of courts of equity to reform instruments made in pursuance of oral agreements, where the correction sought is the addition of lands to those described. We are cited to the case of *Macomber v. Peckham*, 16 R. I. 485, 19 Atl. 910, as a recent adjudication upon the subject, and to *Climer v. Hovey*, 15 Mich. 18, in support of defendants' contention. In the former case the court was careful to withhold an opinion beyond what was required by the facts before it. In stating the facts, *Durfee, C. J.*, says: "Nor is it a case in which it is claimed that the contract is taken out of the operation of the statute of frauds by part performance on the part of the complainant. It presents the naked question whether oral testimony will be received in equity for the purpose of reforming a written contract for the sale of real estate on the ground of mutual mistake, and of enforcing it specifically when reformed." Opposed to this case is that of *Hitchins v. Pettingill*, 58 N. H. 386, decided 11 years earlier by the supreme court of the state of New Hampshire, which was not noticed by the Rhode Island court. It was there held that "when reformation is sought of a deed which, through fraud or mistake, conveys less land than was orally bought, and paid for, the case does not stand as if there were no deed; and the error may be corrected without proof of such part performance as is necessary for a decree of specific performance compelling a conveyance of the whole land when no part of it has been conveyed." Many cases are cited in the opinion as supporting this proposition. This subject is also thoroughly considered in the notes to *Woollam v. Hearn*, 2 White & T. Lead. Cas.

Eq. 1008 et seq. The case of *Climer v. Hovey*, 15 Mich. 18, like the Rhode Island case, was one where the parties had not acted under the contract. In the language of *Campbell, J.*: "No payments are alleged, and no acts of part performance. We are therefore brought down to the simple inquiry whether mere mistake, when neither party has parted with or done anything beyond signing an executory contract for one description of land, can authorize a court of chancery to enforce a parol contract by applying the terms written concerning one estate to another not referred to in writing." The bill was dismissed, Mr. Justice Campbell basing his opinion upon the fact that nothing had been done under the contract, and that it was therefore within the operation of the statute of frauds. Chief Justice Martin concurred in the result. Mr. Justice Cooley reserved his opinion as to the power of the court to correct a mistake in a suit to enforce it, concurring upon other grounds, and with him Mr. Justice Christiancy concurred. But, whatever may be the rule where nothing has been done under the oral contract, we think that in this country the overwhelming weight of authority supports the jurisdiction where part performance is shown sufficient to warrant a specific performance under an oral contract. In this case a payment was made, and the purchaser proceeded to lumber the tracts not in dispute, before the omission was discovered, as was the case in *Hitchins v. Pettingill*, above cited. The case of *Toll v. Davenport*, 74 Mich. 397, 42 N. W. 63, appears to recognize the jurisdiction of chancery in such cases, when a parcel was omitted from a mortgage, relief being denied, for the reason that the rights of a bona fide purchaser intervened. In the later case of *Kimble v. Harrington*, 91 Mich. 281, 51 N. W. 936, a mortgage was reformed by the insertion of the description of a 40-acre parcel a mile distant, which was omitted by mistake. The decree of the circuit court will be affirmed, with costs. The other justices concurred.

HITCHINS v. PETTINGILL.

(58 N. H. 386.)

Supreme Court of New Hampshire. August, 1878.

Wiggin & Fernald and Mr. Hobbs, for plaintiffs. Mr. Bartlett, for defendants.

FOSTER, J. When reformation is sought of a deed which, through fraud or mistake, conveyed less land than was orally bought and paid for, the case does not stand as if there were no deed; and the error may be corrected without proof of such part performance as is necessary for a decree of specific performance compelling a conveyance of the whole land when no part of it has been conveyed. 1 Story, Eq. Jur. §§ 152-161; Adams, Eq. 169, 171; 3 Greenl. Ev. §§ 360, 363; Bloomer v. Spittle, Fisher, Ann. Dig. (1872) 131; Tilton v. Tilton, 9 N. H. 385, 392; Purcell v. Miner, 4 Wall. 513; Prescott v. Hawkins, 12 N. H. 19, 28, 16 N. H. 122; Way v. Cutting, 17 N. H. 450, 451; Bellows v. Stone, 14 N. H. 175, 201; Smith v. Greeley, 14 N. H. 378; Craig v. Kittredge, 23 N. H. 231, 236; Busby v. Littlefield, 31 N. H. 193, 199, 33 N. H. 76; Webster v. Webster, 33 N. H. 18, 22, 23, 25; Doe v. Doe, 37 N. H. 268, 285; Herbert v. Odlin, 40 N. H. 267; Brown v. Glines, 42 N. H. 160; Kennard v. George, 44 N. H. 440; Leach v. Noyes, 45 N. H. 364; Peterson v. Grover, 20 Me. 363; Farley v. Bryant, 32 Me. 475; Tucker v. Madden, 44 Me. 206; Adams v. Stevens, 49 Me. 362; Burr v. Hutchinson, 61 Me. 514; Beardsley v. Knight, 10 Vt. 185, 190; Griswold v. Smith, 10 Vt. 452; Goodell v. Field, 15 Vt. 448; Blodgett v. Hobart, 18 Vt. 414; Brown v. Lamphear, 35 Vt. 252; Shattuck v. Gay, 45 Vt. 87; Allen v. Brown, 6 R. I. 386; Holabird v. Burr, 17 Conn. 556; Wooden v. Haviland, 18 Conn. 101; Stedwell v. Anderson, 21 Conn. 139; Knapp v. White, 23 Conn. 529; Blakeman v. Blakeman, 39 Conn. 320; Gillespie v. Moon, 2 Johns. Ch. 585; Wiswall v. Hall, 3 Paige, 313; Johnson v. Taber, 10 N. Y. 319; De Peyster v. Hasbrouck, 11 N. Y. 582; Rider v. Powell, 28 N. Y. 310; Welles v. Yates, 44 N. Y. 525; Bush v. Hicks, 60 N. Y. 298; Ginschio v. Ley, 1 Phila. 383; Bartle v. Vosbury, 3 Grant, Cas. 277; Wyche v. Greene, 16 Ga. 49; Durrant v. Bacot, 13 N. J. Eq. 201; Weller v. Rolason, 17 N. J. Eq. 13; Ehleringer v. Moriarty, 10 Iowa, 78; Barber v. Lyon, 15 Iowa, 37; Canedy v. Marcy, 13 Gray, 373; Metcalf v. Putnam, 9 Allen, 97, 100.

In the last of these cases, Bigelow, J., delivering the opinion, says: "Upon elementary principles, the plaintiff is entitled to have his deed reformed so that it may truly set forth the whole contract. * * * Upon proof of fraud in the omission of material stipulations in a written contract, a court of equity will admit parol evidence to establish the agreement, as it was understood and con-

cluded between the parties." The defendants rely upon Glass v. Hulbert, 102 Mass. 24, where the doctrine of reformation of written contracts was subjected to a limitation at variance with the settled law of this state.

A court cannot disregard a valid statute, nor regard it with favor or disfavor, nor take out of its operation a case that is within it, nor grant relief, at law or in equity, against it. The judicial question is, What purpose of the legislature appears in its acts, upon the established rules of construction? "No action shall be maintained upon a contract for the sale of land, unless the agreement upon which it is brought, or some memorandum thereof, is in writing." Gen. St. c. 201, § 12. "The supreme court shall have the powers of a court of equity in cases cognizable in such court, and may hear and determine, according to the course of equity, in case of charitable uses, trusts, fraud, accident, or mistake; * * * of specific performance of contracts; * * * and in all other cases where there is not a plain, adequate, and complete remedy at law." Gen. St. c. 190, § 1. These provisions, though printed in different chapters, are consistent parts of one law. We are not to give either of them a strained construction, liberal or strict, for the special purpose of justice in a particular case, or for the general purpose of making the law what in our judgment it ought to be. The meaning of one act may be shown by other acts. There may be several acts, neither of which can be properly administered in a particular case, except as part of one law comprising them all. It may be necessary to consider one statute on any subject a part of the whole law, statutory and common, on that subject, as it is necessary to consider one section or word of a statute a part of that statute. The statute of frauds, severed from all other law, written and unwritten, and taken in its literal sense, would deny these plaintiffs the relief of specific performance, even if they had taken possession of the ten-acre lot and made valuable improvements upon it, and would leave people remediless in a great number of cases of fraud, accident, or mistake, for which ample remedies are provided by the statute of equity jurisdiction; and the latter statute, torn from the general body of the law, taken literally, and administered as if there were no other law, would deprive the community of safeguards which the statute of frauds and the common law were designed to afford, and which the statute of equity was not designed to take away. The well-known general objects of these statutes are the principal guides for their construction. The statute of equity authorizes this court to administer the legal principles of the general system of equity, which, as a great branch of the law of their native country, was brought over by the colonists, and has always existed as a part of the common law, in its broadest sense, in New Hampshire. Wells v. Pierce, 27 N.

H. 503, 512; *Walker v. Cheever*, 35 N. H. 339, 349. The statute of frauds prevents wrong being done in certain cases by the testimony of witnesses.

If, without written evidence of a contract for the sale of land, the vendee pays for the land, and, with the knowledge and consent of the vendor, takes possession of it, and makes valuable improvements upon it, he is entitled to the relief of specific performance. Upon the literal construction of the statute of frauds there could not be a decree for specific performance in such a case, and there could not be, by parol evidence, a reformation of a deed enlarging its operation; but the statute, rightly construed, does not destroy

either of these remedies, as the statute of limitations does not destroy the remedy in cases of fraudulent concealment of the cause of action (*Bank v. Fairbanks*, 49 N. H. 131, 141), as the registry laws do not destroy the effect of actual notice of an unrecorded deed (*Gooding v. Riley*, 50 N. H. 400), and as the statute of frauds does not disturb a boundary fixed by parol agreement and possession (*Kellogg v. Smith*, 7 Cush. 375; *Knowles v. Toothaker*, 58 Me. 172).

The plaintiffs are entitled to a decree for a conveyance of the ten-acre lot.

Case discharged.

STANLEY, J., did not sit.

HUNTER v. BILYEU et al.

(30 Ill. 228.)

Supreme Court of Illinois. Jan. Term, 1863.

W. H. Herndon, and S. P. Moore, for appellant. J. & D. Gillespie, for appellees.

BREESE, J. John B. Hunter, as administrator of Samuel W. Hunter, deceased, brought his action in the circuit court of Bond county, against Wesley A. and Finis Bilyeu, on a note executed by them to the intestate, dated March 30, 1850, and due March 30, 1855. Pending the action the defendants obtained an injunction on their bill of complaint, to which the administrator, and the heirs-at-law of the intestate, who were minors, and their guardian, together with Joseph Smith, were made defendants.

The bill alleges, that the note sued upon, together with others which were paid, was one and the last of a number of notes they had executed to the intestate, for certain lands lying in Bond county, for which a bond for a deed was executed and delivered to them by the intestate. That they were put into possession of the lands, and made lasting and valuable improvements on some of the tracts, but have discovered that one or more tracts, which they supposed they had bought, were not included in the bond. One of those tracts is described as "the old field tract" lying south-east of Shoal creek, and being part of the west half of the north-west quarter of section twenty-three, in town five north, range four west, containing forty and nineteen-hundredths acres; and the other, the "Gillespie tract," being the east half of the north-west quarter of the north-east quarter of the same section, township and range, containing twenty acres; the undivided half of both which tracts, the complainants allege, was purchased by them of the intestate, and was to have been included in the title bond, but by mistake was left out, and these tracts subsequently sold by the intestate to Joseph Smith.

The bill also alleges, that some time anterior to the commencement of this suit on the note, the administrator had filed a petition in the circuit court, at the September term, 1855, praying the court for an order to authorize him to make a deed to complainants for the land described in the bond; that this petition contained the same errors and mistakes as are now complained of, with another error superadded in describing the lands as being in section "twenty-five." The complainants admit they were made defendants, and had due notice of the pending of the petition, but they did not appear to defend, supposing the lands were described as in the bond, and their being made defendants was a mere ceremony, and the proceedings consistent with their rights. That these errors and mistakes were carried into the decree rendered on this petition, and in the

deed which the administrator tendered to them, and by them refused. No exhibit is made of these proceedings or of this deed.

The title bond is alleged to have been written by the intestate, and delivered to the complainants and accepted by them without any objection, on the 30th of March, 1850. In the following year, 1851, the intestate left the state, and in 1852 died, leaving these infant defendants his only heirs at law.

The prayer of the bill is, that the court would order and direct the defendants to convey to complainants all of the land agreed to be conveyed to them by the intestate, and to annul and hold for naught the order of the circuit court in behalf of the administrator, or to amend and correct the decree so as to comport with justice and good conscience, and perpetually enjoin the collection of the note sued on, until they are able to comply with the understanding of Samuel W. Hunter, the intestate.

The bond is made an exhibit, and describes the lands sold, and to be conveyed on payment of the purchase money. They are: "The undivided half of a certain lot, beginning at the south corner of the south-west quarter of section 14, town 5 north, of range 4 west of the third principal meridian; thence running north fifty poles; thence west to the middle of the channel of Shoal creek; thence down the channel of Shoal creek, to the section line; thence east to the beginning corner, containing thirty-eight acres, more or less. Also, the undivided half of so much of the west half of the north-west quarter of section 23, town 5 north, range 4 west of the third principal meridian, lying on the west side of Shoal creek. Also, twenty poles south from the creek on the east line of said half; thence west to said creek; thence up said creek to the beginning. Also, the undivided half of twelve acres, more or less, of the south-west quarter, town 4 west of the third principal meridian, commencing at the south-west corner of said section; thence north fifty; thence east to the middle of the channel of Shoal creek; thence down said creek to the section line; thence west to the beginning. Also, two acres and a half of the west half of the north-west quarter of section 23, in same township and range, commencing at a stake on the east line of said land at the south-east corner of the mile post; thence south twenty poles; thence west twenty poles; thence north twenty poles; thence east twenty poles, to the beginning." This last tract was in a separate bond to Finis Bilyeu, one of the complainants, made at the same time and on the same conditions, as the bond to complainants jointly, and for convenience, no question being made on it, both bonds are considered as one.

There is a slight apparent ambiguity in the description of the undivided half of twelve acres, which is explained by the plat sworn to by the witnesses, and is the tract on the west side of the creek, contained within the

north and south lines of the tract of thirty-eight acres, if extended west to the section line. There is no dispute about this tract. The tract described as "also twenty poles south from the creek on the east line of said half; thence west to said creek; thence up said creek to the beginning," is understood to describe the mill yard, having the shape of a rectangular triangle, the south line being the perpendicular, the west line the base, and the creek the hypotenuse. About this tract there is no dispute.

The administrator demurred to the bill, which was afterwards withdrawn, and his answer filed, not admitting the mistake alleged, to which there was a replication. At a subsequent term, he also filed a plea of the statute of frauds and perjuries. Smith also answered, denying any knowledge when he purchased, of any sale of the tract south-east of Shoal creek, in section twenty-three. On the hearing, the bill was dismissed as to him.

Much testimony was introduced on behalf of complainants, for the purpose of showing by the declarations of the intestate, that an undivided half of other tracts besides these, namely, the tracts known as the "old field" tract, sold to Smith, and the "Gillespie" tract, were bargained for and sold, but, for some cause not fully explained, omitted from the title bond.

The lasting and valuable improvements were made by complainants on other tracts, about which there is no dispute.

The bill is, in effect, a bill to reform by parol, this title bond by incorporating into it the part lying south-east of the creek, called the "old field" tract, and the "Gillespie" tract, and when reformed, to decree a specific performance. The contract must be reformed before such a decree can pass.

This presents a question which has been much discussed in the courts of this country and of England, and on which there is great contrariety of opinion.

The question is, in a bill to reform a written instrument, in the absence of any allegation or proof of fraud, and on the ground of accident and mistake alone, is parol evidence admissible to prove an agreement to do something further than is contained in the writing, the statutes of frauds and perjuries being relied on in the defense, and which that statute requires to be proved by writing?

Whilst in England, the weight of adjudications seems to be opposed to the admission of parol evidence, in this country, it appears to be the other way. One of the leading cases in England, is that of *Woollam v. Hearn*, 7 Ves. 211. It is prominent among the *Leading Cases of White & Tudor* (pt. 1, vol. 2), with copious notes by Hare & Wallace, 510.

In this case the bill filed by Wm. Woollam against Hearn, stated that the rent of seventy-three pounds ten shillings was inserted in the written lease by mistake, or with some

unfair view; the real agreement being that the plaintiff was to have the lease upon the same rent as the defendant paid to his lessor, and that he did not pay more than sixty pounds. The prayer was for a specific performance, and that the defendant may be decreed to execute a lease according to the agreement, at the rent of sixty pounds, or such other rent as the defendant paid his lessor. The defendant, in his answer, denied that seventy-three pounds ten shillings was inserted by mistake, or with any unfair view; or that the agreement was that the plaintiff should pay the same rent as the defendant paid, which he admitted was sixty-three pounds. The bill was proved by depositions.

Sir Wm. Grant, M. R., said: "By the rule of law, independent of the statute (of frauds and perjuries), parol evidence cannot be received to contradict a written agreement. To admit it, for the purpose of proving that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry, that the rule of law was adopted. When equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, the party to be charged is let in to show, that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed; and there are many cases in which parol evidence of such circumstances has been admitted, as in *Buxton v. Lister*, 3 Atk. 383. There on the face of the instrument, a specific sum was to be given for the timbers, but it was shown, by parol, that the defendants were induced to give that, upon the representation that it was valued by two timber merchants which was not true. If this had been a bill brought by this defendant for a specific performance, I should have been bound by the decisions to admit the parol evidence, and to refuse a specific performance. But this evidence is offered, not for the purpose of resisting, but of obtaining a decree, first to falsify the written agreement, and then to substitute in its place a parol agreement to be executed by the court. There is no case in which the court has gone the length now desired. The evidence offered is to vary an agreement in a material part, and having varied it, to procure it to be executed in another form. There is nothing to show that ought to be done; and my opinion being that it ought not, I must dismiss the bill."

In the case of *Rogers v. Earl*, 1 Dickson, 294, which was a bill to rectify a mistake of the solicitor in drawing a marriage settlement; in *Thomas v. Davis*, Id. 301, to rectify a mistake in a conveyance by the omission of one of the parcels of land intended to be conveyed; in *Sims v. Urry*, 1 Ch. Cas. 225, to prove a mistake in the penal sum of a bond, by writing it forty instead of four hundred pounds,—verbal evidence was admitted.

In *Hardwood v. Wallace*, cited in *Targus v.*

Puget, 2 Ves. Sr. 195, where it was proposed to prove a mistake in drawing a settlement; and in *Attorney General v. Sitwell*, 1 Young & C. 559, etc., where it was proposed to show, by parol, that in a contract with the crown for the sale of a certain manor, with the appurtenances, the advowson was omitted by mistake,—such evidence was rejected, or deemed inadmissible. In this case Baron Alderson said: "I cannot help feeling that in the case of an executory agreement, first to reform and then to decree an execution of it, would be, virtually, to repeal the statute of frauds."

In cases within the statute of frauds, verbal evidence was held inadmissible, as in *Dwight v. Pomeroy*, 17 Mass. 303, where the plaintiff, being creditor of an insolvent debtor who had executed a deed of assignment in trust, for the benefit of his creditors, filed his bill against the trustees to reform an alleged mistake in the trusts expressed in the deed. And in *Elder v. Elder*, 10 Me. 80, where the written agreement was for the conveyance of a lot of land in Windham, formerly owned by J. E., and the plaintiff proposed to prove by parol that it was intended to include the adjoining land in Westbrook, under the same ownership, but that this was omitted by mistake. In *Osborn v. Phelps*, 19 Conn. 63, an agreement for the sale of land was drawn in two separate instruments, one to be signed by the vendor, and the other by the purchaser, and neither of the instruments contained any reference to the other, but each was signed by the wrong party by mistake. This the plaintiff sought to prove by parol evidence, but the court held it inadmissible.

In other American cases, such evidence has been held admissible. In *Gillespie v. Moon*, 2 Johns. Ch. 585, which was a bill for relief and for the reconveyance of a tract of land, which had been included by mistake or fraud in a deed of conveyance, verbal evidence of the mistake, on a review of all the cases, was admitted, and a reconveyance decreed. In *Tilton v. Tilton*, 9 N. H. 385, where tenants in common agreed to make partition pursuant to a verbal award, and executed deeds accordingly; but, in the deed to the plaintiff, a parcel assigned to him was omitted by mistake; in a bill for relief, verbal evidence was held admissible, and relief thereupon decreed. So in *Langdon v. Keith*, 9 Vern. 299, where upon the transfer of a part of several promissory notes, secured by mortgage, an assignment of the mortgagee's entire interest in the mortgage was made, by mistake, instead of a part, relief was decreed upon verbal proof. In *De Riemer v. Cantillon*, 4 Johns. Ch. 85, where a portion of the land purchased at sheriff's sale was by mistake omitted in his deed to the purchaser, upon parol evidence of the fact the judgment debtors were decreed to convey to the purchaser the omitted parcel. Several other cases are referred to in this note.

It does not appear that the statute of frauds and perjuries was pleaded in any of these cases, though referred to in the argument, and in the opinion of the court.

In *Woollam v. Hearn*, and in many of the cases referred to in *Hare & Williams'* notes to that case, a distinction is made between seeking and resisting specific performance, as to the admission of evidence. It is said, though a defendant resisting a specific performance, may go into parol evidence to show that by fraud the written agreement does not express the real terms, a plaintiff cannot do so for the purpose of reforming the agreement and obtaining a specific performance of it as reformed.

This doctrine is critically examined in *Gillespie v. Moon*, 2 Johns. Ch. 585, before cited. In that case the bill was filed to rectify a mistake in the conveyance which, by an error in the description of the land, conveyed the whole lot, or two hundred and fifty acres, instead of two hundred acres, parcel of the same.

The mistake is positively denied in the answer, and the point was, is parol proof of this mistake admissible, in opposition to the plain language of the deed, and especially in opposition to the defendant's answer?

It will be seen the statute of frauds and perjuries was not set up in the case.

After entering minutely into the parol proof of the fact of the mistake, Chancellor Kent says: "The rule in courts of law is, that the written instrument does, in contemplation of law, contain the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties, than any that can be supplied by parol. But equity has a broader jurisdiction, and will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself. I have looked into most, if not all the cases on this branch of equity jurisdiction, and it appears to me to be established on great and essential grounds of justice, that relief can be had against any deed or contract in writing, founded in mistake or fraud. The mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake affirmatively by bill, or as a defense."

After reviewing many of the decisions on this question, the chancellor decides that parol proof was admissible, and that it established the mistake as charged in the bill.

It will be observed, the contract in this case was an executed contract, a deed of conveyance having been made; there was no prayer for a specific performance of a contract, but to correct a mistake in the deed. The chancellor remarks: "Whether such proof be admissible on the part of a plaintiff, who seeks a specific performance of an agreement in writing, and at the same time seeks to vary it by parol proof, has been made a question. Lord Hardwicke, in

Jacques v. Statham, 3 Atk. 388, seemed to think it might be done, but such proof was rejected in *Woolam v. Hearn*, 7 Ves. 211 (which we have cited at length); and in *Higginson v. Clowes*, 15 Ves. 516; and when Lord Redesdale said, in *Clinan v. Cooke*, 1 Schoales & L. 39, that he could find no decision in which a plaintiff had been permitted to show an omission in a written agreement, by mistake or fraud, he must be understood to refer to the cases of bills for a specific performance of an agreement, which was the case then before him."

This case would seem to decide nothing more than this: that in a bill to correct a mistake in an executed contract, parol proof of the mistake is admissible, and that such proof is as available for one party, or for one purpose, as for another,—as available for the plaintiff in setting up a claim, as for the defendant in resisting it. It is nowhere said, that a bill to reform an executory contract, and then decree a specific performance when reformed, against a denial, in the answer, of any mistake, and the plea of the statute of frauds and perjuries, can be sustained by parol evidence.

This decision, so far as it goes, has been followed by the courts of many other states. The cases are referred to by Hare & Wallace, on pages 539, 540, but in none of them was the denial in the answer accompanied by a plea of the statute of frauds and perjuries. Nor do these cases go farther than to assert the general principle, that independent of this statute, where it is not set up as a defense, parol evidence will be received to correct an alleged mistake in a written executed contract, when asserted by a plaintiff, and is as available for him, as for defendant.

The cases go to the extent of declaring, that parol evidence shall be admissible to correct a writing as well for a plaintiff as against him, thus establishing mutuality and equality in the operation of the doctrine.

In 1 Story, Eq. Jur. § 161, in commenting on the distinction set up, the learned author says, in a note, that it is of a very artificial character, and difficult to be reconciled with the general principles of courts of equity. He says: "The ground is very clear, that a court of equity ought not to enforce a contract, when there is a mistake, against the defendant insisting upon and establishing the mistake; for it would be inequitable and unconscientious. And if the mistake is vital to the contract, there is a like clear ground, why equity should interfere at the instance of the party as plaintiff, and cancel it; and if the mistake is partial only, why, at his instance, it should reform it. In these cases, the remedial practice is equal; and the parol evidence to establish it, is equally open to both parties to use as proof. Why should not the party aggrieved by a mistake in an agreement, have relief in all cases when he is plaintiff, as well as when he is defendant? If the doctrine be founded upon the impro-

priety of admitting parol evidence to contradict a written agreement, that rule is not more broken in upon by the admission of it for the plaintiff than it is by the admission of it for the defendant. If the doctrine had been confined to cases arising under the statute of frauds, it would, if not more intelligible, at least have been less inconvenient in practice."

In a subsequent case,—*Keisselbrack v. Livingston*, 4 Johns. Ch. 145,—which was a bill for the specific performance of an agreement in writing to execute a lease for lives "containing the usual clauses, restrictions and reservations contained in the leases given by defendant," the bill stated that a lease was offered, containing a provision that upon every sale of the demised premises, one-fifth of the purchase or consideration money should be taken by the defendant to his own use, which complainant refused to receive, alleging, that at the time of the execution of the writing, it was agreed no such quarter or fifth sales should be demanded or paid.

The defendant did not, in direct and clear terms, deny any such agreement, but denied any other or different contract than the one set forth made in writing, and as to the validity of the supposed verbal agreement, he pleaded the statute of frauds.

The point in the case was, whether this verbal agreement could be established by parol. The learned chancellor says, it did not appear to him, that the statute of frauds had any bearing on the case. "The agreement for the three life lease is in writing, and it has been partly performed, by possession taken and transferred, and rent paid. The right of the plaintiff rests upon the contract in writing, and the only inquiry is, whether there is not a mistake in the generality of the expression, that the lease was to contain the 'usual clause,' etc., and whether the parties did not intend an exception in respect to the quarter sales. There is no doubt of their declared intention to make such an exception at the time the agreement was drawn; and I am inclined to think that the writing is, and ought to be, susceptible of amendment and correction in that particular."

The proof was admitted, and the mistake corrected, partly upon the ground, that the writing itself let in parol proof, to show which were "the usual clauses," etc., and such proof being let in by the contract itself, it might, on the principle of the agreement itself, be applied to correct any mistake manifestly shown to exist, in the general and unqualified terms of that part of the written agreement which depended for its explanation upon external proof.

This court has held, as a general proposition, that the terms of a written agreement cannot be changed by parol. *Baker v. Whiteside*, Breese, 132; *Penny v. Graves*, 12 Ill. 298. And so it is held by all courts. At the same time, we have said, that whatever covenants an absolute deed may contain, parol

evidence may be admitted to show that it was intended as a mortgage, or mere security for the payment of the debt, and the grantor can have relief in equity, and this, where mistake is not alleged. *Purviance v. Holt*, 3 Gilman, 405; *Ferguson v. Sutphen*, Id. 547. And it is also held, in *Harlow v. Boswell*, 15 Ill. 57, where parties commit their contracts to writing, this forms the only evidence of its terms.

In *Scott v. Bennet*, 3 Gilman, 254, this court said, it is a familiar principle that you may give evidence to explain, but not to vary, add to, or alter a written contract. Courts cannot make a new contract for the parties. But if there is doubt and uncertainty, not about what the substance of the contract is, but as to its particular application, it may be explained, and properly directed.

As a general principle, where a contract is reduced to writing, the writing affords the only evidence of the terms and conditions of the contract; all antecedent and contemporaneous verbal agreements are merged in the written contract.

There is an apparent contradiction in these several opinions, but we think a few familiar considerations will serve to reconcile them, or show that it is not real. The subjects peculiarly proper for the jurisdiction of courts of equity, are well understood to be, fraud, trusts, accident and mistake, and these courts are vested with the power to afford relief in all cases, wherein, by reason of the universality and rigor of the rules of the common law, a remedy cannot otherwise be had. The power to correct a mistake in a writing, is as much within the scope of this jurisdiction as any other mistake. The whole realm of mistake is laid open to the court, and its powers are limitless to correct, on a proper case made. That it should be dormant, when invoked to correct a mistake in a written contract, would be strange indeed. It is no answer to say, that within the rigid rule of law, the power may be exercised, but not outside of it, as that would destroy the rule. In our judgment, it has no such effect. The jurisdiction of a court of chancery to correct mistakes, is no less important to the due administration of justice, and the safety of the citizen, than the rule of the common law, that parol evidence cannot be received to add to, or vary a written contract, and in a court of equity, it must be determined, on the circumstances of each case, which shall prevail, the exercise of an unquestioned power of the court, or the rule of the common law.

The doctrine is undisputed and incontestable, that a deed, absolute on its face, may be shown, by parol, to have been intended by the parties to it, as conditional, merely, and a court of equity, on proper proof, will so hold. This contract is explained by parol evidence, and if it is made to speak a language its words do not import, who will deny that it is within the competency of that court to ascertain the real contract of the parties, and

then enforce it, according to the intention of the parties? If a court of equity has not the power to correct mistakes in a deed, or other writing, on convincing proof of the existence of the alleged mistake, great injustice would be perpetrated with impunity. A man sells a vacant lot adjoining the lot on which he has a costly residence, but by the mistake of the scrivener, the deed describes the lot of his residence. An ejectment is brought—the purchaser claiming under his deed—and if no power exists in a court of equity to correct the mistake, he must surrender that which he never sold, and the purchaser recover a property he never bought. A court of chancery should not hesitate to receive parol evidence of this mistake, and on sufficient proof, correct it, else the most flagrant injustice would be perpetrated, and an undoubted power of that court be rendered ineffectual and worthless. There can be no danger in exercising this power, since the court has before it all the facts, and if they are not convincing, the stern rule of law will prevail.

The court has, in many cases, acknowledged and exercised this power, and we do not know that it has been questioned by the bar here or elsewhere.

The doctrine is fully recognized in the case of *Broadwell v. Broadwell*, 1 Gilman, 599, that a court of chancery will always correct any mistakes of fact which have occurred in drawing up a paper, when a proper case is presented and clearly proved, and then carry into effect the instrument when thus corrected. And herein is found the safeguard for those so litigating, a proper case must be presented and clearly proved. If it be clearly proved, who shall say that a court of equity transcends its powers, or violates the rule of law, in declaring the contract to be as the parties have made it? We cannot think the statute of frauds and perjuries has any application to such cases.

Here the bill is filed to reform this contract, by inserting in it several tracts of land, alleged to have been omitted from it by mistake, and parol evidence is relied on for such purpose; and when reformed, then the prayer is, to decree a specific performance of the contract. This proof makes the contract different from what its words import, and adds to it, and varies it very materially. It, in fact, makes a new and different contract; yet if the mistake is clearly established, which should give way, that rigid rule of the common law, or that power residing in a court of equity, to correct mistakes? The strongest and most convincing evidence will be required, before the common law rule is postponed, and the power of the court exercised. Now, what is the testimony in this case?

It consists, in great part, of loose conversations held by one Gillespie and others, with the intestate, in which he said, there was a mistake in the bond; that the tract lying south-east of Shoal creek, being part of the

west half of the north-west [quarter] of [section] twenty-three was not in the bond, or not in right, and the Bilyeu had found it out. This witness states nothing in positive terms, but "thinks" the facts were so and so, as he details them. He "thinks" all the lands claimed by complainants were included in the bond, except the Gillespie tract, and thinks that intestate told him some of the numbers were wrong, and some of the land was not named in the bond. He spoke of the west half of the north-west [quarter of section] twenty-three lying south-east of Shoal creek, as not included in the bond, and that he would not rectify the mistake because they could not agree upon a division of the lands according to his understanding of the contract. This witness says that he can neither read nor write, and details only such parts of the conversation, as he "thinks" was had with the intestate. He does not say in positive terms, that the intestate admitted to him he had sold this tract to complainants, or that it was left out of the bond by mistake. No testimony could be more unsatisfactory than his, taking the whole of it together. Fenton says he "thinks" Hunter told him he drew the bond himself and that there was a mistake in it, but does not recollect what the mistake was. He says it was his understanding a bond was given by Hunter to complainants, and notes given for the payment of the money—does not say he ever saw the bond or notes—says the complainants never took possession of the Gillespie tract—on the tract south-east of the creek; they cut some timber off, put a blacksmith shop upon, and pastured the field on it while they and Hunter were in partnership; there was some money paid on the general contract, but don't know how much.

Paine states that Hunter told him complainants were to have half of this tract, when he, Hunter, sold or left, according to the contract as made with complainants, in the sale of the mill, which was in 1850. He had this conversation in the winter after the sale of the mill property; that complainants have cut and hauled saw logs, and Hunter and complainants built a blacksmith shop on this land; and "thinks" complainants repaired the fences some, but is not certain, and they used it as a pasture in connection with Hunter. Hunter also said he had sold the Gillespie tract to them, and that David Hunter was to make a deed to it. Don't know that complainants ever exercised any acts of ownership over this tract. Hunter said there was a mistake in the bond, and if his health would permit, he was coming to town to get it fixed; "thinks" the mistake applied to the tract south-east of Shoal creek, on which there was an old field. Does not know of complainants exercising any acts of ownership over this "old field tract," since they and Hunter dissolved partnership; don't know the numbers of the land.

The testimony of Clouse, and of L. G. Bil-

yeu, does not differ, substantially, from that of other witnesses.

Smith says, Hunter told him, that all the lands the complainants were to get, were included in the bonds; that half of the timber on the tract lying on the south-east side of Shoal creek, on which there was an old field, was included in the contract with complainants, and that they had got their share off, and that he had not sold the land to them. Wesley Bilyeu had stated to witness that he had an interest in this tract, and Hunter then told him as above stated. Hunter had possession of this tract when witness bought it, and had corn standing in the field on it. George Smith stated that Hunter told him that complainants had no right to the tract lying south-east of Shoal creek, but as soon as he could buy a piece from John Clouse, he would make it right, but they were to have it when he sold or left; understood this same tract was included in the original contract.

This is the substance of the evidence to prove the mistake in the bond, and part performance, which, it is very clear, is wholly insufficient for either purpose. It would be relaxing too much those salutary rules of evidence, which require a contract to be clearly proved, before a specific performance of it will be decreed. It is discretionary with the court, in all such cases, to decree or not a specific performance of a contract, and that discretion will not be exercised except in a very clear case.

This contract was made in March, 1850, and the intestate remained in the state until 1851, during a part of which time he was in partnership with complainants, in using the mill property. They paid their notes as they became due, and not a word of complaint is heard of any mistake. They were impleaded, by the administrator of the intestate, in a petition in chancery, for the purpose of obtaining an order of court, authorizing him to make a deed to them in performance of the covenant; in which suit, it was fully competent for the complainants to have litigated all these matters, but which they neglected to do. Though these proceedings are not pleaded, or set up in bar by the defendants, they might have been, successfully, and the case thus disposed of, rendering unnecessary the examination we have been compelled to give it on the issues made.

We are satisfied nothing has been shown to establish a mistake, its nature, or extent, so clearly, as to leave no doubt on the mind of the actual existence of the alleged mistake. The decree, as to the old field tract, being a part of the west half of the north-west quarter of section twenty-three, lying north-east of Shoal creek, and as to the Gillespie tract, is reversed, and the decree so modified as to exempt those tracts from its operation. The injunction will be dissolved, and the administrator, the appellant here, will be allowed to proceed with his action at law.

Decree modified.

GLASS v. HULBERT.

(102 Mass. 24.)

Supreme Judicial Court of Massachusetts.
Sept. Term, 1869.

Bill in equity for the reformation of a conveyance of lands, and for further relief. The case was reserved by the chief justice "for the consideration and decision of the full court upon the question whether, upon the allegations of the bill, the plaintiff is entitled to relief in equity, and whether the plaintiff has not a full, adequate, and complete remedy at law; the defendant also relying in his answer upon the statute of frauds."

W. H. Swift and S. W. Bowerman, for plaintiff. M. Wilcox and W. T. Filley, for defendant.

WELLS, J. The plaintiff purchased certain lots of land of the defendant, received a deed, and paid the whole amount of the purchase money. This suit is brought for relief or redress in several particulars, dissimilar in character, but all connected with the alleged oral contract of purchase. He complains: First. That a proviso was inserted in his deed, imposing upon him the burden of supporting the whole fence upon the south line of the land conveyed; and that he was induced to assent to its insertion upon the consideration, and false representation of the defendant, that the whole fence upon the east side of said land was to be maintained by the adjoining proprietor, Patrick McDaniels, by virtue of a written obligation to that effect, and that the plaintiff would be relieved from all liability to maintain any fence upon that side; as well as by certain other false representations of the defendant in relation thereto. Second. That he delivered to the defendant, in part payment of said purchase money, three bonds of the United States of \$1,000 each, upon the agreement of the defendant that he would allow the full market value of the same, including premium and accrued interest at the time of the transfer thereof; and that the defendant refuses to allow and pay him the value of such premium and interest, amounting together to the sum of \$315; that sum being in excess of the whole purchase money due to the defendant. Third. That during the negotiations for the sale and purchase of said lands the defendant pointed out the southeast corner of the premises proposed for sale, and represented that the land of the adjoining proprietor, McDaniels, extended to that point, and that the southerly line of the land sold would extend from the same corner to a point on the highway near a bridge; that the deed was accordingly written and accepted, describing the land as bounded on the south by a line running from the southwest corner of land of said McDaniels, at right angles to the westerly line of said McDaniels, to the highway, the defendant representing said line

to be the same line previously pointed out by him to the plaintiff, and that it would strike the highway within one rod of said bridge; whereas in fact the land of said McDaniels did not extend so far as to the southeast corner of the defendant's land as pointed out by him, and the south line, running at right angles therefrom to the highway, did not strike the same within one rod of said bridge; and the deed so written and accepted did not include a considerable part of the land so offered and represented to be sold, and intended and understood by the plaintiff to have been purchased by him; the part so excluded consisting of about 17 acres of land, comprising the greater part of the meadow land in the tract as pointed out by the defendant.

The plaintiff, by his bill, does not seek to rescind the contract and conveyance, and does not offer to reconvey or release to the defendant the land conveyed, nor pray that he may be allowed to do so, and recover back the purchase money paid and bonds delivered in payment. The relief prayed for is that the defendant may be required to convey to the plaintiff the portion of the tract which was so by fraud or mistake omitted from the conveyance already made to release the plaintiff from the proviso in his deed in regard to the fence, and to pay to the plaintiff the aforesaid amount of premium and interest upon said bonds.

The argument of the plaintiff is addressed mainly to the question of the equity jurisdiction of this court in cases of fraud or mistake like that alleged in the present suit. There can be no doubt upon that point. There is no ground upon which jurisdiction in equity is so readily entertained and freely exercised. It is given to this court without restriction, if the parties have not a plain, adequate, and complete remedy at law. Gen. St. c. 113, § 2. Having jurisdiction, the question is as to the appropriate remedy. Jurisdiction in equity is often maintained, even when there is a remedy at law, for the sake of the greater facility it affords for adapting the proper relief to the peculiar necessities of each case. If the party suing is entitled to no relief other than that which may be had in an action at law, he is remitted to his remedy in that form. Even in a proper case for an appeal to equity the remedy must be sought in reference to certain recognized rules and principles of chancery jurisprudence, and is often restricted by provisions of positive law. It is not administered arbitrarily. It must flow out of and accord with the agreements and obligations of the parties, and be adapted to the condition of facts to which it is to be applied.

In the present case, the principal ground of action is the fraud or mistake by which an important part of the subject-matter of the alleged contract of sale and purchase was omitted from the deed of conveyance. If the allegations of the bill should be sustained by

the proofs, they would show a clear right to have a rescission of the contract; and, upon reconveyance of the land covered by the deed, to have restoration of the bonds and money that were delivered in payment. But this relief the plaintiff does not seek; and his bill contains no offer to reconvey, without which he cannot have such relief. The prayer of the bill, and its sole purpose in this particular, is that the defendant may be compelled to convey to the plaintiff the 17 acres of land which he alleges were included in the oral contract of sale, or represented by the defendant to be so included, but omitted from the deed.

If the case stood merely upon the oral contract of sale, with a conveyance of part and a neglect or refusal to convey another part of the land which was the subject of the alleged contract, we do not think it would be contended that the plaintiff could compel a conveyance of the other land, against a party denying the contract and setting up the statute of frauds. Courts are bound to regard that statute in equity as well as at law. The only remedy in equity, in such case, would be by a rescission of the entire contract, in which the aid of the court could be obtained, if necessary, upon proper grounds.

There has been no part performance here, such as, according to the general practice in courts of equity, would be held to take the case out of the statute of frauds.

1. Payment of the whole consideration is not sufficient for that purpose. *Hughes v. Morris*, 2 De Gex, M. & G. 356; *Thompson v. Gould*, 20 Pick. 131, 138; *Browne, St. Frauds*, § 461; *Fry, Spec. Perf.* § 403; *Dale v. Hamilton*, 5 Hare, 369; *Clinan v. Cooke*, 1 Schoales & L. 22, 41; *Allen's Estate*, 1 Watts & S. 383; *Purcell v. Miner*, 4 Wall. 513.

2. Possession by the purchaser, under such a deed as was given to the plaintiff, is possession according to the title thereby conveyed; and is not such a possession as to afford ground for enforcing an alleged oral agreement to convey other land, claimed to have been embraced in the same oral agreement with that conveyed. *Moale v. Buchanan*, 11 Gill & J. 314. The plaintiff does not appear to have been let into actual possession of the 17 acres, nor to have been induced to do any acts thereon, as owner, under his supposed rights as purchaser.

3. The conveyance of a portion of the land is neither a part performance, nor is it a recognition of the alleged oral contract, so far as it relates to the remaining land not included in the deed. On the contrary, it is in distinct disregard and implied disavowal of such a contract. The deed was given and accepted in execution of the entire contract of sale. Its terms are in literal conformity with the agreement as made. The plaintiff concedes that the southern boundary was stipulated to be described as it is written in the deed, to wit, running from the southwesterly corner of land of McDaniels, and at right

angles with his westerly line, to the highway.

But the plaintiff claims that he in fact purchased the whole of a certain tract of land which included the 17 acres now in dispute; that the description of the boundaries, as agreed upon and inserted in the deed, was so agreed on and inserted upon the representation of the defendant and the belief of the plaintiff that it did include said 17 acres; and that the failure of the deed to embrace and convey that part of the land was occasioned either by the mutual mistake of the parties as to the position of the southwest corner of land of McDaniels, or else by the misrepresentation, deceit, and fraud of the defendant in relation thereto. In either alternative, the plaintiff contends that he is entitled to a reformation of the deed, to make it conform to the sale actually contracted by the parties.

Such a reformation not only requires a description of the subject-matter of the sale, different from the express terms of the oral contract, but would enlarge the effect and operation of the deed as a conveyance. It involves the transfer of the legal title to land not covered by the deed already given. It requires a new deed to be executed and delivered by the defendant to the plaintiff. Whether that deed shall embrace the entire subject of the alleged contract of purchase, with a corrected description to make it conform to facts and abutments as they were represented to be, or merely convey the 17 acres omitted from the deed already given, the order for its execution will enforce the specific performance of a contract for the sale of lands, for which there exists no memorandum, note, or other evidence in writing signed by the party to be charged therewith. As to the 17 acres in dispute, the obligation to convey them rests solely in the oral contract. The defendant denies any contract which includes them. The plaintiff seeks to establish such a contract by parol evidence, and enforce it. The deed itself furnishes no means of making the correction sought for, and no evidence of the contract relied on for this purpose; nor is it in any sense an acknowledgment of the substance of the alleged oral agreement.

The power to rectify deeds and other written instruments undoubtedly exists in this court, under the clauses of the statute giving equity jurisdiction in cases of fraud, accident, and mistake, or the clause giving it generally where there is no adequate remedy at law. It has been exercised in several cases. *Canedy v. Marcy*, 13 Gray, 373; *Metcalf v. Putman*, 9 Allen, 97. But the power will be exercised in subordination to other fixed principles of law, and especially to statute provisions. If the rules, restricting the administration of judicial remedies, which are prescribed by the statute of frauds, were to be disregarded in this branch of equity procedure, it would open the door to all the

forms of fraud which that statute was intended to prevent. The statute is not a mere rule of evidence, but a limitation of judicial authority to afford a remedy. It requires that contracts for the sale of lands, in order to be enforced by judicial proceedings, must be substantiated by some writing. This provision of law cannot be dispensed with merely for the reason that the want of such writing was occasioned by accident, mistake, or fraudulent representations, unless some other ingredient enters into the case to give rise to equities stronger than those which stand upon the oral contract alone, which estop the other party from setting up the statute.

It makes no difference whether the want of a writing was accidental or intentional, by way of refusal or by reason of mutual mistake; nor that there were false representations, and a pretence of conveying the land, but a fraudulent evasion, by means whereof there was no conveyance in fact, and no proper written evidence of the agreement to convey. From the oral agreement there can be derived no legal right, either to have performance of its stipulations or written evidence of its terms. So long, therefore, as the effect of the fraud or mistake extends no further than to prevent the execution, or withhold from the other party written evidence of the agreement, it does not furnish sufficient ground for the court to disregard the statute of frauds, and enter into the investigation of the oral agreement for the purpose of enforcing it. And we do not see that the present case stands otherwise in this respect than it would if there had been no conveyance of any part of the land. As already shown, that conveyance was not in execution or recognition of the contract which the plaintiff seeks, by this bill, to enforce; and does not furnish any reason for taking the case out of the statute, on the ground of part performance. Indeed, the rule seems to be that no part performance by the party sought to be charged will take an agreement out of the statute of frauds, except in those cases where the statute itself provides for such effect. It is part performance by the party seeking to enforce, and not by the other party, to which courts of equity look, in giving relief from the statute. *Caton v. Caton*, 1 Ch. App. 137, L. R. 2 H. L. 127; *Mundy v. Jolliffe*, 5 Mylne & C. 167; *Buckmaster v. Harrop*, 7 Ves. 369; *Browne, St. Frauds*, § 453.

When the proposed reformation of an instrument involves the specific enforcement of an oral agreement within the statute of frauds, or when the term sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient answer to such a proceeding, unless the plea of the statute can

be met by some ground of estoppel to deprive the party of the right to set up that defence. *Jordan v. Sawkins*, 1 Ves. Jr. 402; *Osborn v. Phelps*, 19 Conn. 63; *Clinan v. Cooke*, 1 Schoales & L. 22.

The fact that the omission or defect in the writing, by reason of which it failed to convey the land or express the obligation which it is sought to make it convey or express, was occasioned by mistake, or by deceit and fraud, will not alone constitute such an estoppel. There must concur, also, some change in the condition or position of the party seeking relief, by reason of being induced to enter upon the execution of the agreement, or to do acts upon the faith of it as if it were executed, with the knowledge and acquiescence of the other party, either express or implied, for which he would be left without redress if the agreement were to be defeated.

Upon a somewhat extended examination of the decisions in regard to the effect of the statute of frauds upon the right to have equitable relief where the writing is defective, although many of them, where relief has been granted, hardly come within this definition in the apparent character of the particular facts upon which they were decided, yet we are satisfied that this principle of discrimination is the only one which can give consistency to the great mass of authorities upon this subject.

The case of *Smith v. Underdunk*, 1 Sandf. Ch. 579, is nearly like the present in its facts; and the opinion of the assistant vice-chancellor would seem to sustain the right of the plaintiff here. There was no fraud in the preparation of the deed. The judgment was based mainly upon the ground of part performance. It was held to be sufficient to take the case out of the statute that the plaintiff had been let into possession as purchaser; and the opinion indicates that possession under and in accordance with a deed of part would be a sufficient possession of the whole for the purpose of requiring a deed of the remainder. But the decision rests upon the fact of possession by the plaintiff of the entire premises, including the part for which the bill was brought. The case arose upon demurrer to the bill, which of course admitted the contract, and the alleged possession of the whole tract. The question of the statute of frauds did not arise therefore.

That the purchaser has been let into possession in pursuance of a parol agreement has been very generally recognized as sufficient to take it out of the statute. The reasoning by which this result was reached is far from satisfactory; and even where the rule prevails there are frequent intimations that it is regarded as trenching too closely upon the spirit as well as the letter of the statute. If it were now open to settle the rule anew, we cannot doubt that it would be limited to possession accompanied with or followed by such change of position of the

purchaser as would subject him to loss for which he could not otherwise have adequate compensation or other redress; and that mere change of possession would not be held to take a case out of the statute. However it may be elsewhere, we are disposed to hold the rule to be so in Massachusetts.

Previously to the Statutes of 1855, c. 194, and 1856, c. 38 (Gen. St. c. 113, § 2), the power of the court to direct specific performance was confined to written contracts. Rev. St. c. 74, § 8. That power was held to be strictly limited to contracts in which the whole obligation to be enforced was expressed in the writing. *Dwight v. Pomeroy*, 17 Mass. 303; *Brooks v. Wheelock*, 11 Pick. 439; *Leach v. Leach*, 18 Pick. 68; *Buck v. Dowley*, 16 Gray, 555; *Park v. Johnson*, 4 Allen, 259. The provision conferring that power specifically in case of written contracts is still retained in the Gen. St. c. 113, § 2. If the subsequent clauses, conferring jurisdiction generally, are to be construed, as we think they are, to extend the power of the court, so as to give relief by way of specific performance, either of contracts wholly unwritten, or of stipulations proved by parol and incorporated into a contract by judicial rectification of a written instrument, as in *Metcalf v. Putman*, 9 Allen, 97, still that power ought to be exercised with constant reference and in subordination to the condition that "the party asking relief has not a plain, adequate, and complete remedy at common law," which accompanied each enlargement of the equity power of the court, and which prefaces and closes the enumeration of those powers in the General Statutes. The force of this consideration is not lessened when applied to agreements within the statute of frauds.

Mere possession of land does not expose the party to loss or danger of loss without redress at law. The parol agreement of sale and purchase, with permission to enter, though not to be enforced as a valid contract of sale, will constitute such a license as will protect the party from liability for acts done before the license is revoked, and for all acts necessary to enable him to remove himself and his property from the premises after such revocation. If possession be taken without such permission, express or implied, it is no foundation for relief in equity, according to any of the authorities. The argument, for the admission of parol evidence to prove an agreement within the statute of frauds in order to enforce it in equity, drawn from the admissibility of such evidence to maintain a defence, either at law or in equity, seems to be based upon a misconception of the purport and force of the statute, which reaches no farther than to deny the right of action to enforce such agreements.

In this commonwealth, the possession of land by a purchaser is not even notice to a third party of an unrecorded deed. The whole spirit of our laws in respect to real es-

tate is against the policy of enabling parties to acquire or confer title, either legal or equitable, by mere parol and delivery of possession. The possession of the plaintiff, therefore, even if it extended to the tract in dispute, is not sufficient to entitle him to relief against the statute.

The principle, on which courts of equity rectify an instrument, so as to enlarge its operation, or to convey or enforce rights not found in the writing itself, and make it conform to the agreement as proved by parol evidence, on the ground of an omission, by mutual mistake, in the reduction of the agreement to writing, is, as we understand it, that in equity the previous oral agreement is held to subsist as a binding contract, notwithstanding the attempt to put it in writing; and upon clear proof of its terms the courts compel the incorporation of the omitted clause, or the modification of that which is inserted, so that the whole agreement, as actually intended to be made, shall be truly expressed and executed. *Hunt v. Rousmaniere*, 1 Pet. 1; *Oliver v. Mutual Commercial Marine Ins. Co.*, 2 Curt. 277, Fed. Cas. No. 10,498. But when the omitted term or obligation is within the statute of frauds, there is no valid agreement which the court is authorized to enforce, outside of the writing. In such case, relief may be had against the enforcement of the contract as written, or the assertion of rights acquired under it contrary to the terms and intent of the real agreement of the parties. Such relief may be given as well upon the suit of a plaintiff seeking to have a written contract, or some of its terms, set aside, annulled, or restricted, as to a defendant resisting its specific performance. *Canedy v. Marcy*, 13 Gray, 373; *Gillespie v. Moon*, 2 Johns. Ch. 585; *Keisselbrack v. Livingston*, 4 Johns. Ch. 148.

Relief in this form, although procured by parol evidence of an agreement differing from the written contract, with proof that the difference was the result of accident or mistake, does not conflict with the provisions of the statute of frauds. That statute forbids the enforcement of certain kinds of agreement without writing; but it does not forbid the defeat or restriction of written contracts; nor the use of parol evidence for the purpose of establishing the equitable grounds therefor. The parol evidence is introduced, not to establish an oral agreement independently of the writing, but to show that the written instrument contained something contrary to or in excess of the real agreement of the parties, or does not properly express that agreement. *Higginson v. Clowes*, 15 Ves. 516; *Clowes v. Higginson*, 1 Ves. & B. 524; *Squier v. Campbell*, 1 Mylne & C. 459, 480.

But rectification by making the contract include obligations or subject-matter to which its written terms will not apply is a direct enforcement of the oral agreement, as

much in conflict with the statute of frauds as if there were no writing at all. *Moale v. Buchanan*, 11 Gill & J. 314; *Osborn v. Phelps*, 19 Conn. 63; *Elder v. Elder*, 10 Me. 80. In *Parkhurst v. Van Cortlandt*, 14 Johns. 15, 32, it is said that, "where it is necessary to make out a contract in writing, no parol evidence can be admitted to supply any defects in the writing." Per Thompson, C. J. Such rectification, when the enlarged operation includes that which is within the statute of frauds, must be accomplished, if at all, under the other head of equity jurisdiction, namely, fraud. *Irnham v. Child*, 1 Brown, Ch. 92; 1 Story, Eq. Jur. § 770a; *Davies v. Fitton*, 2 Dru. & War. 225; *Wilson v. Wilson*, 5 H. L. Cas. 40, 65; *Manser v. Back*, 6 Hare, 443; *Clarke v. Grant*, 14 Ves. 519; *Olinan v. Cook*, 1 Schoales & L. 22.

The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its performance, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds. *Hawkins v. Holmes*, 1 P. Wms. 770; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 274, 14 Johns. 15; *Browne, St. Frauds*, § 437 et seq.; *Fry, Spec. Perf.* §§ 384-388; *Caton v. Caton*, 1 Ch. App. 137, 147, L. R. 2 H. L. 127. In the last named case it is said that "the right to relief in such cases rests not merely on the contract, but on what has been done in pursuance of the contract." Per Lord Chancellor Cranworth. See, also, 1 Story, Eq. Jur. § 759. But the present case, as we have already seen, does not come within the principle of this ground of equitable relief.

Fraud, which relates only to the preparation, form, and execution of the writing, is sufficient to vitiate the instrument so made. It may be set aside either in equity or at law. If it is made to include land not the subject of the actual sale, it is inoperative as to such land; and the fraud may be shown, for the purpose of defeating its recovery, in an action at law. *Walker v. Swasey*, 2 Allen, 312, 4 Allen, 527; *Bartlett v. Drake*, 100 Mass. 174. It has been questioned whether any other effect can be given to such fraud than to defeat the operation of the instrument altogether; and whether a court of equity can reform by giving it a narrower operation, as modified by parol proof, in a case within the statute of frauds.

Attorney General v. Sitwell, 1 Younge & C. Exch. 559. The difficulty is that, if the fraud vitiates and defeats the instrument, then the modified agreement to be enforced must be that which is proved by parol evidence; and this seems to violate the statute. But the instrument, in such case, is not void. It is voidable only; and that not at the election of the party who committed the fraud. He is not entitled to control the extent of the effect that shall be given to his fraudulent conduct; and it is not for him to object that the fraud is availed of only to defeat the rights, which he has secured by fraud, beyond what he is fairly entitled to by the terms of the real agreement between the parties. When those are separable, and the nature of the case will admit of it, the court may enforce the written contract in accordance with its terms, giving relief against the fraudulent excess, or the clause improperly inserted. Parol testimony, used to defeat a title or limit an interest acquired under a written instrument, or to convert it into a trust, does not necessarily conflict with the statute of frauds. It has been held that an absolute deed may, in this mode, be converted, in equity, into a mortgage. *Washburn v. Merrill*, 1 Day, 140; *Taylor v. Luther*, 2 Sumn. 228, Fed. Cas. No. 13,796; *Jenkins v. Eldredge*, 3 Story, 181, 293, Fed. Cas. No. 7,266; *Morris v. Nixon*, 1 How. 118; 4 Kent, Comm. (6th Ed.) 143. Whether this can be done in Massachusetts has not yet been decided. *Newton v. Fay*, 10 Allen, 505. But if it were to be so held, it would not be upon the ground of enforcing a parol agreement to reconvey; but upon the ground that such an agreement, together with proof that the deed was given and accepted only as security for a debt, made out a case of fraud, or trust, which would warrant a decree vacating the title of the grantee, as far as he attempted to hold contrary to the purposes of the conveyance. In such cases the court acts upon the estate or rights acquired under the written instrument; and within the power over that instrument which is derived from the fraud or other ground of jurisdiction. But when it is sought to extend that power to interests in land not included in the instrument, and in relation to which there is no agreement in writing, the case stands differently. Fraud may vitiate the writing which is tainted by it, but it does not supply that which the statute requires. It may destroy a title or right acquired by its means; but it has no creative force. It will not confer title. In the absence of a legal contract by the agreement of the parties, it will not establish one, nor authorize the court to declare one, by its decree.

This distinction is illustrated by the analogous rule in regard to implied trusts. Gen. St. c. 100, § 19. Parol evidence may charge the grantee of lands conveyed with a resulting or implied trust, which equity will en-

force. But such evidence will not create a trust in lands already held by an absolute title.

A fraudulent misrepresentation, although sufficient to sustain an action for damages, cannot be converted into a contract to be enforced as such. Neither will it furnish the measure by which a written contract may be reformed. In this discussion we have assumed that there was a clear agreement between the parties, which the deed fails to carry out, and to which it might properly be made to conform, but for the obstacle in the statute of frauds.

It has been often asserted that where one by deceit or fraudulent contrivance prevents an agreement intended to be put in writing from being properly written or executed, he shall not avail himself of the omission, and shall not be permitted to set up the statute of fraud against the proof and enforcement of the parol agreement, or of the parol stipulation improperly omitted. But in our opinion this doctrine would practically annul the statute. The tendency of the human mind, when fraud and injustice are manifest, is to strain every point to compass its defeat; and to render full redress to the party upon whom it has been practiced. *Mundy v. Jolliffe*, 5 Mylne & C. 167; *Taylor v. Luther*, 2 Sumn. 233, Fed. Cas. No. 13,796. This influence has led to decisions in which the facts of the particular case were regarded more than the general considerations, of public policy upon which the statute is founded and entitled to be maintained. Courts have sometimes regarded it as a matter of judicial merit to wrest from under the statute all cases in which the lineaments of fraud in any form were discernible. But the impulse of moral reprobation of deceit and fraud, however commendable in itself, is liable to mislead, if taken as the guide to judicial decrees.

We apprehend that in most instances where fraud occasioning a failure of written evidence of an agreement or particular stipulation has been held to take the case out of the statute of frauds, there was some fact of prejudice to the party, or change of situation consequent upon the fraud, which was regarded as sufficient to make up the elements of an equitable estoppel. In such case, the argument is transferred to the simple question of the sufficiency of the additional circumstance for that purpose. The cases most frequently referred to are those arising out of agreements for marriage settlements. In such cases the marriage, although not regarded as a part performance of the agreement for a marriage settlement, is such an irrevocable change of situation, that, if procured by artifice, upon the faith that the settlement had been, or the assurance that it would be, executed, the other party is held to make good the agreement, and not permitted to defeat it by pleading the statute. *Max-*

well v. Mountacute, Prec. Ch. 526; *Browne*, St. Frauds, §§ 441-445.

Another class of cases are those where a party acquires property by conveyance or devise secured to himself under assurances that he will transfer the property to, or hold and appropriate it for the use and benefit of, another. A trust for the benefit of such other person is charged upon the property, not by reason merely of the oral promise, but because of the fact that by means of such promise he had induced the transfer of the property to himself. *Brown v. Lynch*, 1 Paige, 147; *Thynn v. Thynn*, 1 Vern. 296; *Oldham v. Litchfield*, 2 Vern. 506; *Devenish v. Baines*, Prec. Ch. 3; 1 Story, Eq. Jur. § 768.

When these cases are cited in support of the doctrine that artifice or fraud in evading or preventing the execution of the writing is alone sufficient to induce a court of equity to disregard the statute and enforce the oral agreement, the subsequent change of situation or transfer of property, without which the deceit would be innocuous, seems to be overlooked, because it is not strictly in part performance of the agreement sought to be enforced. It must be manifest, however, that without such consequent act there would be no standing for the case in a court of equity. That which moves the court to a decree to enforce the agreement is not the artifice by which the execution of the writing has been evaded, but what the other party has been induced to do upon the faith of the agreement for such a writing. It is not that deceit, misrepresentation, or fraud, of itself, entitles a party to an equitable remedy; but that equity will interfere to prevent the accomplishment of the fraud which would result from the enforcement of legal rights contrary to the real agreement of the parties. Indeed, the fraud which alone justifies this exercise of equity powers by relief against the statute of frauds consists in the attempt to take advantage of that which has been done in performance or upon the faith of an agreement, while repudiating its obligations under cover of the statute. When a writing has been executed, the courts allow the fraud or mistake by which an omission or defect in the instrument has been occasioned to defeat the conclusiveness of the writing, and open the door for proof of the real agreement. But the obstacle of the statute of frauds to the enforcement of obligations, or the security of rights not expressed in the instrument remains to be removed in the same manner as if there were no writing. *Phyfe v. Wardell*, 2 Edw. Ch. 47; *Moale v. Buchanan*, 11 Gill & J. 314. The power to reform the instrument is not an independent power or branch of equity jurisdiction, but only a means of exercising the power of the court under its general jurisdiction in cases of fraud, accident, and mistake.

We are aware that the limitation which we

have undertaken to define has not been uniformly observed or recognized.

In *Wiswall v. Hall*, 3 Paige, 313, Chancellor Walworth granted a perpetual injunction, and ordered a deed of release of title to land omitted from a deed by fraud and secret contrivance. There was no discussion of the authorities, nor of the principles upon which the case was decided; and no reference to the statute of frauds; and the statute does not appear, by the report, to have been set up against the prayer for relief.

In *De Peyster v. Hasbrouck*, 11 N. Y. 591, a similar decision was made in the court of appeals in New York. Here again there is no reference to the statute of frauds, no discussion of the principles involved in the decision, and no authority or precedent cited except that of *Wiswall v. Hall*. The mortgagor whose deed was reformed put in no answer whatever. The defence was made by parties claiming under him, and the statute of frauds does not appear to have been pleaded. Denio, C. J., in giving the opinion, proceeds to say: "It is unnecessary to refer to cases to establish the familiar doctrine that when through mistake or fraud a contract or conveyance fails to express the actual agreement of the parties, it will be reformed by a court of equity, so as to correspond with such actual agreement. The English cases have been ably digested by Chancellor Kent, and the principle has been stated with his accustomed care and accuracy, in *Gillespie v. Moon*, 2 Johns. Ch. 585."

But in *Gillespie v. Moon* the relief sought and granted was by way of restricting, and not by enlarging, the operation of the deed. Such relief would not, as already shown, conflict with the statute of frauds; and neither the discussion in that case nor the citation of authorities had reference to the bearing of the statute of frauds upon the question of affording relief upon contracts relating to land. Indeed, the English cases furnish but little aid upon that point, for the reason that the courts there have generally, without reference to the statute of frauds, refused to enforce written contracts with a modification or variation set up by parol proof. *Woollam v. Hearn*, 7 Ves. 211, and notes on the same in 2 Lead. Cas. Eq. 404; *Nurse v. Seymour*, 13 Beav. 254.

The principle which was maintained by Chancellor Kent, and upon which the English authorities were cited by him in *Gillespie v. Moon*, was that relief in equity against the operation of a written instrument, on the ground that by fraud or mistake it did not express the true contract of the parties, might be afforded to a plaintiff seeking a modification of the contract, as well as to a defendant resisting its enforcement. That proposition must be considered as fully established. 1 Story, Eq. Jur. § 161. It is quite another proposition, to enlarge the subject-matter of the contract, or to add a new term to the writing, by parol evidence, and

enforce it. No such proposition was presented by the case of *Gillespie v. Moon*, and it does not sustain the right to such relief against the statute of frauds.

That Chancellor Walworth, in *Wiswall v. Hall*, did not intend to decide that the statute of frauds could be disregarded if properly set up against such an enlargement of the operation of the written contract is apparent from the remarks of the same learned judge in the subsequent case of *Cowles v. Bowne*, 10 Paige, 535. He says: "Whether a party can come into this court for the specific performance of a mere executory agreement for the sale of lands, which in its terms is materially variant from the written agreement between the parties that has been executed according to the statute, where there has been no part performance or other equitable circumstance sufficient to take the case out of the statute of frauds, as a mere parol contract between the parties, is a question which it will not be necessary for me to consider in this case."

In *Gouverneur v. Titus*, 1 Edw. Ch. 480, there was a deed of land described as being in the northwest corner of a township by mistake for the northeast corner. The grantor admitted the real contract, and had corrected the mistake by deed. The only question was whether equity would enforce the corrected deed against the lien of a judgment creditor, who had notice of the mistake. In the opinion it is said: "It is a case in which this court would interfere, as between the immediate parties, to correct the mistake." The judgment was clearly right. The dictum we are disposed to question, unless the deed itself contained some other description by means of which the land might be identified and the mistake corrected.

In *Newson v. Bufferlow*, 1 Dev. Eq. 379, a deed was reformed, which was made, by fraud, to include land not sold; and the fraudulent grantee was required to execute a reconveyance of the excess. The opinion contains a remark of the court that this power may be exercised as well by inserting what was omitted as by striking out what was wrongfully included. But this remark is clearly obiter dictum, and is not sustained by the authority cited, namely, *Gillespie v. Moon*.

In *Blodgett v. Hobart*, 18 Vern. 414, a mortgage was reformed by including other lands omitted by mistake. The statute of frauds was not set up in the answer nor referred to in the opinion of the court, and the answer was considered by the court to be evasive in regard to the alleged agreement for security upon such other lands.

In *Tilton v. Tilton*, 9 N. H. 385, the court controvert the doctrine of such a limitation, as declared in *Elder v. Elder*, 10 Me. 80; but the decision did not involve the question so discussed. The case arose from an attempted partition between tenants in common of real estate. There was a written agreement for partition according to the award of certain

arbitrators named, and the only question was as to the effect of a substitution of other arbitrators by parol. Deeds had been executed, and the plaintiff had fully performed his part of the agreement. It was a case of part performance sufficient to take the case out of the statute of frauds, and was decided upon that ground. Besides, a partition of lands, though effected by mutual deeds of release, is not a contract for the sale of land.

Craig v. Kittridge, 3 Fost. (N. H.) 231, arose upon a partition, and was decided upon the authority of *Tilton v. Tilton*. *Smith v. Greeley*, 14 N. H. 378, was a decree upon default, without argument or opinion, against the executors and heirs of a party whose deed, by mutual mistake, failed to include certain land sold. It does not appear whether there was written evidence of the agreement, nor whether there was possession or acts of performance. It was sufficient, perhaps, that the statute was not pleaded, and the default admitted the agreement.

Caldwell v. Carrington, 9 Pet. 86, was an agreement for exchange of lands, and stands entirely upon the ground of part performance.

Notwithstanding contrary decisions and dicta, we are satisfied that upon principle the conveyance of land cannot be decreed in equity by reason merely of an oral agreement therefor against a party denying the alleged agreement and relying upon the statute of frauds, in the absence of evidence of change of situation or part performance creating an estoppel against the plea of the statute. This rule applies as well to the enforcement of such an agreement by way of rectifying a deed as to a direct suit for its specific performance. We are satisfied also that this is the rule to be derived from a great preponderance of the authorities. *Whitchurch v. Bevis*, 2 Brown, Ch. 559; *Woollam v. Hearn*, 7 Ves. 211; 2 Lead. Cas. Eq. (3d Am. Ed.) notes, [*414], Am. Notes, 691; *Townshend v. Stangroom*, 6 Ves. 328; *Beaumont v. Bramley*, Turn. & R. 41. See, also, *Moale v. Bu-*

chanan, 11 Gill & J. 314; *Osborn v. Phelps*, 19 Conn. 63; and *Elder v. Elder*, 10 Me. 80, already cited above; *Adams*, Eq. 171, 172; *Churchill v. Rogers*, 3 T. B. Mon. 81; *Purcell v. Miner*, 4 Wall. 513.

The prayer in regard to the fence stands differently. If that stipulation had been fraudulently inserted in the deed, the agreement being otherwise, the deed might be reformed by striking out that provision, or requiring a release of it, so as to make the writing correspond with the actual agreement. But upon the allegations of the bill there is no other agreement by which to reform the deed, and to which to make it conform. The plaintiff admits that the stipulation in the deed is precisely in accordance with the actual agreement. The fraud which he alleges relates only to the consideration or inducement upon which he was led to make that agreement; not to the form of the agreement itself. If that stipulation were to be stricken out, the writing would then not express the agreement actually made by the parties. The court cannot rectify an instrument otherwise than in accordance with the actual agreement. It cannot make an agreement for the parties. *Hunt v. Rousmaniere*, 1 Pet. 1, 14; *Brooks v. Stolley*, 3 McLean, 523, Fed. Cas. No. 1,962. If the subject-matter of this stipulation were of sufficient materiality, the fraud alleged might have the effect to defeat the whole instrument. But this effect is not sought. The plaintiff's remedy, therefore, is at law, in damages for the deceit and false representation.

The alleged agreement in regard to the premium and accrued interest upon the bonds transferred in payment for the land will not sustain a bill in equity. If such an agreement was made and broken, we see no reason why an action of assumpsit will not lie upon the agreement, or for the overpayment of the agreed price of the purchase. The remedy at law is as effectual as it can be in equity.

The entry must therefore be, bill dismissed.

DAVIS v. ELY et al.

(10 S. E. 138, 104 N. C. 16.)

Supreme Court of North Carolina. Oct. 28, 1889.

This was a civil action tried before BOYKIN, J., and a jury at spring term of the superior court of Pasquotank county. The complaint was as follows: (1) That on the 22d day of April, 1884, the plaintiff and defendants entered into a contract with regard to the sale and division of the Great Park estate; that a paper writing, purporting to contain the terms of said contract, was executed by Timothy Ely and wife, Hannah, by their duly-authorized agent, Harvey Terry, and by the plaintiff, through his agent, William J. Griffin. A copy of this writing is hereto attached, marked "Exhibit A," and is made a part of this complaint. (2) That the recitals and agreements set forth in said contract, down to section numbered 40, are all true. (3) That the agreement which was intended to be embodied in the contract, of which the exhibit hereto attached is a copy, was made by Francis Davis, Esq., father of the said John F. Davis, and Harvey Terry, agent of Timothy Ely, and wife, Hannah. (4) That, before the contract could be reduced to writing, the said Francis Davis left Elizabeth City for his home in Ohio, and directed one W. J. Griffin, an attorney at law, to draft said contract, and have the same executed and recorded. (5) That the said draughtsman was compelled to rely upon statements of the said Terry, and, by false and fraudulent representations by said Terry, the said contract, or that portion set forth in the paragraph numbered 40 of the exhibit, hereto attached, does not set forth the true terms agreed on. (6) That the Great Park estate was incumbered by a mortgage which had been purchased by Timothy Ely, and the equity of redemption was held by a firm known as Conrow, Bush & Lippincott; that the said John F. Davis had entered into a contract with the said Conrow, Bush & Lippincott for the purchase of their interest in the Great Park estate, except a portion known as the "Hall Tract," and the said Davis bound himself to pay off and discharge the mortgage, which was then held by the plaintiff Ely, and thereby leave the Hall tract to Conrow, Bush & Lippincott, unincumbered. This contract of Davis with Conrow, Bush & Lippincott was well known to Harvey Terry, the agent of the defendant Ely. (7) That the said Terry, as agent of the said Timothy Ely, had obtained a judgment of foreclosure on his mortgage, and the sale of the Great Park estate was advertised to take place April 22, 1884; that, after the advertisement had been posted, the said John F. Davis applied for and obtained a restraining order, commanding the commissioners to desist from the sale of the Great Park estate until a certain time mentioned in said restraining order. (8) That the said Francis Davis and Timothy Ely and Harvey Terry met in Elizabeth City on the 21st day of April, 1884, and on that day verbally made a contract which was intended to be embodied in the contract hereinbefore set out. It was only

when the said Davis and Terry had thus come to terms that the said Davis consented to the sale mentioned in said contract. (9) The said Francis Davis, as agent for his son, John F. Davis, refused to treat with the said Terry upon any basis except that the Hall tract should be given or set apart to his son, John F. Davis, in order that the said John F. Davis might perform his contract with the said Conrow, Bush & Lippincott. (10) That, after much talking, it was finally agreed that the said Hall tract should be excepted, and the balance of the Great Park estate should be divided into two parts, equal in area, by a line running north and south, and the western half thereof should be given or allotted to John F. Davis and the eastern half to Timothy Ely, and, in addition to the western half, the said Davis should have the portion known as the "Hall Tract." (11) That the said Terry represented unto the said Davis that the said Hall tract contained but 1,300 acres, which the said Terry well knew to be false. In truth and in fact this complainant has been informed that the said Hall tract contains 3,000 acres. (12) That, having confidence in the integrity of said Terry, and having urgent business engagements in Ohio, the said Francis Davis left Elizabeth City on the 22d day of April, 1884, and this plaintiff did not learn of the error in the agreement for some time thereafter, and instituted suit as soon as he heard thereof. Wherefore plaintiff prays—*First*, that the said contract may be reformed so as to speak the true agreement of the parties as herein set out; *second*, that the defendants be decreed to pay all costs of this proceeding; and *third*, for such other and further relief as to the court may seem meet. The answer fully denied all the allegations imputing fraud, and the following issues were submitted without objection to the jury. (1) Does the written contract dated April 22, 1884, contain the true agreement entered into between the parties? (2) Was it the agreement between the parties that John F. Davis should have the Hall tract and one-half of the balance of the Great Parker estate, and the defendants the other half of the Great Parker estate? (3) Was the reservation of the Hall tract to J. F. Davis omitted from the written contract by reason of false and fraudulent representations made to the draughtsman by the defendants, or either of them? The issues show the true contention of the parties. The plaintiff offered evidence tending to show the fraud set out in the complaint, and all the other allegations of the complaint, for the purpose of reforming the contract. The defendants objected to the testimony, unless it was introduced for the purpose of rescinding the contract, whereupon the counsel for the plaintiff stated that the purpose of the testimony offered was to reform the contract, and not to rescind it. The court excluded the testimony, holding that it was not admissible for the purpose of reforming the contract, but that it was admissible for the purpose of rescinding the contract. Upon this intimation the plaintiff submitted to a nonsuit, and appealed.

C. W. Grandy, for appellant. Harvey Terry, for appellees.

SHEPHERD, J., (*after stating the facts as above.*) There is a hopeless conflict of authority upon the question whether a court of equity will correct an executory contract on the ground of fraud or mistake, and enforce it with the variation. In England and several of the American states such relief is denied, although a defendant, for the purpose of resisting specific performance, may show that by fraud or mistake the written contract does not express the real terms of the agreement. In other states this distinction is repudiated, and the contract will be corrected and enforced in proper cases at the instance of either party. Where such executory contracts, within the statute of frauds, are corrected and enforced, there is a further diversity, some courts holding that they will only exercise the power where the object is to restrict the subject-matter of the contract, while others hold that the contract will be corrected, although its subject is enlarged. Of this latter opinion is Mr. Pomeroy (2 Pom. Eq. Jur. § 862 et seq.) and other writers of great respectability. Opposed to this view we have the English authorities, (*Woolam v. Hearn*, 2 White & T. Lead. Cas. Eq. 920,) and Bisp. Eq. § 383; Whart. Ev. § 1024, and many decisions in the United States, of which the leading case is *Glass v. Hulbert*, 102 Mass. 24. In this case the court says that "when the proposed reformation of an instrument involves the specific enforcement of an oral agreement within the statute of frauds, or when the terms sought to be added would so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel to deprive the party of the right to set up that defense. *Jordan v. Sawkins*, 1 Ves. Jr. 402; *Osborn v. Phelps*, 19 Conn. 63; *Clinan v. Cooke*, 1 Schoales & L. 22. The fact that the omission or defect in the writing by reason of which it failed to convey the land or express the obligation which it is sought to make it convey or express was occasioned by mistake, or by deceit and fraud, will not alone constitute such an estoppel. * * * Rectification, by making the contract include obligations or subject-matter to which its written terms will not apply, is a direct enforcement of the oral agreement, as much in conflict with the statute of frauds as if there were no writing at all." This decision, in so far as it holds that the subject-matter of the contract may not be enlarged, is supported by abundant authority. Story's Equity Jurisprudence is often cited to sustain the other view, but the argument there seems to be directed against the distinction between parties seeking and parties resisting specific performance. It refers to the decisions of Chancellor KENT in *Gillespie v. Moon*, 2 Johns. Ch. 585, and *Keiselbrack v. Livingston*, 4 Johns. Ch. 144. In neither of these cases was the subject-matter enlarged. In *Gillespie's Case* (so often cited) the correction made was the striking out of 50 acres from a written agreement which included 250. Bisp. Eq. 445, says that "in cases which fall

within the statute it is obvious that to carry the rule in *Gillespie's Case* to the extent of holding that an agreement (for example) to convey fifty acres may, for the sake of justice and equity be construed to mean a contract to convey one hundred, would be to repeal the statute of frauds and to give effect to a simple verbal agreement to sell land. Where, however, the contention of the complainant is that something which is actually embraced in the writing was not intended to be included therein, to suffer him to show this is not to enforce a parol contract in relation to land. It is simply to prove that a written contract did not embrace all that, on its face, it appeared to include. Such was the actual state of the case in *Gillespie v. Moon*." It may be remarked that in most of the states where such relief is granted the doctrine of "part performance" is recognized, and the proof required is but little short of that which is necessary to enforce a contract upon that ground. In North Carolina, so far from correcting such executory contracts within the statute so as to enlarge their terms, the tendency of our decisions is to confine such corrective relief to executed contracts alone. We have been able to find no decision in point, but the words of HALL, J., in *Newsom v. Bufferlow*, 1 Dev. Eq. 379, strongly show the disinclination of the court to depart from the statute, except upon the most imperative demands of justice and equity. The learned judge says: "It is altogether unnecessary to inquire in this case how far courts of equity have gone in carrying into effect written executory contracts or varying them by parol evidence. Suffice it to say that the reason why they have declined giving relief in many such cases is that the plaintiff had a remedy at law. That reason is not applicable to executed contracts. In these cases the plaintiff has no remedy at law, and, unless a court of equity will give relief, he can have no redress." This distinction between executed and executory contracts is clearly put by Adams, Eq. 171: "Where land is the subject of the erroneous instrument, the reformation of an executed conveyance on parol evidence is not precluded by the statute of frauds, for otherwise it would be impossible to give relief. * * * But it does not appear that, where the defendant has insisted on the benefit of the statute, the court has ever reformed such an executory agreement on parol evidence and specifically enforced it."

Land is regarded as such a high species of property that exceptional safeguards have been devised for the preservation and security of its title, and these should not be departed from unless such departure is absolutely necessary to subserve the ends of justice. Under the former system the equitable relief we have mentioned was administered by the trained minds of learned judges, sitting as chancellors, who appreciated the grave evils which the statute was designed to prevent, and who gave full effect to the rule which required the clearest and most cogent testimony. Even then the relief in this state was confined, it seems, to executed contracts, and surely there is nothing in the new method of trying equitable issues which encourages us to leave the

old moorings and venture upon a sea of trouble, confusion, and insecurity. On the ground of necessity we correct conveyances by adding clauses of defeasance and words of inheritance. We also restrict or enlarge the subject-matter, but we decline to do this in the case of executory contracts, where there can necessarily be no other object than, as in the case before us, to have it specifically enforced. It is believed that no great hardship can result from such ruling, as the court will, upon rescission, endeavor to place the parties *in statu quo*, and damages may be given for the fraud and deceit. The court is liberal in the adjustment of equities arising in such cases; but, even if occasional instances of hardship occur, it is far better that these should be endured than that every title in the state should be exposed to the assaults of false and fraudulent oral testimony. What we have said has no reference to the correction of ordinary executory contracts in aid of actions for damages at law, such as the correction of the terms of a bond and the like. Equity will always make the correction, and the party can sue upon the corrected contract at law. The two jurisdictions being now blended, such relief will be granted in a single action. It may be that in cases of personal property, where there is a *pretium affectionis*, the contract may be corrected

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and specifically enforced, but it is unnecessary to pass upon that question here.

The relief sought in this action is to correct the contract so as to include the "Hall tract." It seems from the complaint that the alleged fraud consisted in certain false representations as to the number of acres made to the plaintiff when the parol agreement was made. False representations are also alleged to have been made to Mr. Griffin, the draughtsman; but these are not specified, so we must assume that they were the same as those made to his principal, Davis. However this may be, we have here a plain case where it is proposed to correct an executory contract for the sale of land by making it include a larger quantity than is stated in the writing. The plaintiff does not wish to rescind, and offers the parol testimony solely for the purpose of reformation. We think that to admit the testimony in such cases would be, as has been said, virtually repealing the statute of frauds, and opening the door to a flood of evils, the extent of which it would be impossible to estimate. The plaintiff may enforce the contract in its present form, or he may rescind it, and ask for an adjustment of any equities which may have grown out of the transaction. We think that the testimony was properly rejected, and that there is no error.

MILLER et al. v. SCAMMON.

(52 N. H. 609.)

Supreme Judicial Court of New Hampshire.
June, 1873.

In equity. The bill by Frank W. Miller and George W. Marston against Stephen Scammon alleged that the plaintiffs were the publishers of a daily newspaper, that the defendant, fraudulently intending to deceive and injure the plaintiffs, and to expose them to loss and to a prosecution for libel, persuaded and procured them to insert in their newspaper an advertisement over the signature of the defendant, and which he said was true, and which he alleged was necessary and designed to protect him against being compelled to pay certain notes therein described, which he then and there solemnly declared had been wrongfully obtained, and purporting to have been for a valuable consideration, and to have been signed by the defendant, and which he then and there pretended and asserted he never signed, and upon which he might be sued, or which might be set up in a suit against him.

The bill then avers that the allegations of the advertisement were false, and the present plaintiffs, as well as the defendant, were indicted and convicted for publishing a false and malicious libel in said advertisement, and the present plaintiffs were fined \$150, which they have paid, with costs taxed at \$21.63, together with other costs for counsel fees and other expenses amounting to \$50, amounting in the whole to \$221.63.

The plaintiffs pray that the court will ascertain the amount which they have had to pay and the damages they have suffered by reason of the fraud and deceit of the defendant, and that he may be ordered and decreed to pay the same to the plaintiffs, with interest, and for such other relief as may be just.

To this bill there was a general demurrer, and the questions of law thus raised were reserved.

W. H. Y. Hackett, for plaintiffs. Mr. Wiggin, for defendant.

FOSTER, J. As a declaration in case, to recover damages for the deceit and fraud of the defendant, the plaintiffs' bill does not seem wanting in the essential and ordinary forms of pleading. The prayer of the bill is that the court may ascertain what the plaintiffs "have had to pay, and the damages they have suffered by reason of the fraud and deceit" of the defendant, and that he may be ordered and decreed to pay the same; but the damages are specifically enumerated in dollars and cents in the bill, and no aid in equity is required for their ascertainment.

No reason is suggested in the bill why the plaintiffs have chosen to proceed in equity rather than by the usual course of the law, which is ample in its form and power for the redress of such grievances as the plaintiffs complain of, provided they are entitled to re-

lief or satisfaction. If the plaintiffs' remedy at law is not as plain, full, complete, and adequate as it is by proceedings in equity, neither the fact nor the reasons why are suggested in this bill, which, if it may be adopted for the disposition of such a case as the present, may just as well serve hereafter as a precedent, *mutatis mutandis*, for a bill to recover damages for deceit, in any case in which such damages are now sought by means of an action of tort.

It is quite true that, not only by force of our statutes, but upon general principles, courts of equity exercise a general jurisdiction in cases of fraud, sometimes concurrent with, and sometimes exclusive of, the common-law courts. Gen. St. c. 190, § 1; Snell, Eq. 359. And it is said that in some cases of fraud, for which the common law affords complete and adequate relief, chancery may have concurrent jurisdiction. Snell, Eq. 359. This general proposition, however, is too broad when applied to our practice, under the rules of evidence which permit or require parties to testify. In the English practice, and perhaps in some American states, equity may entertain this concurrent jurisdiction, because, although the remedy at law may be said to be adequate, the means of obtaining the truth, where discovery by the oath of the party is essential, may be wanting or deficient in the courts of common law. "The jurisdiction of the courts of equity for the enforcement of civil rights, as distinguished from the jurisdiction of the courts of common law, derives much of its utility from the power of the great seal to compel the defendant, in a suit, to discover and set forth, upon oath, every fact and circumstance within his knowledge, information, and belief material to the plaintiff's case." Adam, Eq. 1. But to a very great extent the right to enforce discovery, and to search the conscience of the party, which was formerly only to be had in chancery, is afforded in the practice and by the statutes of our law courts as fully and effectually as by a court of equity.

"Perhaps the most general, if not the most precise, description of a court of equity, in the English and American sense," says Judge Story, "is that it has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law. The remedy must be plain, for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate, for, if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity; and it must be complete, that is, it must attain the full end and justice of the case. * * *

The jurisdiction of a court of equity is, therefore, sometimes concurrent with the jurisdiction of a court of law. It is sometimes exclusive of it, and it is sometimes auxiliary to it." 1 Story, Eq. Jur. § 33.

In the matter of actual fraud, Blackstone has said that "courts of equity are established to detect latent frauds and concealments which the process of the courts of law is not adapted to reach." 3 Bl. Comm. 431. And although it may still be that courts of liberal equity powers may entertain concurrent jurisdiction with the courts of law, even in those cases of fraud which are effectually remediable in the latter, such jurisdiction is very seldom exercised anywhere, as we believe, and never, to our knowledge, in this state. Its ordinary application is restricted to cases in which a decree is required compelling the wrongdoer, specifically, to make good his default; "and therefore," says Mr. Adams, "if the wrong require specific redress, and such specific redress is not attainable at law, there is a prerogative jurisdiction in equity to relieve." Adams' Eq., Introduction *xxxv. Sometimes, also, where the remedy at law would seem to be effectual, equity will entertain jurisdiction for the sake of avoiding circuity of action or multiplicity of suits. Smith, Man. Eq. § 1. Indeed, as we regard it, the correct principle is laid down by Judge Story in his Equity Pleadings (section 473), where he says, "In general, courts of equity will not assume jurisdiction where the powers of the ordinary courts are sufficient for the purposes of justice, and therefore it may be stated as a general rule, subject to few exceptions, that where the plaintiff can have as effectual and complete a remedy in a court of law as in a court of equity, and that remedy is direct, certain, and adequate, a demurrer, which is in truth a demurrer to the jurisdiction of the court, will hold; but where there is a clear right, and yet there is no remedy in a court of law, or the remedy is not plain, adequate, and complete, and adapted to the particular exigency, then, and in such cases, courts of equity will maintain jurisdiction." And see 1 Daniell, Ch. Prac. 610.

Although the plaintiffs have not told us, in their complaint, wherein their remedy is deficient at law, they have suggested it in argument. They say, "It is a recognized rule that equity will give relief against fraud upon less direct proof than would induce a court of law to afford the same relief." But the only difference in the quality of proof seems to be with regard to the matter of presumptions; and although it is said, in support of the plaintiffs' general proposition, that courts of equity will grant relief upon the ground of fraud, established by such presumptive evidence as courts of law would not always deem sufficient proof to justify a verdict (1 Story, Eq. Jur. § 190), it seems quite manifest from the charge of the plaintiffs' bill that they cannot support or derive aid to their claim from any presumptions other than those which could as well be deduced in a court of law as in equity, from the circumstances which may be disclosed and developed before a jury.

Again, the plaintiffs say, "In equity the plaintiffs are entitled to search the conscience of the defendant, and to have the benefit of his answer under oath, or of his refusal so to make it; and it is not quite certain that the defendant could be compelled to state facts as a witness which, while they would make out the plaintiffs' case, would expose him to another indictment." But our statute, permitting and compelling the testimony of parties in civil actions, seems to afford all the advantages claimed for chancery jurisdiction in this respect; and an answer to a question, searching the defendant's conscience to its lowest depths, could not, after his conviction for the libel which he uttered and the plaintiffs published, be now avoided on the ground of its tendency to expose him to a criminal prosecution, that prosecution and its consequences having once been suffered and expiated.

And, finally, they submit that "the remedy may be neither plain nor adequate, which depends upon the unwilling testimony of a convicted libeler." But a remedy will not be regarded as inadequate simply because it may be said that the evidence required to enforce it is that of an unwilling, or perhaps an untruthful, witness; and, moreover, it is not very apparent that equity is more effectual than the law to extract truth from the lips of an unwilling "convicted libeler." In the one tribunal, as in the other, the process is the same; in the one tribunal, as in the other, both parties may testify, and both be cross-examined.

In short, we are unable to discover any sufficient grounds for entertaining equitable jurisdiction of the plaintiffs' case. If the plaintiffs are entitled to relief, their remedy is plain, and not doubtful or obscure. It is by an action on the case for deceit. It is adequate, and does not fall short of what the party is entitled to, that is, it entitles him to a verdict for full and ample damages, and a judgment and execution thereon, with costs, to be levied upon his goods or estate, and, for want thereof, upon his body. And in this particular it is complete, attaining the full end and justice of the case, which requires no other decree than such a judgment and execution. In all these particulars, the definition of the terms "plain, adequate, and complete," as furnished by the books, is fully satisfied. 1 Story, Eq. Jur. § 33.

It is unnecessary to entertain the question whether the plaintiffs, upon the statements contained in their bill, might have a remedy at law. It would seem that everything alleged in the bill might, upon the indictment against them, have been shown in evidence. Whether, if proven by credible testimony, it would constitute a legal defense, we need not now inquire. It is said that, before a person gives general notoriety to oral calumny by circulating it in print, he must be

prepared to prove its truth to the letter. An editor gives publicity to a private slander at his own risk, for he has no more right to take away the character of a man, without being able to prove the charge that he has made against him, than he has to take his property, without being able to justify the act by which he possessed himself of it. Add. Torts, 775, 776. And even the truth of the thing charged is in many jurisdictions inadmissible as a justification, and, if admitted at all, can only be received to rebut or refute the proof or inference of malice,

which is said to constitute the essence of the offense. Whart. Cr. Law, 850.

It would seem that if the plaintiffs might have shown the facts which they now allege in defense of the indictment upon which they have been convicted, or if the proffered testimony was inadmissible, because affording no justification, the conviction must be regarded as putting all the parties to this bill in *pari delicto*, and that the plaintiffs can therefore have no claim, either in law or equity, for relief.

Bill dismissed.

BUZARD et al. v. HOUSTON.

(7 Sup. Ct. 249, 119 U. S. 347.)

Supreme Court of the United States. Dec. 13, 1886.

Appeal from the Circuit Court of the United States for the Western District of Texas.

This was a bill in equity, filed November 23, 1881, by Buzard and Hillard, citizens of Missouri, against Houston, a citizen of Texas, the material allegations of which were as follows:

That the plaintiffs were partners in the business of pasturing and breeding cattle upon a tract of land owned by them in the state of Texas, and on October 14, 1881, negotiated a purchase from the defendants of 1,500 cows and 50 bulls, to be delivered at Lampasas, in that state, in May, 1882, at the price of \$15.50 a head, one-half payable upon the signing of the contract, and the other half upon delivery of the cattle; that the terms of their agreement were stated in a memorandum of that date, signed by the parties, and intended as the basis of a more formal contract to be afterwards executed; and that the plaintiffs at once paid to the defendant \$500 in part performance. That on October 31, 1881, the parties resumed negotiations, and met to complete the contract; that the defendant then proposed that, in lieu of the contract with him for the cattle mentioned in the memorandum, the plaintiffs should take from him an assignment of a similar contract in writing, dated August 13, 1881, and set forth in the bill, by which one Mosty agreed to deliver to the defendant an equal number of similar cattle, at the same time and place, at the price of \$14 a head; that the defendant then stated that he had paid the sum of \$15,000 on the contract with Mosty; and asked that, in case of his assigning that contract to the plaintiffs, they should pay him that sum, and also the difference of \$1.50 a head in the prices mentioned in the two contracts, but finally proposed to deduct from this 25 cents a head; that, as an inducement to the plaintiffs to make the exchange of contracts, the defendant represented to them that Mosty was good and solvent, and able to perform his contract; that he was better than the defendant, and then had on his ranch 1,200 head of the cattle; and that there was no doubt of the performance of this contract, because one McAnulty was a partner with Mosty in its performance; of all which the plaintiffs knew nothing, except that they knew that McAnulty was a man of wealth, and fully able as well as willing to perform his contracts.

That on November 1, 1881, the plaintiffs, believing and relying on the defendant's representations aforesaid, accepted his proposition, and paid the sum of \$14,500, making, with the sum of \$500 already paid, the amount of \$15,000, which he alleged he had

paid to Mosty on his contract, and executed and delivered to the defendant their obligation to pay him, on the performance by Mosty of that contract, an additional sum of \$1,837.50, being the profit on the contract with Mosty in the sale to the plaintiffs, less the deduction of 25 cents a head; and returned to him his original contract with them, and in lieu thereof received from him his contract with Mosty, and his assignment thereof to the plaintiffs indorsed thereon, and set out in the bill, containing a provision that he should not be responsible in case of any failure of performance by Mosty; that the aforesaid representations of the defendant were absolutely untrue, deceitful, and fraudulent, and were known by the defendant to be false, and the plaintiffs did not know and had no means of knowing that they were untrue; that those representations were intended by the defendant to deceive the plaintiffs, and did deceive them, to their great injury, to-wit, to the extent of the amount of \$15,000 paid by them to him, and to the further extent of \$10,000 for the expenses necessary to obtain other cattle, and for the loss of the increase of such cattle for the next year by reason of the impossibility of obtaining them in the exhausted condition of the market; and that Mosty, at the time of the assignment, was absolutely insolvent, and had no property subject to be taken by his creditors, and his contract was utterly worthless, as the defendant then knew.

The bill then stated that the plaintiffs brought into court the contract between the defendant and Mosty, that it might be delivered up to the defendant; and also the assignment thereof by the defendant to the plaintiffs, that it might be canceled. The bill prayed for a discovery; for a rescission and cancellation of the assignment of the contract with Mosty, and also of the plaintiffs' obligation to pay to the defendant the sum of \$1,837.50; for the repayment to the plaintiffs of the excess of money received by the defendant from them beyond the amount which they were to pay him under the original contract; for a reinstatement and confirmation of that contract, and its enforcement upon such terms as the court might deem just and proper; or, if that could not be done, that the defendant be compelled to restore to the plaintiffs the sums of \$500 and \$14,500 received from them, and also to pay them the sum of \$10,000 for damages which they had sustained by reason of the defendant's fraudulently obtaining the surrender of the original contract, and by reason of the other injuries resulting to them therefrom; and for further relief.

The defendant demurred to the bill, assigning as a cause of demurrer that the bill showed that the plaintiffs' only cause of action, if any, was for the sums of money paid by them on the contract, and for damages for breach of the contract, for which they had an adequate and complete remedy at

law. The circuit court overruled the demurrer. The defendant then answered fully under oath, denying that he made any of the representations alleged, and repeating the defense taken by demurrer; the plaintiffs filed a general replication; conflicting testimony was taken; at a hearing upon pleadings and proofs the bill was dismissed, with costs; and the plaintiffs appealed to this court.

H. E. Barnard, for appellants Buzard and another. Jas. F. Miller, for appellee Houston.

Mr. Justice GRAY, after stating the case as above reported, delivered the opinion of the court.

In the judiciary act of 1789, by which the first congress established the judicial courts of the United States, and defined their jurisdiction, it is enacted that "suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law." Act of September 24, 1789, c. 20, § 16 (1 Stat. 82; Rev. St. § 723.) Five days later, on September 29, 1789, the same congress proposed to the legislatures of the several states the article afterwards ratified as the seventh amendment of the constitution, which declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." 1 Stat. 21, 98.

The effect of the provision of the judiciary act, as often stated by this court, is that "whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." *Hipp v. Babin*, 19 How. 271, 278; *Insurance Co. v. Bailey*, 13 Wall. 616, 621; *Grand Chute v. Winegar*, 15 Wall. 373, 375; *Lewis v. Cocks*, 23 Wall. 466, 470; *Root v. Railway Co.*, 105 U. S. 189, 212; *Killian v. Ebbinghaus*, 110 U. S. 568, 573, 4 Sup. Ct. 232. In a very recent case the court said: "This enactment certainly means something; and, if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule, and to impress it upon the attention of the courts." *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205, 214, 2 Sup. Ct. 279.

Accordingly a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief, in kind or in degree, on the equity side, than on the common-law side; as for instance, by compelling a specific performance, or the removal of a cloud on the title to real estate; or preventing an injury for which damages are not recoverable at law, as in *Watson v. Sutherland*, 5 Wall. 74; or where an agreement procured by fraud is of a con-

tinuing nature, and its rescission will prevent a multiplicity of suits, as in *Boyce v. Grundy*, 3 Pet. 210, 215, and in *Jones v. Bolles*, 9 Wall. 364, 369. In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received. *Parkersburg v. Brown*, 106 U. S. 487, 500, 1 Sup. Ct. 442; *Ambler v. Choteau*, 107 U. S. 586, 1 Sup. Ct. 556; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820.

In England, indeed, the court of chancery, in cases of fraud, has sometimes maintained bills in equity to recover the same damages which might be recovered in an action for money had and received. But the reason for this, as clearly brought out by Lord's Justices Knight Bruce and Turner, in *Slim v. Croucher*, 1 De Gex, F. & J. 518, 527, 528, was that such cases were within the ancient and original jurisdiction in chancery before any court of law had acquired jurisdiction of them, and that the assumption of jurisdiction by the courts of law, by gradually extending their powers, did not displace the earlier jurisdiction of the court of chancery. Upon any other ground, such bills could not be maintained. *Clifford v. Brooke*, 13 Ves. 131; *Thompson v. Barclay*, 9 Law J. Ch. 215, 218. And we have not been referred to any instance in which an English court of equity has maintained a bill in such a case as that now before us. In *Newham v. May*, 13 Price, 749, Chief Baron Alexander said: "It is not in every case of fraud that relief is to be administered by a court of equity. In the case, for instance, of a fraudulent warranty on the sale of a horse, or any fraud upon the sale of a chattel, no one, I apprehend, ever thought of filing a bill in equity."

The present bill states a case for which an action of deceit could be maintained at law, and would afford full, adequate, and complete remedy. The original agreement for the sale of a number of cattle, and not of any cattle in particular, does not belong to the class of contracts of which equity would decree specific performance. If the plaintiffs should be ordered to be reinstated in all their rights under that agreement, and permitted now to tender performance thereof on their part, the only relief which they could have in this suit would be a decree for damages, to be assessed by the same rules as in an action at law. The similar contract with Mosty, and the assignment thereof to the plaintiffs, are in the plaintiffs' own possession, and no judicial rescission of the assignment is needed. If the exchange of the contract was procured by the fraud alleged, it would be no more binding upon the plaintiffs at law than in equity; and in an action of deceit the plaintiffs might treat the assignment of the contract with Mosty as void,

and, upon delivering up that contract to the defendant, recover full damages for the non-performance of the original agreement. No relief is sought against Mosty, and he is not made a party to the bill. The obligation executed by the plaintiffs to the defendant is not negotiable, so that there is no need of an injunction. A judgment for pecuniary damages would adjust and determine all the rights of the parties, and is the only redress to which the plaintiffs, if they prove their allegations, are entitled. There is therefore no ground upon which the bill can be maintained. *Insurance Co. v. Bailey*, 13 Wall. 616, and other cases above cited.

The comparative weight due to conflicting testimony such as was introduced in this case can be much better determined by seeing and hearing the witnesses than upon written depositions or a printed record.

This case does not require us to enter upon a consideration of the question under what circumstances a bill showing no ground for equitable relief, and praying for discovery as incidental only to the relief sought, is open to a demurrer to the whole bill, or may, if discovery is obtained, be retained for the purposes of granting full relief, within the rule often stated in the books, but as to the proper limits of which the authorities are conflicting. It is enough to say that the case clearly falls within the statement of Chief Justice Marshall: "But this rule cannot be abused by being employed as a mere pretext for bringing causes, proper for a court of law, into a court of equity. If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, the established rules, limiting the jurisdiction of courts, require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law." *Russell v. Clark*, 7 Cranch, 69, 89. See, also, *Horsburg v. Baker*, 1 Pet. 232, 236; *Brown v. Swann*, 10 Pet. 497, 503.

The decree of the circuit court, dismissing the bill generally, might be considered a bar to an action at law, and it is therefore, in

accordance with the precedents in *Rogers v. Durant*, 106 U. S. 644, 1 Sup. Ct. 623, and the cases there cited, ordered that the decree be reversed, and the cause remanded, with directions to enter a decree dismissing the bill for want of jurisdiction, and without prejudice to an action at law.

BRADLEY, J. (dissenting.) I dissent from the judgment in this case so far as it directs the bill to be dismissed by the court below for want of equitable jurisdiction. The complainant had been induced to give up a contract for cattle made to him by the defendant, and to accept in lieu of it an assignment from the defendant of a contract which he had from a third person who was insolvent, and whose insolvency was not known by the complainant, but was known by the defendant, though he asserted that the third person was entirely responsible. The bill seeks to abrogate and set aside the assignment, and to restore to complainant his original contract, on account of the fraud and misrepresentation practiced upon him. Having been induced to pay \$15,000 in the transaction, and suffered a large amount of damages, he adds to the relief sought a prayer to have his damages assessed and decreed. This is the case made by the bill. I think it is clearly within the scope of equity jurisdiction, both on account of the fraud, and from the nature of the relief asked by the complainant; namely, the cancellation of an agreement, and the reinstatement of a contract which he had been fraudulently induced to cancel. If the bill had prayed nothing else, it seems to me clear that it would have presented a case for equity. A court of law could not give adequate relief. The existence of the assignment, and the cancellation of the first agreement, would embarrass the plaintiff in an action at law. It is different from the case of a lost note or bond. Fraud is charged, and documents exist which in equity ought not to exist. I think the complainant is entitled to have the fraudulent transaction wiped out, and to be restored to his original status.

TEFT v. STEWART et al.

(31 Mich. 367.)

Supreme Court of Michigan. Jan. Term, 1875.

Appeal from circuit court, Berrien county; in chancery.

Edward Bacon, for complainant. George S. Clapp and D. Darwin Hughes, for defendants.

GRAVES, C. J. The real grievance alleged by complainant is, that defendants combined to defraud him, and the substance of the transaction, and its incidents, which he relates at much length, may be stated from the bill as follows:

The defendant Stewart resided in St. Joseph, Berrien county, and owned a stock of goods, including a quantity of boots and shoes. This property was at Bangor, Van Buren county, and was valued by Stewart at some fourteen thousand dollars, and he wished to sell it. One Sherwin, residing in Illinois, owned a tract of about two hundred acres of land in Berrien county, which he desired to dispose of. Complainant was an acquaintance of Sherwin, and after some negotiations, it was agreed between the different parties, that Stewart should transfer to complainant the boots and shoes and one-half of the remainder of the stock, and that complainant, in consideration thereof, should procure Sherwin, upon certain terms agreed on between Sherwin and complainant, to convey the land to Stewart, but subject to an existing mortgage on it of one thousand dollars; that Carroll should buy the remaining half of the stock of Stewart, at two thousand five hundred dollars; that complainant in a few days received from Sherwin the deed going to Stewart, and called on the latter to deliver it, and get possession of the boots and shoes and his share of the other goods; whereupon Stewart stated that complainant would have no trouble about the goods, as Carroll was at Bangor, in charge of them and making an inventory; that complainant expressed himself as unwilling to deliver the deed unless Stewart would give him some writing which would assure to him his portion, as he had nothing to do with Carroll; that Stewart then stated his readiness to give such a paper, and one Devoe, a brother-in-law of complainant, being present, it was arranged that the writing should run to Devoe instead of complainant; although, as was understood, complainant was solely interested; that Stewart then made a bill of sale to Devoe of the boots and shoes, and half of the rest of the stock, and added an order to Carroll to make delivery; that complainant then gave up the deed to Stewart, who subsequently put it on record, and Devoe received the bill of sale and order, and proceeded to Bangor for the property; that complainant and Devoe then called on Carroll for it, when he refused to deliver any of it, or to allow any of it to be taken, and claimed

the whole in virtue of a purchase by himself of Stewart; that complainant succeeded in getting a part of the boots and shoes, but was precluded by Carroll from getting anything more; that complainant discovered, after this claim by Carroll, that subsequent to the conclusion of the terms of the bargain as before mentioned, but before the delivery of Sherwin's deed to Stewart, and the making of the bill of sale and order by Stewart to Devoe, Carroll and Stewart had fraudulently, and without complainant's knowledge, and with intent to cheat him, made an arrangement by which Stewart had given a bill of sale of the whole property to Carroll, and had taken back a mortgage on it for two thousand five hundred dollars; that complainant had neither knowledge nor notice of this transaction when the deed was delivered to Stewart, and the bill of sale and order received from him, and first became aware of it when Carroll refused to allow anything to be taken; that Stewart and Carroll refused to recognize any right of complainant in or to the property, and refused to allow him to have any of it; that Stewart and Carroll, or one of them, have converted a portion of it and appropriated the proceeds, and mixed with the rest of the old stock other goods since procured; that Devoe has assigned to complainant, but that Stewart and Carroll wholly deny his right.

The bill waived answer on oath, and asked no preliminary or final relief by injunction. Neither did it seek to get rid of the deed made to Stewart, or to obtain the land conveyed by Stewart to complainant.

The defendants answered separately, and denied the fraud charged, and most of the material matter tending to show the grievance alleged in the bill. Their account of the transaction was in substance, that complainant was not known to Stewart in the transaction as vendee, or as a party in any way to the trade concerning the goods, and that Carroll was sole vendee.

They further explicitly claimed that the bill did not make a case of equitable cognizance, and insisted that his remedy, if any, was at law.

Proofs having been taken, the court on final hearing decreed that the defendants, within forty days after the 11th of August, 1874, should pay to complainant, or his solicitor, two thousand nine hundred and fifty dollars, with interest from that date at seven per cent., together with complainant's costs, and that he should have execution therefor. The defendant Stewart thereupon appealed, whilst the defendant Carroll acquiesced in the decree.

It appears to me quite impossible, in the face of the objection taken and insisted on, to sustain this decree without sanctioning the right to come into equity in all cases to recover damages where the grievance asserted is a fraud committed by one upon another in a dealing in personal property.

If the right contended for and carried out by the decree can be maintained, no reason is perceived why, upon the same principle, a party claiming to have been cheated in a horse trade, or in a purchase of any chattels where the amount is sufficient, may not at his election proceed to sue in chancery for damages, and preclude an investigation before a jury.

The principles and course of practice of the court are, however, not in harmony with any such procedure.

It is admitted that the books commonly say that equity has jurisdiction in all cases of fraud, but every one knows that the proposition is not to be accepted literally. It must always be understood in connection with the general and specific remedial powers of the court. These confine it absolutely to civil suits. They also confine it, when the point is seasonably and properly made and insisted on, to transactions where, in consequence of the indicated state of facts, there appears to be ground for employing some mode of action, or some kind of aid or relief not practicable in a court of law, but allowable in equity.

In the present case no injunction was called for, and there was no ground for discovery, and no discovery was sought, as the bill waived an answer on oath.

No claim was set up to have the deed from Sherwin to Stewart set aside, or to have the land conveyed to complainant, and no case is made to warrant such a claim, since the bill contains nothing to show that third persons may not have acquired interests on the faith of Stewart's title.

Indeed, no circumstances are set forth to call specially for equitable intervention or for any assistance or mode of redress peculiar to chancery procedure.

The facts as given, and the case as shaped, point to just the action and relief peculiar to a court of law. They look to a single judgment for damages, and nothing else.

The case, then, was really of legal, and not in strict propriety of equitable cognizance.

The objection was timely made and urged,

and complainant was bound to regard it; and unless it is to be maintained that in all cases standing on the same principle, a complaining party is to be allowed by his election to try in chancery, and prevent an investigation by jury, the point made by appellant must be sustained, and in my judgment it should be. Story, Eq. Jur. §§ 72-74; 1 Spence, Eq. Jur. 691-700; Adams, Eq. Introduction, pp. 57, 58; Shepard v. Sanford, 3 Barb. Ch. 127; Bradley v. Bosley, 1 Barb. Ch. 125; Monk v. Harper, 3 Edw. Ch. 109; Pierpont v. Fowle, 2 Woodb. & M. 23, Fed. Cas. No. 11,152; Vose v. Philbrook, 3 Story, 335, Fed. Cas. No. 17,010; Insurance Co. v. Bailey, 13 Wall. 616; Hipp v. Babin, 19 How. 271; Parker v. Manufacturing Co., 2 Black, 545; Jones v. Newhall, 115 Mass. 244; Suter v. Matthews, Id. 253; Foley v. Hill, 2 H. L. Cas. 28; Crampton v. Varna R. Co., 7 Ch. App. 562, 3 Eng. R. 509; Hoare v. Bremridge, L. R. 14 Eq. 522, 3 Eng. R. 824, cited by Lord Hatherly with approbation in Ochsenein v. Papellier, 8 Ch. App. 695, 6 Eng. R. 576; Kemp v. Tucker, 8 Ch. App. 369, 5 Eng. R. 596; Warne v. Banking Co., 5 N. J. Eq. 410; Haythorn v. Margerem, 7 N. J. Eq. 324.

There would be more reason than there is for wishing to escape from the objection noticed, if complainant's version of the affair was placed by the proofs beyond fair controversy; but it is not. The evidence is extremely conflicting in regard to the true nature of the transaction, and there is room for arguing in favor of the theory advanced on each side. The case is, then, specifically suited for investigation by jury, where the witnesses can be seen and their trustworthiness be better understood.

I think that, so far as the defendant Stewart is concerned, who alone has appealed, the decree should be reversed, and the bill dismissed, with his costs of both courts, but that the dismissal should be without prejudice to any proceedings at law against him the complainant may think proper to take.

CAMPBELL and COOLEY, JJ., concurred. CHRISTIANCY, J., did not sit in this case.

HICKS v. STEVENS.

(11 N. E. 241, 121 Ill. 186.)

Supreme Court of Illinois. March 22, 1887.

Error to appellate court, First district.

Stevens, the plaintiff, was introduced to Hicks, the defendant, by Jones, who had the option for purchasing the rights in tube-closer, an invention of Hicks, for the state of New York. Stevens talked with Hicks about investing in it. Hicks asked \$50,000 for each of several states, including Pennsylvania and Ohio, and that the rights for each of these states were worth that sum, as were also the rights for the state of New York. After several interviews, Stevens told Jones he should have to give it up, as Hicks' prices were too high. Jones then asked him to take half of New York with him, and that they go in as partners on an option he had to purchase that state for \$20,000. Negotiations were had, and a number of interviews took place, at which representations were made by Hicks as to the capabilities and merits of his invention, and Hicks gave Stevens a circular containing a description of such capabilities. May 30, 1883, an agreement of purchase was executed by the parties, wherein Hicks sold to Jones and Stevens the territorial rights for the state of New York to make and sell the Hicks Tube-closer. Stevens executed his three notes for \$2,500 each, and delivered them to Hicks, and shortly thereafter paid him \$2,500 in cash. Jones did the same. Stevens paid Jones \$250, half of the amount he paid Hicks for the option. This sum Hicks gave Stevens credit for on one of his notes. Being unable to sell the tube-closer, October 16, 1883, Stevens and Jones gave Hicks a reassignment of their rights, and demanded their money and notes, which Hicks refused to give up. October 23d, Stevens notified Hicks in writing that he rescinded the contract, and demanded a return of the consideration. November 5th he filed his bill to rescind the contract, and recover the money and notes. The judge found that the patent was worthless; that Hicks' representations were material and false; and decreed that the contract be rescinded, and that the \$2,500 paid and the notes be returned, but did not decree the repayment of the \$250 paid by Stevens to Jones, and indorsed by Hicks on one of Stevens' notes.

On appeal the appellate court affirmed the decree, except that it added the \$250 paid by Stevens to Jones to the money decree.

H. W. Wolseley, for plaintiff in error. Utli-man Strong and Edward A. Dicker, for defendant in error.

SHOPE, J. There is no disputing as to the making of the contract of sale in this case, or as to its terms; the principal controversy being whether Hicks, before the sale, made material representations as to the utility and value of the invention sold, which were relied on by Stevens, and which were false.

The evidence satisfies us that, prior to the consummation of the sale, the parties had frequent interviews, in which Hicks represented to Stevens and Jones that the Hicks Tube-closer was a new and valuable invention, and would save both steam and fuel; that it was a good and profitable thing to sell, and would bring great profits. Hicks also gave Stevens a printed circular setting forth therein its capabilities and merits, which, among other things, stated that "the use of the tube-closer demonstrates to a positive certainty its ability to show by the steam-gauge, in the morning, before firing up, the same steam pressure that is felt at night after the day's work. It will even hold steam in the boiler from Saturday night until Monday morning. It is guaranteed to save fully 15 per cent. of fuel, or whatever fuel is usually required to raise steam in the morning. The Hicks tube-closer will do it. It will save its cost every month." Hicks also assured Stevens, in some of the interviews, that the right to make and sell the tube-closer in either of the states of Ohio or Pennsylvania was worth \$50,000; that the right to the state of New York was worth the same sum; and that the appliances could be manufactured for five dollars apiece, and would sell for \$30 each, and that there was not less than 2,000 boilers in each of the states named. Most of these representations, especially those in the circulars, are not denied. Hicks, by his answer and testimony, claims that all the representations he in fact made were true, but, whether true or false, they were not relied on by Stevens in making the purchase.

It is claimed there was an error in admitting in evidence the verbal statements made by Hicks, in regard to the tube-closer, prior to the written agreement for its sale. Such statements were not admitted for the purpose of changing the terms of the written contract, but to show that its execution was procured through fraudulent misrepresentations on the part of the vendor, and for that purpose it was certainly proper. But it is said there is no charge of fraud in the bill, and hence there was no foundation in the pleadings to justify the admission of the evidence. This is a misapprehension. Good pleading requires fraud to be charged specifically, and not in general terms. The facts relied on as constituting fraud should be set forth so as to apprise the opposite party what he is called on to meet. *Elston v. Blanchard*, 2 Scam. 420; *Davis v. Pickett*, 72 Ill. 483. The bill sets forth the specific representations made by Hicks which induced the complainant to make the purchase, and then charges "that the representations in the circular given by Hicks to the complainant and Jones, and the representation that by Hicks' experience, by the use of said invention, great saving of steam and fuel could be made, and other representations of like effect, whereby complainant and Jones were induced to purchase said rights, are and were utterly false, and said inven-

tion is worthless, and by its use no saving of any practical value can be made," and were known by Hicks to be worthless and of no value. The facts alleged in the bill, if true, constitute a fraud. If it were otherwise, Hicks should have interposed a demurrer or motion to dismiss for want of equity.

It is urged that Stevens did not rely on any of the representations made by Hicks, but acted upon his own judgment; and that, if he did rely upon them, he was guilty of such negligence, in failing to properly investigate, as to deprive him of any equitable relief. To entitle a party to relief, either legal or equitable, on the ground of a fraudulent misrepresentation, he must have relied upon the representation as true; for unless the representations are believed to be true, and acted upon, it can cause no legal injury. It is necessary that he should trust the representation, but it is not essential that the false representations should be the sole inducement to his entering into the contract. 2 Pom. Eq. Jur. § 890; 2 Pars. Cont. (5th Ed.) 773. The party acting upon a representation must, under the circumstances of the case, have been justified in relying upon it, in order to entitle him to relief. As stated in Pom. Eq. Jur. § 891: "It may be laid down as a general proposition that where the statements are of the first kind, [relating to substantial matters of fact, and not mere opinion,] and especially when they are concerning matters which, from their nature or situation, may be assumed to be within the knowledge or under the power of the party making the representation, the party to whom it is made has a right to rely on them; and, in the absence of any knowledge of his own, or of any facts which should arouse suspicion and cast doubt upon the truth of the statements, he is not bound to make inquiries and examination for himself. It does not, under such circumstances, lie in the mouth of the person asserting the fact to object or complain because the other took him at his word. If he claims that the other party was not misled, he is bound to show clearly that such party did know the real facts; the burden is on him of removing the presumption that such party relied and acted upon his statements." And in section 895 the same author says: "When a representation is made of facts which are, or may be assumed to be, within the knowledge of the party making it, the knowledge of the receiving party concerning the real facts, which shall prevent his relying on and being misled by it, must be clearly and conclusively established by the evidence."

When a party, ignorant of the real facts, and having no ready means of information, makes a purchase, or enters into a transaction as to the subject-matter of which representations have been made which are material, the law will presume, as a matter of fact, that he relied on them. *Redgrave v. Hurd*, 20 Ch. Div. 1; *Nicols' Case*, 3 De Gex & J. 387; *Fishback v. Miller*, 15 Nev.

428; *Benj. Sales* (4th Am. Ed.) 465, note b. If false representations are made as to matters of fact, and the means of knowledge are at hand, and equally available to both parties, and the purchaser, instead of resorting to them, trusts the vendor, the law, as a general rule, will not relieve him from his own want of ordinary prudence. *Cooley, Torts*, 487. This is the case where the property is tangible and is at hand, and subject to inspection, but a different rule obtains when the property is at a remote distance, or where the property right is intangible, and the falsity of the representations cannot be detected by inspection. In *Smith v. Richards*, 13 Pet. 26, it is held that when a sale is made of property, but at a remote distance, which the purchaser knows that the seller has never seen, but which he buys upon the representation of the seller, relying on its truth, such representation in effect must be deemed to amount to a warranty, or at least that the seller is bound to make it good. *Cooley, Torts*, 488; *Maggart v. Freeman*, 27 Ind. 531; *Lester v. Hahan*, 25 Ala. 445.

In the case at bar the purchaser was wholly unacquainted with the use, operation, and management of steam-boilers, and of the utility and value of the invention, and it is doubtful whether its capabilities, usefulness, and practical value could then have been determined, even by experts, without very considerable use and long experiment. At the date of this contract, the patent, though allowed, had not been issued, and but few of the tube-closers had been used or tested by others than the inventor. Stevens testifies that he had not seen the tube-closer in use or operation before he signed the contract; that he inquired of several to whom he was referred by Hicks, but could learn nothing as to their merits, except from one party, who said they had tried it, but had thrown it away. When Hicks was informed of this, he said he had met a similar case, and had fixed it up so that it worked all right, and that he would do the same with this one. Hicks was the inventor, and claimed to have made thorough tests of his invention, and presumably had a greater knowledge of its use, capabilities, utility, and value than any other person. From these facts, and his profession of friendship to Jones, and of his desire to put him into a good paying business, we think Stevens and Jones not only relied upon the representations, but had a right to rely on them in making their purchase. *Allin v. Millison*, 72 Ill. 201.

It is true that Hicks told Stevens and Jones not to take his word, but to satisfy themselves as to the merit of his invention before buying, but this cannot relieve him from liability for his misrepresentation made for the purpose of inducing the purchase. He must have known that but little, if any, information could be obtained by inquiry, from the fact the tube-closer had not been

brought into general use. The inquiries made proved fruitless, as he must have known they would. In 2 Pom. Eq. Jur. § 896, it is said: "If, therefore, the party accompanies or follows his misrepresentations by words of general caution, or by advice to the other that he consult his friends or professional advisers before concluding the agreement, he does not thereby counteract any effect upon the transaction which his untrue statement would otherwise produce;" citing *Reynel v. Sprye*, 1 De Gex, M & G. 709; *Smith v. Richards*, 13 Pet. 26. In *Eaton v. Winnie*, 20 Mich. 156, the court say: "When one assumes to have knowledge upon a subject of which another may well be ignorant, and knowingly makes false statements regarding it, upon which the other relies, to his injury, we do not think it lies with him to say that the party who took his word, and relied upon it, was guilty of negligence in so doing, so as to be precluded from recovering compensation for the injury which was inflicted upon him under cover of the falsehood;" citing *Railroad Co. v. Ogier*, 35 Pa. 72; *Gordon v. Railroad Co.*, 40 Barb. 550; *Ernst v. Railroad Co.*, 35 N. Y. 28. See, also, *Walsh v. Hall*, 66 N. C. 233; *Oswald v. McGehee*, 28 Miss. 340; *McClellan v. Scott*, 24 Wis. 81; *Starkweather v. Benjamin*, 32 Mich. 305; *Kendall v. Wilson*, 41 Vt. 567; *Pierce v. Wilson*, 34 Ala. 603.

To maintain an action at law for fraud and deceit arising from false representations of a material matter connected with a transaction, it is necessary to show that the party making it knew it to be false, or occupied such a position as that the law would impute to him a knowledge of the fact. A person cannot, it is believed, be free from fraud in a court of equity when he makes a positive representation of a material fact which he does not know to be true, or has good reason to believe is true, and which in point of fact is false. In *Allen v. Hart*, 72 Ill. 104, it is held that it is not indispensable to a right to rescind a contract that the party making the representation knew it to be false, provided it is material, and the other party had a right to rely upon it, and did so, and was deceived; and this is believed to be sustained by the weight of authority. In this case, Hicks' facilities were superior to those of any one else for knowing whether the representations made by him were true. If he did not in fact know them to be true, he should not have so asserted to Stevens, whom he knew had no means at hand by which to detect their falsity.

There was no error in admitting in evidence the printed circular of Hicks, showing the valuable qualities of his invention. The proof shows that he gave Stevens one of them during their negotiations, containing material and important representations of what his invention would accomplish as a means of saving steam and fuel; that it would save its cost in a month; while the

proof showed that practically it was of no value in the respect mentioned in the circular. These circulars were printed and distributed for the purpose of inducing others to purchase rights of him, and the statements therein may be regarded as of a more deliberate character than if made in a conversation. They were properly admitted. See 2 Pom. Eq. Jur. § 881, and also *Cooley, Torts*, 477.

As a general rule, representations as to the value of property sold, though exaggerated, do not constitute fraud, but it has some exceptions. As said in *Cooley, Torts* (page 484:) "There are some cases, however, in which even a false assertion of an opinion will amount to a fraud: the reason being that under the circumstances the other party has a right to rely upon it without bringing his own judgment to bear. Such is the case when one is purchasing goods, the value of which can only be known to experts, and is relying upon the vendor, who is a dealer in such goods, to give him accurate information concerning them. The same rule has been applied when a dealer in patent-rights sold certain territory to one who was ignorant of its value, representing it to be very valuable, when he knew it was not." See *Allen v. Hart*, 72 Ill. 104. The value of a patent-right for the purpose of sales depends largely upon the usefulness of the invention, and the demand for the article patented.

Objection is made to the admissibility of some other evidence. In chancery it will be presumed that the court considered and acted only upon such as may be proper. As the other evidence in the case is sufficient to sustain the decree of the superior court, it will not be necessary to consider the objection.

It is also claimed that the appellate court erred in directing that the \$250 paid by Stevens be added to the money decree. Before Stevens was introduced to Hicks, the latter made sale to Jones of an option to purchase the right to the state of New York at \$20,000, and Jones had paid him \$500 therefor. Jones was not bound to take the right for the state of New York, but, if he did not, he could not recover back the money he had paid for the option. Stevens bought of Jones a half interest in the option, for which he paid Jones \$250. To this transaction Hicks was not a party. If Jones and Stevens together failed to purchase the state right, Stevens could not have called on Hicks to refund to him the money he had paid to Jones; and, when the contract for the purchase of the right for the state of New York was rescinded, it was the same, in substance, as if it had never been made. Hicks was again placed where he was before his sale, and Jones and Stevens having failed to exercise their option, could not compel Hicks to return the price paid for it. The bill did not seek to set aside and rescind Jones' contract for the purchase of the option; nor did Hicks refuse to let either Jones, or Jones

and Stevens, purchase the right for the state of New York, but, on the contrary, was anxious to have them take it. This ruling of the appellate court is, we think, clearly erroneous.

The judgment of the appellate court will be reversed as to so much of its judgment as adds to the decree the said sum of \$250, and the decree of the superior court is affirmed. Reversed in part, and affirmed in part.

STIMSON v. HELPS et al.

(10 Pac. Rep. 290, 9 Colo. 33.)

Supreme Court of Colorado. Feb. 26, 1886.

Appeal from county court, Boulder county.

The complaint sets out that on the sixth day of October, 1881, William Stimson leased to the defendants in error the S. W. $\frac{1}{4}$ of section 21, in township 1, range 70 west, in said county, for the period of four years and six months, for the purpose of mining for coal, under the conditions of said lease; that they had no knowledge of the location of the boundary lines of said tract at the time of the leasing, and that they so informed Stimson, the defendant in the case; that they requested Stimson to go with them and show them the boundary lines; that the defendant, pretending to know the lines bounding said land, and their exact locality, went then and there with plaintiffs, and showed and pointed out to them what he said was the leased land, and the boundary lines thereof, especially the north and south lines thereof; that plaintiffs not then knowing the lines bounding said land, nor the exact location thereof, and relying upon what the defendant then and there pointed out to them as the leased land, and the lines thereof, then and there proceeded to work on the land pointed out, and sank shafts for mining coal thereon, and made sundry improvements thereon,—made buildings, laid tracks, etc.; that all the said work was done and labor performed and improvements made on the land pointed out by defendant to plaintiffs as the leased land, and that plaintiffs, relying upon the statements of defendant as aforesaid, and not knowing otherwise, believed they were performing the work, and making all the improvements on the land they had so leased, which they did by direction of the defendant; that while they were working on the said land Stimson was frequently present, and told the plaintiffs they were on his land, and received royalty from ore taken therefrom; that about April 10, 1882, they were notified to quit mining on said ground by the Marshall Coal Mining Company; that the land belonged to said company; that none of the said improvements were put on said leased land; and that they were compelled to quit work and mining thereon; that the improvements made by them were worth \$2,000; that Stimson falsely represented to them other and different lines than the true boundaries of said premises, and showed and pointed out to them other and different lands than the lands leased them, and thereby deceived them, and damaged them, in the sum of \$2,000. Issue joined, and trial to the court. Motion by defendant's counsel for judgment on the pleadings, and evidence overruled. Judgment for the plaintiffs in the sum of \$2,000, and costs.

Wright & Griffin, for appellant. G. Berkeley, for appellees.

ELBERT, J. The law holds a contracting party liable as for fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where the representations were false, and the other party, relying upon them, has been misled to his injury. Upon such representations so made the contracting party to whom they are made has a right to rely, nor is there any duty of investigation cast upon him. In such a case the law holds a party bound to know the truth of his representations. Bigelow, *Fraud*, 57, 60, 63, 67, 68, 87; Kerr, *Fraud & M.* 54 et seq.; 3 *Wait, Act. & Def.* 436. This is the law of this case, and, on the evidence, warranted the judgment of the court below.

The objection was made below, and is renewed here, that the complaint does not state sufficient facts to constitute a cause of action. Two points are made: (1) That the complaint does not allege that the defendant knew the representations to be false; (2) that it does not allege intent to defraud.

It is not necessary, in order to constitute a fraud, that the party who makes a false representation should know it to be false. He who makes a representation as of his own knowledge, not knowing whether it be true or false, and it is in fact untrue, is guilty of fraud as much as if he knew it to be untrue. In such a case he acts to his own knowledge falsely, and the law imputes a fraudulent intent. Kerr, *Fraud & M.* 54 et seq., and cases cited; Bigelow, *Fraud*, 63, 84, 453; 3 *Wait, Act. & Def.* 438 et seq.; 2 *Estee, Pr.* 394 et seq. "Fraud" is a term which the law applies to certain facts, and where, upon the facts, the law adjudges fraud, it is not essential that the complaint should, in terms, allege it. It is sufficient if the facts stated amount to a case of fraud. Kerr, *Fraud & M.* 366 et seq., and cases cited; 2 *Estee, Pl.* 423. The complaint in this case states a substantial cause of action, and is fully supported by the evidence.

The action of the county court in refusing to allow the appellant to appeal to the district court after he had given notice of an appeal to this court, and time had been given in which to perfect it, cannot be assigned as error on this record. If it was an error, it was error not before, but after, the final judgment from which this appeal is taken.

The judgment of the court below is affirmed.

[Note from 10 Pac. Rep. 292.]

A contract secured by false and fraudulent representations cannot be enforced. *Mills v. Collins*, 67 Iowa, 164, 25 N. W. Rep. 109.

A court of equity will decree a rescission of a contract obtained by the fraudulent representations or conduct of one of the parties thereto, on the complaint of the other, when it satisfactorily appears that the party seeking the rescission has been misled in regard to a ma-

terial matter by such representation or conduct, to his injury or prejudice. But when the facts are known to both parties, and each acts on his own judgment, the court will not rescind the contract because it may or does turn out that they, or either of them, were mistaken as to the legal effect of the facts, or the rights or obligations of the parties thereunder, and particularly when such mistake can in no way injuriously affect the right of the party complaining under the contract, or prevent him from obtaining and receiving all the benefit contemplated by it, and to which he is entitled under it. Seeley v. Reed, 25 Fed. Rep. 361.

When, by false representations or misrepresentations, a fraud has been committed, and by it the complainant has been injured, the general principles of equity jurisprudence afford a remedy. *Singer Manuf'g Co. v. Yarger*, 12 Fed. Rep. 487. See *Chandler v. Childs*, 42 Mich. 128, 3 N. W. Rep. 297; *Cavender v. Roberson*, 33 Kan. 626, 7 Pac. Rep. 152.

When no damage, present or prospective, can result from a fraud practiced, or false representations or misrepresentation made, a court of equity will not entertain a petition for relief. *Dunn v. Remington*, 9 Neb. 82, 2 N. W. Rep. 230.

A person is not at liberty to make positive assertions about facts material to a transaction unless he knows them to be true; and if a statement so made is in fact false, the assessor cannot relieve himself from the imputation of fraud by pleading ignorance, but must respond in damages to any one who has sustained loss by acting in reasonable reliance upon such assertion. *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486.

Equity will not relieve against a misrepresentation, unless it be of some material matter constituting some motive to the contract, something in regard to which reliance is placed by one party on the other, and by which he was actually misled, and not merely a matter of opinion, open to the inquiry and examination of both parties. *Buckner v. Street*, 15 Fed. Rep. 365.

False representations may be a ground for relief, though the person making them believes them true, if the person to whom they were made relied upon them, and was induced thereby to enter into the contract. *Seeberger v. Hobert*, 55 Iowa, 756, 8 N. W. Rep. 482.

Fraudulent representations or misrepresentations are not ground for relief, where they are immaterial, even though they be relied upon. *Hall v. Johnson*, 41 Mich. 286, 2 N. W. Rep. 55. See, to same effect, *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486; *Seeberger v. Hobert*, 55 Iowa, 756, 8 N. W. Rep. 482.

In fraudulent representation or misrepresentation the injured parties may obtain relief, even though they did not suppose every statement made to them literally true. *Heineman v. Steiger*, 54 Mich. 232, 19 N. W. Rep. 965.

Where the vendor honestly expresses an in-

correct opinion as to the amount, quality, and value of the goods he disposes of in a sale of his business and good-will thereof, and the purchaser sees or knows the property, or has an opportunity to know it, no action for false representations will lie. *Collins v. Jackson*, 54 Mich. 186, 19 N. W. Rep. 947.

Mere "dealing talk" in the sale of goods, unless accompanied by some artifice to deceive the purchaser or throw him off his guard, or some concealment of intrinsic defects not easily detected by ordinary care and diligence, does not amount to misrepresentation. *Reynolds v. Palmer*, 21 Fed. Rep. 433.

False statements made at the time of the sale by the vendor of chattels, with the fraudulent intent to induce the purchaser to accept an inferior article as a superior one, or to give an exorbitant and unjust price therefor, will render such purchase voidable; but such false statement must be of some matter affecting the character, quantity, quality, value, or title of such chattel. *Bank v. Yocum*, 11 Neb. 328, 9 N. W. Rep. 84.

A statement recklessly made, without knowledge of its truth, is a false statement knowingly made, within the settled rule. *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. Rep. 360.

Whether or not omission to communicate known facts will amount to fraudulent representation depends upon the circumstances of the particular case, and the relations of the parties. *Britton v. Brewster*, 2 Fed. Rep. 160.

Where a vendor conceals a material fact, which is substantially the consideration of the contract, and which is peculiarly within his knowledge, it is fraudulent misrepresentation. *Dowling v. Lawrence*, 58 Wis. 282, 16 N. W. Rep. 552.

Evidence of fraudulent representations must be clear and convincing. *Wickham v. Morehouse*, 16 Fed. Rep. 324.

Where a man sells a business, and the contract of sale contained a clause including all right to business done by certain agents, evidence that the seller was willing to engage in the same business with such agents is not proof of fraud in making the contract. *Taylor v. Saurman*, 110 Pa. St. 3, 1 Atl. Rep. 40.

It was recently held by the supreme court of Indiana, in the case of *Cook v. Churchman*, 104 Ind. 141, 3 N. E. Rep. 759, that where money is obtained under a contract, any fraudulent representations employed by a party thereto as a means of inducing the loan to be made, if otherwise proper, are not to be excluded because of the statute of frauds; also that where parol representations are made regarding the credit and ability of a third person, with the intent that such third person shall obtain money or credit thereon, the statute of fraud applies, and no action thereon can be maintained, although the party making the representations may have entered into a conspiracy with such person with the expectation of obtaining some incidental benefit for himself.

MITCHELL et al. v. McDUGALL.

(62 Ill. 498.)

Supreme Court of Illinois. Jan. Term, 1872.

Appeal from circuit court, McLean county; Thomas F. Tipton, Judge.

Bill in equity to rescind a conveyance of lands on the ground of misrepresentation and fraud.

R. E. Williams, for appellants. Benjamin & Weldon, for appellee.

BREESE, J. In *Lockridge v. Foster*, 4 Scam. 569, which was a bill in chancery praying, in the alternative, for the rescission of an executed contract for the sale of land, on the ground of fraudulent representations by the vendor, this court said, on the principles of equity and justice, a contract, to be obligatory, must be justly and fairly made. The contracting parties are bound to deal honestly, and act in good faith with each other. There should be a reciprocity of candor and fairness. Both should have equal knowledge concerning the subject-matter of the contract; especially ought all the facts and circumstances which are likely to influence their action to be made known. If they have not mutually this knowledge, nor the same means of obtaining it, it is then a duty incumbent on the one having the superior information to disclose it to the other. In making the disclosure, he is bound to act in good faith and with a strict regard to truth. If he makes false representations respecting material facts, or intentionally conceals or suppresses them, he acts fraudulently, and renders himself responsible for the consequences which may result. Fraud may consist as well in a *suppressio veri* as in a *suggestio falsi*, for, in either case, it may operate to the injury of the innocent party. A false representation by the vendor, which influences the conduct of the other party, and induces him to make the purchase, will vitiate and avoid the contract. And in making the representation, it is immaterial whether he knows it to be false or not, for the consequences are the same to the vendee. If he relies on the truth of the declaration, he is equally imposed on and injured, and ought to have redress from the one who has been the cause of the injury. So a suppression or concealment by the vendor of facts, which, if known to the vendee, would have the effect to prevent him from making the purchase, will, in equity, equally vitiate the contract. A court of equity will not enforce and carry into effect contracts thus unfairly and fraudulently made; and when the injured party invokes its aid in proper time, and the circumstances of the case will permit it to be done, the contract will be rescinded and the parties restored to their original rights.

The court refers to 1 Story, Eq. Jur. §§ 191-197, 204-207, and 2 Kent, Comm. 482, 490.

Sections 191-197, inclusive, treat of false suggestions, and fully support the doctrine of

the case cited, on that point. Sections 204 to 207, inclusive, treat of the doctrine of *suppressio veri*, a doctrine which, though true in morals, is not the doctrine recognized by courts of equity, except under certain circumstances.

The extreme doctrine of some courts is, that undue concealment of a fact resting in the knowledge of one contracting party, which, if known to the other, would have prevented the contract, will vitiate the contract.

The true definition is found in section 207, *supra*, where it is said undue concealment which amounts to a fraud in the sense of a court of equity, and for which it will grant relief, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other, and which the latter has a right, not merely in *foro conscientiae*, but *juris et de jure*, to know.

Under such circumstances, the concealment of an important fact would be improper and unjust; it would be an undue concealment on account of the fiduciary relation existing; but where two parties, in the absence of any such relation, are treating for an estate, and the purchaser knows, from surface indications, or otherwise, by actual boring, there is a valuable mine upon the land, the purchaser is not bound to disclose that fact to the owner, for the means of information on the subject were as accessible to the owner of the land as to the purchaser.

The rule stated by Chancellor Kent, at page 482, referred to in the opinion in 4 Scam., *supra*, is that each party is bound to communicate to the other his knowledge of the material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation.

This, we admit, is a rule of moral obligation, but not enforced in the courts. It is by them qualified, as we have stated above, that the party in possession of the facts must be under some special obligation, by confidence reposed, or otherwise, to communicate them truly and fairly, and this is the doctrine of this court in the cases of *Fish v. Cleland*, 33 Ill. 243, and *Cleland v. Fish*, 43 Ill. 282, referred to by appellee's counsel.

It is qualified by *Beach v. Sheldon*, 14 Barb. 72; *Laidlaw v. Organ*, 2 Whart. 178; *Knitzing v. McElrath*, 5 Pa. St. 467.

In *Fox v. Mackeath*, 2 Brown, Ch. 400, *Thurlow*, Lord Chancellor, in delivering the opinion in the case where undue concealment of an important fact was charged, said: "The doubt I have is, whether this case affords facts from which principles arise to set aside this transaction, which will not, by necessary application, draw other cases into hazard. And, without insisting upon technical morality, I don't agree with those who say, that where an advantage has been taken in a contract, which a man of delicacy would not have taken, it must be set aside. *Sup-*

pose, for instance, that A, knowing there to be a mine in the estate of B, of which he knew B was ignorant, should enter into a contract to purchase the estate of B for the price of the estate without considering the mine, could the court set it aside? Why not, since B was not apprized of the mine and A was? Because B, as the buyer, was not obliged, from the nature of the contract, to make the discovery. It is, therefore, essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but it must arise from some obligation in the party to make the discovery." Not, as Justice Story says (1 Story, Eq. Jur. § 148), from an obligation in point of morals only, but of legal duty. In such a case he says, a court of equity will not correct the contract merely because a man of nice morals and honor would not have entered into it. Lord Eldon, in *Turner v. Harvey*, Jac. 178, approved the doctrine of Lord Thurlow and the illustration of the mine, and so does Justice Story in 1 Eq. Jur. § 207.

But we are dealing in this case with the doctrine of *suggestio falsi* and not of *suppressio veri*, as the charge in the bill is, false representations made by appellee of the value of the land and lots in Missouri.

There is much testimony in the record, from which we derive the knowledge that appellee represented to appellant, who had never been in Missouri (appellee having resided there before coming to Bloomington), that the land was good land, and was the land occupied by one Judge Smith, before the Rebellion, and improved by him. This land was the south part of section eighteen and the north part of section twenty-four, in all one hundred and sixty acres, and was worth, probably, fifteen dollars per acre. The land conveyed was in section fifteen, stony, poorly timbered, and comparatively worthless. The house in Montevallo, instead of being a desirable residence, and worth one thousand dollars, as represented by appellee, proved to be a mere shell, one story high, occupied by hogs and goats, bringing not eight dollars a month rent "right along," as represented, but unfit for human abode, and worth, with the "lot and a half," not over two hundred and fifty dollars, and, as we should judge, not at all saleable. So soon as appellant, by personal inspection on a visit to the locality, discovered the facts, he came to the conclusion appellee had imposed upon him, and at once, on his return to Bloomington, demanded a rescission of the contract and a reconveyance of the Bloomington property, and tendering deeds for the Missouri property, together with appellee's note for three hundred dollars, part of the purchase money. This being refused by appellee, this bill was filed by appellants, and pending the bill the house was consumed by fire, on which, however, appellee had effected an insurance of three thousand dollars.

The court dismissed the bill and complainants appealed.

There is no question of law made except

the one we have discussed, and there is some conflict in the testimony, but a careful examination of it, as we find it in the record, satisfies us appellant has not received from appellee what he contracted for, and which contract he made wholly on the representations of appellee, which have proved to be untrue.

It is said by appellee, there was a mistake in conveying the land as in section fifteen—that he supposed the "Smith farm" was on that section, but is willing and offers to convey the land in fact occupied by Smith in sections eighteen and twenty-four, and he insists, that a mistake being made is no ground for the rescission of the contract, as the court can and will correct the mistake. But this consideration should not prevail in this case, because appellee represented the land he was selling to be worth twenty dollars per acre, which he had purchased but a short time previously for four dollars per acre, and he asserted to appellant that such land was selling for twenty dollars an acre in that neighborhood. This he based upon a letter said to have been received by him from one Selsor, a land agent in that county. Selsor in his deposition says, the lands he referred to in that letter were among the best improved farms in that portion of Cedar and Vernon counties; he says he had no idea of fixing the price of raw lands by these figures, and did not suppose any one would be so foolish as to attempt it.

That letter, which appellee says was burnt up in the building when it was destroyed, was to this effect: "We have sold within the last two weeks ten thousand dollars worth of land, from fifteen to twenty-five dollars an acre." This was so construed by appellee to appellant as to induce the latter to believe they were lands in the neighborhood of those he was about to purchase.

The town property was of small value. Now, under such circumstances, it would not be just to allow appellee to correct the mistake in the land and claim the contract as made, but it would be just, as a mistake was made by appellee in the deed, to permit the injured party to avail of it, and, through that, repudiate the entire contract. In a case where false representations have been made, it is the province of a court of equity, if applied to for that purpose, to rescind the contract, putting the parties in statu quo.

It is claimed by appellee that the Bloomington property was taken at a very high valuation, and that he ought to be permitted to show that appellant has received from him its full value.

This we do not consider as the question before us. The question is, did appellant get what he bargained for? That he did not we think the evidence satisfactorily shows.

Appellant's right to the insurance money will hardly be questioned, as the building upon the lot when sold, is now represented by that money, and after deducting the premium paid by appellee and the cost of the addition

to the building which he erected, and was covered by the insurance, we are of opinion the company should pay the balance to appellant.

On the point that Mrs. Mitchell, appellant's wife, was improperly rejected as a witness, we think the court ruled correctly; the case was in no correct legal sense her own case.

The views here expressed reverse the decree of the circuit court dismissing the bill. The cause is remanded for further proceedings consistent with this opinion.

Decree reversed.

SCOTT, J., did not hear the argument in this case, and gave no opinion.

**SOUTHERN DEVELOPMENT CO. OF
NEVADA v. SILVA.**

(8 Sup. Ct. 881, 125 U. S. 247.)

Supreme Court of the United States. March 19, 1888.

Appeal from the circuit court of the United States for the Northern District of California.

Wm. M. Stewart, A. T. Britton, and A. B. Browne, for appellant. J. P. Langhorne and John H. Miller, for appellee.

LAMAR, J. This is a bill in equity to rescind a contract of purchase of a silver mine on the ground of fraudulent representations, and to recover the consideration paid. The suit was commenced originally in the superior court of Inyo county, Cal., on the 8th of May, 1884; but on account of the diverse citizenship of the parties, the plaintiff being a corporation organized under the laws of Nevada, and the defendant a citizen of California, it was removed into the United States circuit court. Demurrers to the original bill and to an amended bill having been sustained, the present "second amended" bill of complaint was filed. Answer was filed by defendant, replication by complainant, and issue was joined. Testimony was taken, and the case was heard, resulting in a decree dismissing the bill on the 14th of March, 1887. It appears from the record that on the 15th of March, 1884, the appellant (who was the complainant below) purchased from the defendant a mining claim, known as the "Sterling Mine," together with other mining property, all situated in Inyo county, Cal., paying him therefor the sum of \$10,000. On the 8th of May, 1884, the original bill of complaint was filed, charging, in substance, that complainant was induced to purchase said mine and mining property solely upon the representations made by Silva as to its condition, extent, and value; that such representations were made to H. M. Yerington, the president of said complainant company, and to one Forman, a mining expert in his employ, in January, 1884, when an examination of said mine was made by them; that said representations were false and fraudulent, and were well known to the defendant at the time to be such; and that said representations were, in substance and in a somewhat different order, as follows: (1) That there were 2,000 tons of ore in the mine; (2) that the bottom of what is called the "Ore Chamber" was solid ore, as good as the ore exposed on the sides of the chamber; (3) that there were not less than 500 tons of ore in and about the said ore chamber; (4) that the mine was worth \$15,000; and (5) that, after going through the mine, the defendant represented to said Yerington and Forman that he had shown them all the work which had been done in or about the

mine that would throw any light upon the quantity of ore therein.

The answer of the defendant is direct, positive, and unequivocal in its denials of the allegations of the bill; and, as an answer on oath is not waived, unless these denials are disproved by evidence of greater weight than the testimony of one witness, or by that of one witness with corroborating circumstances, the complainant will not be entitled to a decree; and this effect of the defendant's answer is not weakened by the fact that the equity of the complainant's bill is the allegation of fraud. *Vigel v. Hopp*, 104 U. S. 441; 2 Story, Eq. Jur. § 1528; 1 Daniell, Ch. Prac. 844. The burden of proof is on the complainant; and unless he brings evidence sufficient to overcome the natural presumption of fair dealing and honesty, a court of equity will not be justified in setting aside a contract on the ground of fraudulent representations. In order to establish a charge of this character the complainant must show, by clear and decisive proof—First, that the defendant has made a representation in regard to a material fact; secondly, that such representation is false; thirdly, that such representation was not actually believed by the defendant, on reasonable grounds, to be true; fourthly, that it was made with intent that it should be acted on; fifthly, that it was acted on by complainant to his damage; and, sixthly, that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true. The first of the foregoing requisites excludes such statements as consist merely in an expression of opinion or judgment, honestly entertained; and, again, (excepting in peculiar cases,) it excludes statements by the owner and vendor of property in respect to its value.

The evidence in the case shows that in the development of this mine a tunnel, called the "Sterling Tunnel," had first been dug. At a distance of about 140 feet along the line of this tunnel, from its mouth, there are branches running easterly and westerly. About 60 feet from the main tunnel, in the eastern branch, winze No. 1 starts down. About 38 feet below the level of the tunnel, a level, known as the "38-feet level," starts off from this winze, and at the bottom of the winze, a distance of about 82 feet vertical below the main tunnel, there is another level, known as "82-feet level." In the easterly branch of the tunnel, about 30 feet from winze No. 1, there is another winze starting downward, inclining to the southeast as it goes down. This winze is numbered 2, and is connected with the 38-feet and the 82-feet levels. Intermediate between these levels is another level, known as the "55-feet level," which opens out to the eastward of winze No. 2 into a chamber about 15 feet long and about 8 feet wide. In the south-east corner of this chamber was a little hole or shaft,

extending downward a few feet only. In sinking winze No. 2, Silva struck an ore body at a point opposite the 38-foot level. It was irregular in shape, dipping at an angle of about 45 degrees. Commencing at a point, comparatively speaking, it increased gradually as it descended, and was in form somewhat like a pyramid. At its base it measured 4 or 5 feet across, and it was about nine feet long. The surface of this inclined pyramid formed the floor or bottom of the chamber. There was, however, a small space between the base and opposite foot-wall, which is called the "bottom" of the chamber by complainant's witnesses, and it is the "bottom" spoken of in the bill. The ore comprising this pyramid was carbonate, and, being friable, had slacked down over the face of the pyramid to the bottom, partially covering it, and partially filling up the little hole or shaft in the south-east corner.

As to the first alleged representation, as classified above,—viz., that there were 2,000 tons of ore in sight in the mine, and that Yerington relied upon such statement when he made the purchase,—the proof utterly fails to establish either that Silva made the statement, as a statement of fact, or that Yerington relied upon such statement, even had it been made. Silva, both in his answer and in his testimony, denies ever having made the statement, and the testimony of Yerington himself is to the effect that Silva's statement was qualified by the phrase "in his judgment." This, then, is shown to have been nothing more than an expression of opinion on the part of Silva as to the quantity of ore in sight in the mine. But, even if Silva had made the statement imputed to him in the bill, there is abundant evidence to show that Yerington did not rely upon it in the purchase of the mine. Yerington's own evidence, on this point, is against him. He testifies that he did not believe that there were more than 1,000 tons of ore in the mine, and that Forman agreed with him on that point. And he further testifies that, valuing this ore at 32 ounces of ore and 45 per cent. of lead per ton, (which it appears was its approximate value, as determined by several assays,) and calculating that there would be 1,000 tons of ore there, the mine would be worth \$10,000,—the sum he actually gave for it. This lacks much of coming up to the rule that the complainant must have been deceived, and deceived by the person of whom he complains. *Atwood v. Small*, 6 Clark & F. 232; *Pasley v. Freeman*, 3 Term R. 57. Besides, the quantity of ore "in sight" in a mine, as that term is understood among the miners, is at best a mere matter of opinion. It cannot be calculated with mathematical, or even with approximate, certainty. The opinions of expert miners, on a question of this kind, might reasonably differ quite materially. In the case of *Tuck v. Downing*, 76 Ill. 71, 94, the court says: "No man, however scientific he may be,

could certainly state how a mine, with the most flattering outcrop or blow-out, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. 'The sight' determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of the thing, utterly speculative, and every one knows the business is of the most fluctuating and hazardous character. How many mines have not sustained the hopes created by their outcrop!" We approve the position of the court below, that "Yerington and his expert, Forman, were as competent to judge how much ore there was 'in sight' as Silva was. They were novices in matters of that kind. This misrepresentation, if such it be, does not contain either the first, fourth, or fifth element stated by Pomeroy as essential elements in a fraudulent misrepresentation."

As stated above, the substance of the allegation of the bill is that Silva represented that the bottom of this ore chamber, which was covered with loose ore slacked down from the pyramid, was composed of ore as good as that exposed on the sides of the chamber. Silva, in his answer, expressly denies ever having made such statement. Forman testifies that with a little prospecting pick he had with him he raked through the dirt and loose ore that had slacked down, to see if it would reach the bottom of the ore chamber, but that it would not. He further says: "I asked Silva how the bottom was; if he had sunk below there. He said, 'No.' I said, 'How is the bottom. You, as a miner, know it is a suspicious thing to see a bottom covered up, or anything of that kind.' He said the bottom was as good or better than any ore which we saw in the chamber." Yerington at first testifies that Silva, in reply to a question by Forman, stated that this floor was solid ore; but he says that he does not think any comparison was made between that ore and the ore in the sides of the chamber, as narrated by Forman. On the next day, however, Yerington having, as he says, refreshed his memory,—“and I [he] had the means of doing it,”—was positive that the conversation between Silva and Forman at that time was as Forman afterwards stated it. Silva, in addition to his positive denial in his answer, testifies that "there never was a word said about that. They asked me this: 'What I thought of the ore body?' and I said 'I thought it would be extensive.' I thought so at the time, and I think so yet." The witness Eddy, who was present all the time in the ore chamber, except when he went to the 38-foot level to get a pick, does not know anything about a conversation such as Yerington and Forman narrate. On this point, then, the testimony of Silva is directly to the contrary

of that of Yerington and Forman. Certain other material facts in the case seem to indicate that there is just as strong probability that Silva's statements in this matter are true as that those of Yerington and Forman are true. In the bill Yerington alleged, under oath, that Silva had discovered the fact that the bottom of the ore chamber was not composed of ore, and had afterwards covered the bottom with ore, vein-rock, and matter,—in other words, had "salted" the mine. There is no evidence in the record to prove this, or tending to prove it; on the contrary, the evidence of Yerington himself, and of the other witnesses who were examined on that point, is all to the effect that the ore covering the floor of the chamber had slacked down from natural causes in fine particles like wheat. Nor is there such evidence to show that Silva knew the character of this floor, or of the extent of the ore vein, or deposit, (as it afterwards turned out to be,) as would justify the interposition of a court of equity to set aside the contract on the ground of fraudulent representations. He had come onto the ore in excavating from the top. The sides of the ore chamber contained some ore of a good quality, and he had never demonstrated the extent and amount of ore in the pyramidal wedge in the side of the chamber. It is shown by the evidence of Yerington himself that, in the side of a drift running westerly from the ore chamber, there was ore which appeared to be continuous with the body of ore in the chamber; so that the statement Silva said he made,—viz., that he thought the ore body would be extensive,—at least, appears reasonable. Upon all the facts and circumstances apparent of record, he might have made the statement he says he made, and believed he was telling the truth. For there is also some evidence to the effect that Silva had commenced to run a drift from the bottom of winze No. 1, for the purpose of striking and cutting the supposed downward extension of the ore body in the chamber; and this, before the examination of the mine by Yerington and Forman. After the sale of the mine, Coffin, the superintendent for the complainant company, when he commenced work in the mine, started in where Silva had left off in this drift, and carried it immediately beneath the ore chamber, entering the chamber by an up-raise. Then it was that the discovery was made that the ore body, instead of being a continuous ledge or lead, was merely a deposit. Furthermore, the testimony of Yerington and Forman, as regards the little hole or shaft in the south-east corner of the chamber, is directly opposed by the testimony of Silva and Eddy. Both Yerington and Forman testify that this little shaft was completely filled up with dirt and loose ore; while Silva and Eddy both testify that it was not so filled up, but that both Yerington and Forman stood in that shaft, and took samples of ore from it. It is thus seen

that the evidence on this material point does not clearly establish the fraudulent representations of Silva as claimed by the complainant; but that, on the contrary, the material facts and circumstances as disclosed by the record are entirely compatible with the theory that Silva did not make the representations charged against him, or, at most, that he merely gave expression to an opinion as to the extent of the ore body, erroneous though it proved to be. This would not constitute fraud. In the language of the court below: "This testimony was taken in June, 1866, about two and a half years after the conversations took place. They were present at the time, examining the mine, and engaged in conversation for an hour or more. These discrepancies in matters of detail during a long conversation, related by different parties, viewing the subject from different stand-points after the lapse of so long a period of time, are no more than might reasonably be expected, even in honest witnesses. There is no occasion to impute any intention to testify falsely to either. * * * Parties are extremely liable to misunderstand each other, and, in looking back upon the transaction in the light of subsequent developments, are prone to take the view most advantageous to themselves."

As to the third alleged representation,—to wit, that there were not less than 500 tons of ore in and about that ore chamber,—Silva, both in his answer and in his testimony, denies that he ever told Yerington and Forman, or anybody else, that there were 500 tons of ore there, or that there was any amount fixed or agreed upon by them as to the quantity of ore there; while the testimony of both Yerington and Forman is to the effect that Silva said, in his opinion, or in his judgment, there were 500 tons of ore in the chamber. So that, taking the strongest testimony produced on the part of complainant upon this point, it simply amounts to an expression of opinion on the part of Silva as to the amount of the ore in the chamber, and not a statement of fact. It therefore does not constitute fraud.

It is equally true that any statements that may have been made by Silva with reference to the value of the mine, cannot, under the circumstances of this case, be considered an act of fraud on his part sufficient to warrant a court of equity in setting aside the contract herein. Yerington testifies that Silva said he had been asking \$15,000 for the mine, but that he would take \$12,500; while Forman says he does not recollect that Silva made any statement as to the value of the mine, but that he heard Silva say he thought it was worth \$15,000. Such statements are not fraudulent in law, but are considered merely as trade talk, and mere matters of opinion, which is allowable. *Gordon v. Butler*, 105 U. S. 553; *Mooney v. Miller*, 102 Mass. 217. Moreover, it is clear, beyond question, that Yerington did not purchase the mine upon

Silva's representations as to its value, as we shall hereafter see.

This disposes of all the alleged fraudulent representations, as arranged above, except the last, adversely to the complainant; and it is to this one that attention will now be directed. This charge is, substantially, that Silva represented to Yerington and Forman, when they visited the mine in January, 1884, and had gone through it, that he had shown them all the work which had been done in and about the mine that would throw any light on the quantity of ore therein. This representation is alleged to have been false and fraudulent, and well known by Silva to be such, because at a cut a short distance from the mouth of the main tunnel, at a point known as the "point of location," a little hole or shaft had been sunk which had been filled up, and was not observable at the time of the examination of the mine in January, 1884, and also because there had been a number of drill-holes made in the sides of the ore chamber, and afterwards filled up before the examination in January, 1884, so that they were not observable at that time; which holes clearly developed the fact that the ore about the chamber was nothing more than a shell, instead of a continuous body, as it appeared to the observer. The existence of the plugged-up drill-holes in the sides of the ore chamber is the worst feature of the case against Silva. They could not have been made by a former proprietor of the mine, as is slightly claimed in his behalf; for, as has been already shown in this opinion, Silva himself, or at least persons in his employ, had excavated that chamber after he had purchased it from one Edwards, in 1876. And certain it is that the drill-holes were found plugged up within a short time after he had sold the mine to the complainant company, March 15, 1884. The question is, did Silva know of their existence at the time he sold the mine, and, having such knowledge, did he falsely represent to the complainant that he knew nothing of them, thereby inducing complainant to act upon such representations? Upon this question the evidence is somewhat conflicting. Yerington testifies that after going through the mine, he asked Silva if he had shown him the whole of the mine, and he replied that he had. And Forman testifies that Silva, in reply to a question from him, said that he had shown him all the work that had been done in and about the mine that would throw any light upon the quantity of ore in the mine, or the extent of the ledge or deposit. Silva admits that, in reply to a question by Yerington, he told him that he had shown him all the work that had been done in and about the mine, either by himself or under his direction. So that the question is narrowed down to simply this: Were said drill-holes in existence at the time Silva made such statement? If so, had they been made by him, or under his direction, or did he know of their existence? In his sworn answer Silva ex-

pressly "denies that he drilled any such hole or holes through the ore into the country rock or otherwise, or thereby or at all discovered the extent of said ore, or that he filled up said drill-holes, or concealed them from view, or kept them secret from complainant," etc.; and in his testimony he also denies having any knowledge of their existence. He says that he drilled no holes in the mine except what he had to do as a miner, and that he concealed nothing from Yerington when he showed him the mine. And again he says: "I showed Mr. Yerington all the work that was done in the mine that I knew anything of." There is no direct evidence going to show who drilled the holes; and there is nothing in the entire record to connect Silva with them, except the fact that he was the owner of the mine, and was in possession of it at a time when it is most likely they were drilled. But this circumstance alone should not outweigh the positive denial of Silva in his answer, and also in his equally positive denial in his testimony, of his knowledge of the existence of said drilled holes. The law raises no presumption of knowledge of falsity from the single fact per se that the representation was false. There must be something further to establish the defendant's knowledge. *Barnett v. Stanton*, 2 Ala. 181; *McDonald v. Trafton*, 15 Me. 225. This rule is fortified by the consideration that, had he known of the limited quantity of ore in and about the "ore chamber," Silva would hardly have gone to the expense and labor of starting a drift from the bottom of winze No. 1, and constructing it for a certain distance, before the sale of the mine, for the purpose of reaching the supposed downward extension of the ore in and about that chamber. Knowing that the ore body terminated within a few inches of the surface of the chamber, and then, in the face of that knowledge, actually constructing a drift on the 82-foot level, at enormous expense, for the purpose of getting under that limited quantity of ore, would not appear a reasonable thing to do by any one, especially by such an experienced and practical miner as Silva is admitted to have been. The testimony, therefore, and all the other facts and circumstances of record, do not substantiate complainant's theory of the case on this point; in other words, there is not a satisfactory case of fraudulent representations on this point made out,—not such a case as would justify the interposition of a court of equity to set aside the contract under consideration on the ground of fraudulent representations. As regards the little hole or shaft that had been sunk at the "point of location," and afterwards filled up, so that it was not observable at the time of Yerington's visit in January, 1884, there is absolutely no testimony at all to show that Silva knew anything about its existence. He had done no work at that place, or very little at most, and was using the cut there as a sort of kitchen. The sides of the cut indicated that there was

a ledge of ore there. It is admitted that Forman asked Silva why he did not "go down" on that ore, and that he replied that he considered the tunnel the best place to mine. Silva denies, both in his answer and in his testimony that he ever knew that a shaft had been sunk at the point of location, and no one is found who can testify that he did know anything about it; on the contrary, the former owner of the mine, one Edwards, testifies that he himself dug that shaft, and filled it up, prior to the time Silva purchased it, and that to his knowledge Silva did not know anything about that shaft.

It is essential that the defendant's representations should have been acted on by complainant, to his injury. Where the purchaser undertakes to make investigations of his own, and the vendor does nothing to prevent his investigation from being as full as he chooses to make it, the purchaser cannot afterwards allege that the vendor made misrepresentations. *Atwood v. Small*, supra; *Jennings v. Broughton*, 5 De Gex, M. & G. 126; *Tuck v. Downing*, supra. The evidence abundantly shows that Yerington had been willing to

give \$10,000 for the mine prior to the time he visited it, and made his examination, in January, 1884. He had made inquiries of various persons for months previous to that visit. Several experts in his employ had visited the mine, had taken samples of ore from it; and it must have been from reports thus received that Yerington had made up his mind as to what the mine was worth. From the letters of an agent (Woods) to Eddy, the testimony of the witness Boland, the testimony of the witness Anthony, Eddy's testimony, and from the testimony of Silva himself, there can be no doubt that Yerington had offered \$10,000 for the mine several months before he had ever seen it; thus showing that his examination of the mine in January, 1884, merely went to corroborate the reports that he had received of it from his experts, Forman, Bliss, et al., and that it was upon such reports, and his own judgment after an examination of the mine, that he made the purchase of it.

From all which it is clear to this court that the complainant has not proven his case, and the decree below is affirmed.

PREWETT v. TRIMBLE.

(17 S. W. 356, 92 Ky. 176.)

Court of Appeals of Kentucky. Oct. 24. 1891.

Appeal from circuit court, Montgomery county.

"To be officially reported."

Action by John T. Prewett, trustee, etc., against James G. Trimble for rescission of a contract for the purchase of bank stock. Judgment for defendant. Plaintiff appeals. Reversed.

Ed. C. O'Rear and Z. T. Young, for appellant. Wood & Day, for appellee.

LEWIS, J. January 19, 1888, appellee, then president of the Exchange Bank of Kentucky at Mt. Sterling, sold and transferred to appellant 20 shares of stock in that bank at the price of \$120 per share, and 21 shares in the Mt. Sterling National Bank at \$120 per share for 20 shares, and \$118 for the remaining one, payment for which was then made partly in notes assigned to and received by appellee at their face value, and partly in money. May 14, 1888, appellant brought this action for rescission of the contract and restoration of the notes, or, if collected, payment of amount thereof, and the money received by appellee, and interest on the whole; it being alleged and not denied that a tender and offer to retransfer the stock and demand of repayment of the purchase price had been made by appellant and refused by appellee. It appears that December 31, 1887, a statement of resources and liabilities of the Exchange Bank of Kentucky, signed by the cashier, was published in newspapers of Mt. Sterling, and by printed cards, which were generally distributed; there being at foot of the statement an announcement that the bank had declared its usual semi-annual 4 per cent. dividend. There was printed on the same card a statement, signed by the president and directors, in which the cashier's statement was referred to as evidence of the prosperous condition and increasing business of the bank. According to that statement, the resources of the bank, having a capital of \$100,000, amounted to \$329,380.42, of which \$245,790 were loans and discounts and \$13,338.68 overdrafts, while the undivided profits were \$15,851.41. But no mention was made of any insolvent debts being part of the aggregate of either loans or overdrafts. In respect to the statement it is alleged and appears that of the total amount of loans and discounts more than \$30,000 consisted of stale and worthless demands, and of overdrafts at least \$7,000 were likewise worthless, the drawers being insolvent; and that, after charging off such worthless demands, there would be left in the bank no undivided profits at all. It is further alleged and proved that the books of the bank showed at date of the statement

about \$7,600 more due to depositors, and, consequently, that much more liabilities than disclosed by it.

The evidence places beyond question that when the statement was published and circulated the real value of stock in the Exchange Bank of Kentucky, calculated and determined by the actual condition of its resources and liabilities, was not over \$70 per share. It is also satisfactorily shown that when he made the purchase appellant did not know, nor have any other means of knowing, the true condition of that bank's affairs than such information as was afforded by the cashier's statement, and that given directly to him by appellee, and that he believed and acted on that information. There is discrepancy in the testimony of the parties as to what occurred between them when the contract was made; but that of another person, present at the time, is substantially that appellee said, if not directly to, in hearing of, appellant, that the notes held by the Exchange Bank of Kentucky were worth dollar for dollar, and, being asked about value of the stock, took in his hands the card upon which was printed the cashier's statement, one of which he had on a previous occasion in person given to appellant, and, referring to it, explained that, the capital being \$100,000, the surplus of \$15,000 made the stock worth \$115 per share and more as an investment, and that it was going at \$120. But, independent of what occurred between the parties at the time of the contract, it is manifest the cashier's statement was published and circulated by authority of the president and directors for the purpose and in expectation of it being accepted, and treated by the public as in all respects true and reliable; thereby not only increasing business of the bank, but keeping up or enhancing market value of the stock, in which each of them had a personal interest; and, as their own accompanying statement was obviously intended to be, it should be regarded a deliberate affirmation of the truth of that of the cashier, and as equivalent to a report of the affairs of the bank, made directly by them; and, if so, upon both principle and authority no other relation or privity between the parties to this action need be shown than the act of appellee as president indorsing and authorizing publication and circulation of the cashier's statement, and the resulting injury to appellant, who was within the class designed to be influenced by the statement. Cook, Stocks, §§ 353, 354, and cases cited. Whether they published and gave currency to the statement, knowing it to be materially untrue, and for the fraudulent purpose of deceiving the public as charged in the petition, we need not inquire; for it is not, in order to maintain this action, indispensable that appellee be shown to have known the statement was false, for it is elementary doctrine that a false representation may, in contemplation of law, be made with

knowledge of its falsity,—that is, made scienter,—so as to afford a right of action in damages, and, a fortiori, ground for equitable proceedings, (1) without actual knowledge of either its truth or falsity, as when the party has affirmed his knowledge by a positive statement which implies knowledge; (2) when made under circumstances in which the party ought to have known, if he did not know, of its falsity, as when, having “special means of knowledge,” it is his duty to know. Bigelow, *Frauds*, pp. 509, 516. In *Story, Eq. Jur.* § 193, it is laid down that affirmation of a material fact that “one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false; and even if the party innocently misrepresents a material fact by mistake, it is equally conclusive, for it operates as surprise and imposition on the other.” Representations by a party having means of knowledge in regard to a matter, not possessed generally, are apt to be believed and acted on, especially if he is in a situation where he owes a duty to the public to deal honestly and intelligently. Therefore something more than use of ordinary diligence to know the condition of a bank should be required of the president in order to exempt him from liability to a person who has suffered loss by a false statement or report of its affairs, officially made or affirmed by him, especially when he has been thereby personally benefited. In *Cook, Stock & S.* § 145, it is said on authority of numerous cases cited that any statement by the authorized agents of a corporation in regard to the status of the corporation, or material matters connected therewith, whereby subscriptions of stock are obtained, is a fraudulent representation, for which a person sustaining loss thereby may hold such agents personally liable, or have the contract rescinded. This is upon the principle and for the reason that such agents have exceptional

means of knowledge, and owe a duty to speak the truth or not at all about the matter. But, as observed by the author, “in all these cases the distinction between statements relative to the prospects and capabilities of the enterprises, and statements specially specifying what does or does not exist, must be carefully borne in mind.” In this case, not the bank, but appellee personally, profited by the bargain appellant was induced by the false report or statement of its condition to make with him; and therefore it would be contrary to reason and justice for him to be permitted to enjoy the benefit of it, at the expense of appellant, upon the flimsy ground of ignorance about the material matters in reference to which he made the deliberate and positive representation, for, leaving out of view the question whether he did in fact know the statement was untrue, being in a situation to know, and where it was his duty to know, he, in contemplation of law, did know it, and consequently such statement is to be held fraudulent; and appellee has a remedy for the loss sustained either by action in damages or for rescission, for it is a settled rule that, even where one who brings about a contract by misrepresentation commits no fraud, because his representation was, when made, innocent in the ordinary sense, still if, when the fact of its falsity becomes known, he refuses to relinquish the advantage, upon offer of reciprocal relinquishment received by the injured party, it would make him guilty of constructive fraud, and the contract subject to rescission by a court of equity. In our opinion, appellant, as the record stands, was entitled to a rescission of the contract as prayed for in his petition, and the court had jurisdiction to grant it; wherefore the judgment is reversed, and cause remanded for judgment in favor of appellant.

HOLT, C. J., not sitting.

HADCOCK v. OSMER.

(47 N. E. 923, 153 N. Y. 604.)

Court of Appeals of New York. Oct. 5, 1897.

Appeal from supreme court, appellate division, Fourth department.

Action by Charles E. Hadcock, as executor, against Luman Osmer, for deceit. From a judgment of the appellate division (38 N. Y. Supp. 618) affirming a judgment entered on a verdict for plaintiff, defendant appeals. Affirmed.

Watson M. Rogers, for appellant. Henry I'urcell, for respondent.

VANN, J. Prior to the 15th of September, 1888, Deloss Brown, as principal, and Joseph Brown, as surety, were indebted to the defendant on a past-due note for over \$300, and payment thereof had repeatedly been demanded. After trying in vain to borrow money to pay the note, Deloss told the defendant that he did not know where they could get it, and asked if he must have it. The defendant said "yes," and, upon being further asked by Deloss where the money could be had, recommended him to call on one Benjamin Hadcock. He did so, and was told by Benjamin that he could not lend the money, but that his brother, Emmanuel, who was stopping with him, could let him have it. Deloss reported to the defendant that he thought he could get the money of "the Hadcocks," and that they would let him have it "some time in October." When the time came around, the Messrs. Brown started to see if they could get the money of Emmanuel Hadcock, but first went to the defendant, and asked him to go along. He said that he could not, when Deloss declared there was no use of their going alone, and thereupon the defendant wrote and delivered to the Browns a paper, of which the following is a copy: "Mr. Hadcock: The Browns are good for what money you let them have. [Signed] L. Osmer." The Hadcocks did not know the Browns, but, as they knew the defendant, on the strength of this paper Emmanuel Hadcock lent them \$400, taking their note therefor, and on the same day they used the most of the money to pay their debt to the defendant. Both of the Browns were insolvent at this time, and, while the defendant may have believed they were good, he did not know whether they were good or not, and did not try to find out. Upon the trial of this action, which was brought to recover damages for false representations by means of said paper, there was but slight dispute as to the representations, their falsity, or the injury resulting therefrom; but the defendant insisted that, as he did not know that his representations were false, there could be no recovery against him. Through his counsel, he asked the trial court to charge the jury "that there can be no recovery in an action of deceit unless it appears that the defendant made the represen-

tations knowing them to be false, with intent to deceive, and that the plaintiff suffered damages in consequence thereof." The court refused to so charge, except with the modification: "That, if he made the statement that they were good as a fact, not as an opinion, without knowing whether it was true or not, then it was false in the sense that he made a statement of fact as though he knew it to be true, which he did not know to be true. That, together with what I have already said in my charge in regard to it, will enable the jury to understand what I mean." Exception was taken to the refusal to charge as requested and to the charge as made. In the body of the charge, the court, after instructing the jury as to the difference between the assertion of a fact and the expression of an opinion, told them, in substance, that if the defendant made the representation, either knowing it to be untrue, or, without knowing whether it was untrue or not, stating it as an existing fact, intending that it should be taken and acted upon as such, they might infer an intent to defraud; "because," as the court continued, "a man has no right to state a thing as a fact, which misleads the other party to his damage, unless he knows whether it is true or untrue; and if he states it, knowing and understanding that he does not know whether it is true or not, he just as much misleads the other man as though he stated it with the knowledge that it was untrue."

An action to recover damages for deceit cannot be maintained without proof of fraud as well as injury. Actionable deceit cannot be practiced without an actual intention to deceive, resulting in actual deception, and consequent loss. But, while there must be a furtive intent, it may exist when one asserts a thing to be true which he does not know to be true, as it is a fraud to affirm positive knowledge of that which one does not positively know. Where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not, and it is actually untrue, he is guilty of falsehood, even if he believes it to be true; and if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it, to his injury, the result is actionable fraud. *Kountze v. Kennedy*, 147 N. Y. 124, 130, 41 N. E. 414; *Rothschild v. Mack*, 115 N. Y. 1, 7, 21 N. E. 726; *Marsh v. Falker*, 40 N. Y. 562, 573; *Bennett v. Judson*, 21 N. Y. 238; *Add. Torts*, 1007; 1 *Bigelow, Fraud*, 514. Such seems to be the case now before us, as the facts are presumed to have been found by the jury. The plaintiff's testator did not ask for information in regard to the solvency of those who wished to borrow money of him, but the defendant volunteered to give it. He was interested in the result of the loan, for the bulk of the proceeds was for his benefit. On being told that the loan would not be made

without his presence, he armed the proposed borrowers with a written statement over his own signature, containing a positive assertion of a material fact, with the intention that it should be acted upon, and should induce the loan of the money. Yet he did not know the assertion thus positively made for such an important purpose to be true, and he did not investigate or seek to discover whether it was true or not, although he had dealt some with the Browns, and had some information as to their circumstances. He intended, as the jury has found upon sufficient evidence, that the lender should understand him as communicating his actual knowledge, and not as expressing his opinion, judgment, or belief. Knowing that he did not know what he said he did, and what he intended to cause another to believe he did, he took the responsibility of its truth; and honesty of belief in the supposed fact, under such circumstances, cannot relieve him from the imputation of falsehood and fraud. As was said by Judge Peckham in *Rothschild v. Mack*, supra: "He either knew or he did not know of the financial condition of the makers of the note. If he did know it, then he knew that the note, as to both makers and indorsers, was without value. If he did not know its condition, he yet assumed to have actual knowledge of the truth of his statement. * * * He certainly meant to convey the impression of actual knowledge of the truth of the representations he made as to the value of the note, and he either knew such representations were false, or else he was conscious that he had no actual knowledge while assuming to have it, and intending to convey such impression. If damage ensue, this makes an actionable fraudulent representation." The language of Chief Judge Andrews, in *Kountze v. Kennedy*, supra, is equally applicable: "One who falsely asserts a material fact, susceptible of accurate knowledge, to be true of his own knowledge, and thereby induces another to act upon the fact represented to his prejudice, commits a fraud which will sustain an action for deceit. This is not an exception to, but an application of, the principle that actual fraud must be shown to sustain such an action. The purpose of the party asserting his personal knowledge is to induce belief in the fact represented; and if he has no knowledge, and the fact is one upon which special knowledge can be predicated, the inference of fraudulent intent, in the absence of explanation, naturally results." The rule is the same in other states and in England. Thus, in *Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. 168, the court said: "The charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made as of the party's own knowledge, which is false, provided the thing stated is not merely matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any fur-

ther proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist; and if he does not know it to exist he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge." See, also, *Bullitt v. Farrar*, 42 Minn. 8, 43 N. W. 566; *Hexter v. Bast*, 125 Pa. St. 52, 17 Atl. 252; *Wells v. McGeoch*, 71 Wis. 196, 35 N. W. 769; *Swayze v. Waldo*, 73 Iowa, 749, 33 N. W. 78; *Craig v. Ward*, 1 Abb. Dec. 454; *Evans v. Edmonds*, 13 C. B. 777. The charge of the learned trial judge was within these rules, and the exceptions under consideration furnish no ground for a reversal of the judgment.

The court was further asked to charge that "there can be no recovery in this case, in any event, unless it be proven or be found that there was an actual purpose or intent on the part of the defendant, on the 15th day of September, 1888, to defraud Emmanuel Hadcock of his property." The court so charged, but added: "Of course, that is in connection with what I have already charged, that it was not necessary it should have been determined, when he made the paper, before they got the money, as to which of the Hadcocks it was to go, but there must have been an intention to cheat and defraud the person to whom this paper should be delivered, the one or the other." The defendant excepted to the modification, and now argues that it was reversible error. In the course of his charge the trial judge had said: "If it was understood by the defendant that there was a proposition to borrow of one or more Hadcocks, and he sent out a general paper addressed to Mr. Hadcock, why, then you can say whether it was not fairly intended to be delivered to such person of the family as would loan the money; and, if that is true, it is not essential that it should appear to you that it had been determined, at the time the paper was drawn, that the loan should be from one or the other. If you find that fairly the meaning, intention, and design of the parties was that whoever loaned the money should have this paper presented to him, then it may be fairly said that the representation was made to whoever did loan the money to those persons." While the defendant had at first suggested that the money might be borrowed of Benjamin Hadcock, he was finally told that "the Hadcocks" would probably make the loan. Since the brothers Hadcock lived together as members of the same family, and the paper was addressed generally to "Mr. Hadcock," it was properly left to the jury to find whether it was not the intention of the defendant that the paper should be delivered to such member of the Hadcock family as would make the loan, which was the primary object of giving the writing. As a general recommen-

dation of credit, knowingly given to an insolvent person, will support an action for deceit in favor of any one acting thereon to his injury, so, as we think, a letter addressed simply to "Mr. Hadcock" would justify any man of that name in acting upon it, at least when it was delivered to him with the apparent authority of the writer, and there was no direction from the latter as to which one of the Hadcocks it should be given. More-

over, the evidence warranted the inference that the Browns had implied authority from the defendant to deliver the letter to either one of the Hadcocks, and hence to the plaintiff's testator. We agree with the conclusion reached by the learned appellate division, and think that their judgment should be affirmed, with costs. All concur, except O'BRIEN, J., who takes no part, and GRAY, J., absent. Judgment affirmed.

BORDERS v. KATTLEMAN.

(31 N. E. 19, 142 Ill. 96.)

Supreme Court of Illinois. May 9, 1892.

Appeal from appellate court, Fourth district.

Bill by H. A. Kattleman against William R. Borders to set aside a sale for fraud. Complainant obtained a decree, which was affirmed by the appellate court. Defendant appeals. Affirmed.

Koerner & Koerner, for appellant. H. Clay Horner, for appellee.

SHOPE, J. This was a bill in chancery by appellee against appellant, Borders, to set aside and rescind a sale of property on the ground of fraud practiced by appellant upon appellee, whereby the latter was induced to part with his property in exchange for a comparatively worthless note and mortgage of a third party. About the 1st of July, 1884, appellee deposited in the banking house of Borders & Boyle \$2,000, taking a certificate of deposit therefor, payable in six months after date, at 5 per cent. interest per annum. A few months thereafter the firm became embarrassed, and was dissolved by the retirement of Boyle. A new firm was formed, composed of James J. Borders and appellant, who, for a valuable consideration, agreed to indemnify Boyle against all debts and liabilities of the late banking firm. Shortly after the maturity of the certificate of deposit appellee applied to appellant at the bank for payment of said certificate, who then, as the weight of proof tends to show, stated to him that he (appellant) had a tract of land in Randolph county worth \$2,800, which he had just sold and conveyed to Crozier at that price; that Crozier had paid \$700 in cash, and given his promissory note to him (appellant) for \$2,142, secured by mortgage on the land. It is also shown that he represented to appellee that the land was well worth \$2,800; was ample security for the note, which would be promptly paid at its maturity. He advised appellee, as appellee testified, to go and see Crozier, who he represented was well posted in respect of the land. The proofs leave but little, if any, doubt that the sale of the land to Crozier was not a sale in good faith. It appears, also, from the testimony that appellee did call on Crozier for information, and was assured by him that he (Crozier) had in fact bought the land for \$2,800, and given a mortgage on the same to appellant to secure a note of \$2,142. Appellant also, it seems, represented their tract of land had 40 acres cleared and under cultivation. Proof shows there were only 8 or 9 acres cleared on the tract. Appellant also represented to appellee, as the chancellor found from the evidence, that the firm of Borders & Boyle was so embarrassed financially as to endanger the loss of his money deposited with that

firm; that he told appellee that he did not want to see him lose anything, and advised him to take the Crozier note and mortgage in exchange for his certificate of deposit, as the only sure means of protecting himself from loss. It is only just to say that appellant denies most of these alleged representations, or that he was guilty of deceiving appellee in respect of the value or nature of the land. Appellant knew that James J. Borders, one of the partners in the firm of Borders & Boyle, was perfectly solvent, and that the new firm of which appellant was a member had obligated themselves to Boyle, the outgoing partner of the firm of Borders & Boyle, to protect him from all the liabilities of the late firm, which, of course, included appellee's certificate. Appellee not closing with the terms offered at once, appellant wrote him, urging speedy and prompt action in the matter. He wrote: "We are settling very fast with out depositors. In this way, delay is dangerous. * * * I could have used the note offered you, [Crozier note,] and can do so yet. If you want it on the terms offered, to wit, trade my note, for you to give me an order on Crozier for difference, which order, if not paid, shall not bind you, and you to become owner of full face of note and interest, which terms, if satisfactory, put your name on it, without recourse, and send same to me, and I will send you note and mortgage indorsed in same way; mortgages duly recorded. Answer by return mail. * * * I will take pleasure in showing you the land at any convenient time. I am too busy now. Besides, the ground is covered with snow, and you could not judge of the quality of the soil. I cannot put this matter off. Time is very precious with me now."

It is shown by the witness Stout that appellant told him he was about to sell this land to a man named Kattleman, and that if he cornered witness, and asked anything about the value of the land, for the witness to put the price up. After Borders had sold the notes to appellee, this same witness asked him (appellant) how he came to sell the land for the price he did, and appellant replied, as is testified, that he "had got hold of a man that had more money than brains;" and also said, in reply to a remark by the witness, that Crozier would never pay the notes,—“Of course, that is the calculation.” Most of the material representations shown by the evidence to have been made by appellant to appellee, to induce the purchase of the Crozier note and mortgage, are shown to have been untrue. Some of them, at least, if the evidence is to be credited, appear to have been made under circumstances strongly tending to charge appellant with knowledge of their untruthfulness, or, at least, he occupied such a position as to lead to the presumption of his knowledge of their falsity. He admits that he knew that J. J. Borders, one of the firm of Borders & Boyle,

was perfectly solvent at the time it is shown he was endeavoring to induce appellee to believe that the firm was insolvent, and that he was in danger of losing his money. He had owned the land in question some time before the pretended sale to Crozier, professed to be familiar with it, and must be held to have had notice of its value.

The point is made that, if the means were at hand by which appellee might have satisfied himself as to the truth or falsity of the representations, he was bound to do so, and, failing to avail himself of such means, he is not entitled to the relief sought. If appellant could make a defense based upon appellee's credulity and faith in appellant's representations, it could not prevail here. It appears that appellee did try to see the land before concluding his purchase from appellant. But, it being covered with snow, it could not, as stated by appellant in his letter, be properly examined; and, moreover, appellee was assured by appellant and Crozier, to whom the land had been conveyed, that the land was of the value of \$2,800, and that practically one third of it was cleared and improved. Appellant says in his letter, as has been seen, that he will take pleasure in showing appellee the land at any convenient time; that he was too busy then; and that no proper judgment could be formed by his personal inspection of it at that time. While willing to show the land at some convenient time in the future, he was unwilling to delay concluding the transaction with appellee. He wrote: "I cannot put this matter off. If you do not want the note, say so, and I will place it elsewhere." He wanted an answer by return mail. Time was exceedingly precious to appellant then. Under such circumstances, it would be in the highest degree unconscionable to permit appellant to take advantage of the fact that appellee gave credence to his word, and relied upon his statements as true. In such case, the party will not be relieved from the consequence of his false representations, because the party thereby injured trusted him, and parted with his property upon false representation of fact, which he assumed to know to be true. Where the sale is of property at a distance, so that the purchaser has not the means at hand of ascertaining the truthfulness of the vendor's representations, the vendee may rely upon their truth, and have redress if they are shown to have been materially false. *Smith v. Richards*, 13 Pet. 26; *Maggart v. Freeman*, 27 Ind. 531; *Harris v. McMurray*, 23 Ind. 9; *Ladd v. Pigott*, 114 Ill. 647, 2 N. E. 503; *Savage v. Stearns*, 126 Mass. 207.

Here, as it appears, appellee did not have

the ability to make any proper examination of the land without further time. Appellant, it would seem, was imperious in his demand that the transaction be closed at once, having first induced appellee to believe, as before stated is shown by the evidence, that he was in danger of losing his money unless he took the Crozier notes and mortgage. Nor is it important that it should be affirmatively found that the untrue representation should have in fact been known to appellant to be false. It is well settled that it is immaterial whether a party misrepresenting a material fact knows it to be false, or makes the assertion of the fact without knowing it to be true; for the affirmation of what one does not know to be true is unjustifiable, and, if another act upon the faith of it, he who induced the action must suffer, and not the other. *Story*, Eq. Jur. § 193; 2 Pom. Eq. Jur. § 877; *Bigelow*, *Frauds*, p. 410 et seq.; *Cooley*, *Torts* (2d Ed.) 582; *Thompson v. Lee*, 31 Ala. 292; *Railroad Co. v. Tyng*, 63 N. Y. 653; *Allen v. Hart*, 72 Ill. 104; *Fauntleroy v. Wilcox*, 80 Ill. 477; *Hicks v. Stevens*, 121 Ill. 186-197, 11 N. E. 241. So it has been held that, where the representations relate to facts which must be supposed to be within the defendant's knowledge, proof of their falsity is a sufficient showing of his knowledge that they were false. *Cooley*, *Torts*, 583; *Morse v. Dearborn*, 109 Mass. 593; *Morgan v. Skiddy*, 62 N. Y. 319. And so a party selling property is presumed to know whether the representations he affirmatively makes in respect of it are true or false. If he know them to be false, it is a positive fraud; and if he make them without knowing them to be true, for the purpose of inducing another to act upon them, it in equity amounts to fraud. *Miner v. Medbury*, 6 Wis. 295; *Smith v. Richards*, *supra*; *McFerran v. Taylor*, 3 Cranch, 270; *Glasscock v. Minor*, 11 Mo. 655. Taking the evidence on the part of appellee, supported by the letters of appellant and proof of extrinsic facts, we are unable to say that the chancellor was not justified in finding that appellee was induced to part with his certificate of deposit by the statements and representations of appellant of matters materially affecting the transaction, and which are shown to be untrue. All fraud and untrue statement, and that he made any untrue representations, is denied by appellant, and his version of the transaction is consistent with his honesty and good faith; but in the conflict we think the preponderance of the evidence is with appellee, and sustains the material allegations of the bill. The decree of the circuit court will accordingly be affirmed.

NEILL v. SHAMBURG et al.

(27 Atl. 992, 158 Pa. 263.)

Supreme Court of Pennsylvania. Nov. 6, 1893.

Appeal from court of common pleas, Forest county; Charles P. Noyes, Judge.

Bill by Elizabeth P. Neill against B. F. Shamburg and H. W. Shamburg, administrators of G. Shamburg, deceased, to rescind a contract of sale by plaintiff to defendants' intestate of an undivided half interest in a leasehold of a 200-acre tract of oil land. The price consideration of the contract of sale was \$550 paid in cash, and \$100 to be paid in case a well producing six or more barrels of oil per day should be found on the land. The bill was dismissed, and complainant appeals. Affirmed.

T. F. Richey and Samuel T. Neill, for appellant. Julius Byles, Samuel D. Irwin, and Eugene Mackey, for appellees.

MITCHELL, J. There are two main questions of fact upon which the plaintiff's claim to relief must ultimately rest—First, serious inadequacy of price; and, secondly, fraud, actual or constructive. If either of these grounds fails, the case must fall. The master finds that there was no inadequacy of price, and, as the learned court concurs in this finding, it would be sufficient for us to say that we have not been shown that it was clear error. But an examination of the whole evidence, in deference to the earnestness of counsel, who regard this as a turning point in the case, leads us to the same conclusion. At the time of the sale,—July, 1879,—the 200-acre tract was undeveloped, except for one well, No. 8, which had been in operation about three months. The most favorable evidence as to this well was given by James, who said, "My recollection is that it started off between five and seven barrels, somewhere," while the McIntyres, Tucker, and other witnesses, put its production at from one to three barrels. The same witnesses describe the neighboring territory as "spotted," good wells and dry holes being found close together. The 50-acre tract adjoining on the northwest had at that date three wells, two of which, Nos. 5 and 6, were small, and one, No. 7, was a valuable well, having produced as high as 75 barrels, and ranging down, according to the different witnesses, from that to 7 or 8 barrels, which James McIntyre says was its production in July, 1879. Business was dull, and there was no active market for leases in that neighborhood, (Jenkins and Fogle.) Under these circumstances, it is plain that the value of the lease was almost entirely speculative. Indeed, James testifies that the value of oil territory is always speculative, until it is actually developed. It is a business with elements of great uncertainty, and that appears to have been peculiarly so in the present case. Everything depended on whether

No. 7, or the little wells near it, should be taken as the best index of the nature of the territory. The three witnesses for plaintiff put the value of the lease at from twenty thousand to eight or ten thousand dollars; the highest estimate being given by Egoff, whose testimony is badly handicapped by the fact that he was a discharged employe, who admitted that he had come forward in the case partly "to get even with" his former employer. On the other hand, we have the testimony of eight or nine witnesses, most of them with superior local knowledge, and several owners of land in the immediate vicinity, with certainly no bias to depreciate the neighborhood, all concurring that the lease was worth nothing beyond the royalty. The decided weight of the evidence is in favor of the adequacy of the consideration paid.

As this finding takes away the foundation of the plaintiff's claim to relief, the other matters may be dismissed briefly.

There was no proof of actual fraud. No express misrepresentations were shown, all that there was on the subject being the clause in the assignment of the lease stipulating a "further consideration of one hundred dollars when a well is found on said lease producing six barrels per day," etc. The master construed this as "a practical representation that no such well had then been found." In view of the fact that this is writing into a paper in which the plaintiff is the grantor, and which the grantee has not signed, a representation by the latter which is not to be found in the words used, this construction might be difficult to maintain; but, as it is in favor of the appellant, we need not consider it further. Even conceding that the representation was thus made, the master finds that it has not been shown to be untrue.

It is further claimed that Shamburg, intentionally and in bad faith, concealed from the plaintiff facts relating to the production of oil on the 50-acre lease, which she was entitled to know. It was certainly shown that Shamburg had directed his employes not to give information on this subject, but to refer parties to him. The plaintiff had no interest in the 50-acre lease, but we may concede that, when she was about to sell her part of the other lease to her cotenant, she became entitled to know such facts with regard to its production as would bear upon the value of the other. But, unless there is some exceptional circumstance to put on him the duty to speak, it is the right of every man to keep his business to himself. Possibly, Shamburg was unduly suspicious on this point, but the nature and position of his business suggested caution. Fogle testifies that Shamburg was the only person operating in that neighborhood, and James says that Shamburg told him he had spent near \$150,000 in developing that territory, "and now all these fellows are anxious to

pry into my business." We do not find in the acts of Shamburg, under the circumstances, anything more than a positive intention and effort to reap the benefit of his enterprise, by keeping the knowledge of its results to himself, and we agree with the master that this "falls far short of establishing fraud."

The claim of constructive fraud is based on the relations of the parties as partners, and as mortgagor and mortgagee. The master has rightly found that there was no partnership. The parties were tenants in common. No presumption of partnership arose from that relation. *Walker v. Tupper*, 152 Pa. St. 1, 25 Atl. Rep. 172; *Dunham v. Lovetrock*, 27 Atl. Rep. 990, (not yet officially reported.) And there was no evidence from

which to infer a partnership by intention and agreement of the parties. The relationship of mortgagor and mortgagee, like that of tenants in common, is in some respects, and to a limited degree, one of confidence. There are certain things, approximating to, if not actually involving, a breach of good faith, which neither will be permitted to do, to the prejudice of the other. But we do not find in the present case anything which requires the application of this principle. The mortgage was merely for indemnity against a contingent loss by having to pay a guaranty to third persons. Until such loss occurred, Shamburg had no claim on the mortgaged premises which changed the relation of the parties as tenants in common. Decree affirmed.

PORTER v. WOODRUFF.

(36 N. J. Eq. 174.)

Court of Chancery of New Jersey. October Term, 1882.

On bill, answer and proofs taken in open court.

Oscar Keen, S. H. Pennington, and Thomas N. McCarter, for complainant. John R. Emery and Henry C. Pitney, for defendant.

VAN FLEET, V. C. This is a bill by a principal against her agent. The complainant charges the defendant with many acts of misconduct in the course of his agency, some of which constitute gross frauds. The relation of principal and agent was formed between the parties in January, 1873. The complainant's husband died November 29, 1872. She was then about 68 years of age, childless, and without experience in business. She lacked both a knowledge of business and an inclination to acquire it. Her husband, by his will, gave his whole estate to her. His personal estate amounted to about \$60,000. He had, by a writing, which has not been put in evidence, but the existence of which has been fully proved, recommended the defendant as a fit person to assist the complainant in the management of her estate. The defendant had been associated with the complainant's husband for many years as a ruling elder in the superintendence of the spiritual affairs of one of the most influential Presbyterian churches of the city of Newark. His reputation as a capable and trustworthy business man stood high. He was president of one of the most prominent fire insurance companies of the city of Newark. His high religious character, and the position of trust he occupied in the business community, were almost sure to give him the confidence of the most cautious person. Very shortly after the death of her husband, the complainant surrendered into the possession of the defendant all her papers and securities, and requested him to have the safe in which her husband had kept his securities removed to his office, in order that he might manage her affairs with less inconvenience to himself. This he did. From this time forth until the latter part of December, 1879, the defendant exercised over the securities and moneys of the complainant a dominion almost as absolute as he did over his own. The complainant, in describing her relations to the defendant, says: "I looked to the defendant for everything without anxiety. I just threw myself on his fidelity, as a child would on a parent, without questioning."

And the defendant, speaking on the same subject, says that the complainant and he were on terms of close friendship and intimacy; that she looked upon him as her adviser, comforter and friend, and that what he did for her was done as a friend, and

were such services as a son or brother might render for a mother or a sister, without expectation of compensation, except by way of gift.

This narrative shows that the relation between the parties was one of great trust and almost blind confidence on one side, and complete control on the other. The defendant, therefore, occupied a position towards the complainant where he was bound not only to deal with her honestly and justly, but to scrupulously avoid engaging in any transaction, in respect to her estate, in which his interests might be put in antagonism to hers. He was required, in all things relating to her estate, to subordinate his interests to hers, and carefully abstain from using his power and influence over her for his own advantage and to her harm. The law by which he was bound to regulate his conduct is a law of jealousy, and under its wise provisions he can keep nothing that he has obtained from her, under the guise of a contract, to which he cannot show a title entrenched in the utmost good faith. His title must have been acquired openly, on a full and frank disclosure of every fact likely to influence her conduct, and his contract must be shown to have been just and honest in every particular.

The first of the several claims to relief presented by the bill, which I shall consider, is that in which the complainant charges that the defendant is liable for the profit made on the purchase and sale of certain railroad stock. Among the property which the complainant acquired, under the will of her husband, were 67 shares of the capital stock of the Central Railroad Company of New Jersey. After this corporation became insolvent and passed into the possession of the chancellor, the complainant became very much troubled about what was best to do with her stock, whether to sell it or to keep it. She sought information in many directions, consulted the defendant almost daily, and after undergoing much perturbation of mind upon the subject, at last, under a strong fear that if she continued to hold it, the whole would be lost, she gave the defendant peremptory direction to sell it at \$16 a share. This direction was given about the 1st of May, 1878. The defendant did not sell the stock, but caused it to be transferred to his wife, and paid the complainant for it at the price it was then selling for on the market. The amount he paid was \$1,072. He did not tell the complainant that he intended to purchase the stock himself or of his purpose to have it transferred to his wife, but, on the contrary, by his answer, he says that after he made up his mind to buy, he went to the complainant and told her that a sale had been effected, or could be effected, at \$16 a share. In his evidence, he says that the idea of purchasing the stock for himself, as a speculation, first entered his mind after he had received direction to sell it, and after he had

had an interview with Vermilyea & Co., stockbrokers of the City of New York, in which they told him that they thought the market price of the stock would advance. At the time he told the complainant that a sale had been effected, or could be effected, at \$16 a share, he did not tell her that he had consulted these gentlemen, nor what opinion they had expressed. After the stock was transferred, the defendant paid to the receiver in charge of the affairs of the corporation under the re-organization scheme, the sum of \$500, and in return received an adjustment bond, and also surrendered five shares of stock, and in return received an income bond. On January 30, 1880, he sold the 62 shares still standing in the name of his wife, for \$5,091.75. The defendant's wife had no beneficial interest in the transaction, she paid no part of the purchase money, and received no part of the proceeds of sale.

The defendant's reticence under the circumstances was not only unnatural, but undutiful. It amounted to a concealment of information which, I think, he was bound to give. He knew that the complainant had long been in a state of painful anxiety about her stock, that she had been reaching out in almost every direction for help, and that she seized upon every scrap of information that came in her way with the greatest avidity; he knew, also, that her mind had been in a very unstable condition as to what it was best for her to do, and that she had great confidence in his shrewdness, as well as his integrity, and that she would be likely to be strongly influenced by his conduct. I am thoroughly persuaded that he concealed from her the fact that he intended to buy for the purpose of inducing her to sell, believing that if he told her he intended to become the purchaser himself, she would at once refuse to sell.

This conviction is greatly strengthened by his subsequent conduct. Shortly after the stock was transferred, its market price began to advance, and the complainant expressed regret that she had sold, and applied to the defendant to know whether she could not get the stock back again. He told her she had spoken too late. He did not acknowledge that he was its purchaser, and frankly state, as I think he should have done, that he was unwilling to return it. Subsequently, when applied to for information as to whom the complainant's stock had been sold, he answered that he did not know, but said it had been sold through Vermilyea & Co. This statement, it will be perceived, involved something more than concealment. The evidence renders it entirely clear, I think, that from the time the defendant made up his mind to buy the stock, up until the evidence of his purchase was discovered, he made a constant effort to conceal from the complainant the fact of his purchase. His motive for adopting this course originally was to prevent the complainant from

retreating from the purpose to sell, and he afterwards found it necessary to adhere to it to escape her reproaches for not dealing with her openly and fairly.

The legal principle to be applied in deciding whether the defendant can successfully resist the complainant's claim is too firmly established to warrant even the most astute and courageous counsel in attempting to overthrow it or to narrow its scope. The general interests of justice and the safety of those who are compelled to repose confidence in others alike demand that the courts shall always inflexibly maintain that great and salutary rule which declares that an agent employed to sell cannot make himself the purchaser, nor, if employed to purchase, can he be himself the seller. The moment he ceases to be the representative of his employer and places himself in a position towards his principal where his interests may come in conflict with those of his principal, no matter how fair his conduct may be in the particular transaction, that moment he ceases to be that which his service requires and his duty to his principal demands. He is no longer an agent but an umpire; he ceases to be the champion of one of the contestants in the game of bargain, and sets himself up as a judge to decide, between his principal and himself, what is just and fair. The reason of the rule is apparent; owing to the selfishness and greed of our nature, there must, in the great mass of the transactions of mankind, be a strong and almost ineradicable antagonism between the interests of the seller and the buyer, and universal experience has shown that the average man will not, where his interests are brought in conflict with those of his employer, look upon his employer's interests as more important and entitled to more protection than his own.

In such cases the courts do not stop to inquire whether an agent has obtained an advantage or not, or whether his conduct has been fraudulent or not, when the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, in one of which he acted for himself and in the other pretended to act for another person, and to have secured for each the same measure of advantage that would have been obtained if each had been represented by a disinterested and loyal representative; they do not pause to speculate concerning the merits of the transaction, whether the agent has been able so far to curb his natural greed as to take no advantage, but they at once pronounce the transaction void because it is against public policy. The salutary object of the principle is not to compel restitution in case fraud has been committed or an unjust advantage has been gained, but to elevate the agent to a position where he cannot be tempted to betray his principal. Under a less stringent rule, fraud might be committed or unfair

advantage taken, and yet, owing to the imperfections of the best of human institutions, the injured party be unable either to discover it or prove it in such manner as to entitle him to redress. To guard against this uncertainty, all possible temptation is removed, and the prohibition against an agent acting in a dual character is made broad enough to cover all his transactions. The rights of the principal will not be changed, nor the capacity of the agent enlarged, by the fact that the agent is not invested with a discretion, but simply acts under an authority to purchase a particular article at a specified price, or to sell a particular article at the market price. No such distinction is recognized by the adjudications, nor can it be established without removing an important safeguard against fraud. *Benson v. Heathorn*, 1 *Younge & C. Ch.* 326; *Conkey v. Bond*, 34 *Barb.* 276, 36 *N. Y.* 427.

In pronouncing the judgment of the court of errors and appeals in *Staats v. Bergen*, 17 *N. J. Eq.* 554, 558, the present chief justice has discussed this whole subject with his usual vigor and perspicuity. "The rule," just stated, he says, "is one of public policy. The trustee,"—and here, I think, it should be said that the persons referred to are not simply those who are strictly entitled to be called trustees, but the term is used in its most comprehensive sense, and intended to embrace all persons who act in a representative capacity, whether, according to exact nomenclature, they are styled agents, factors, executors, administrators or trustees,—"the trustee is not prevented from bidding for property which he himself sells, on the ground simply of a supposition of actual fraud, but because the law has established, as an inflexible rule, applicable to every emergency, that he shall not place himself in a situation in which he will be tempted to take advantage of his *cestui que trust*. This is a wise public regulation, intended to protect a species of property which otherwise would be constantly exposed to peculiar hazard. The trustee, therefore, must submit to this regulation, and if he does an act in violation of it, no matter how pure his intention may be, such act is voidable at the instance of the person whom he represents. * * * At these sales, then, the trustee is forbidden to purchase, because his interest, as such purchaser, is opposed to the interest of his *cestui que trust*, and he acts, therefore, under a bias in his own favor. Nor does this rule rest, to any considerable extent, in the fact that, in a particular line of cases, the trustee has peculiar opportunities for the practice of fraudulent acts with regard to the property in his charge. The rule, to be efficacious, must be general, and the law implies, therefore, that in all cases of trusts such opportunities may exist, and consequently the prohibition is universal. * * * So jealous is the law on this point, that a trustee may not put himself in a posi-

tion in which, to be honest, must be a strain on him." The cases are numerous in which these principles have been enforced against persons acting in the capacity of agents. I shall cite only those most pertinent. *Ex parte Lacey*, 6 *Ves.* 625; *Brookman v. Rothschild*, 3 *Sim.* 153; *Rothschild v. Brookman*, 2 *Dow & C.* 188; *Gillett v. Peppercorne*, 3 *Beav.* 78; *Moore v. Moore*, 5 *N. Y.* 256; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 *N. Y.* 85.

It is possible for an agent, dealing directly with his principal, to make a contract which the courts will uphold; but such transactions, to be maintained, must be characterized by the utmost good faith. There must be no misrepresentation, and an entire absence of concealment or suppression of any fact within the knowledge of the agent, which might influence the principal; and the burden of establishing the perfect fairness of the contract, in such cases, rests upon the agent. *Condit v. Blackwell*, 22 *N. J. Eq.* 481. Such transactions are never upheld, unless it is clearly shown that there has been, on the part of the person trusted, that most marked integrity, that *uberrima fides*, which removes all doubt respecting the fairness of the contract. *Rothschild v. Brookman*, *ubi supra*.

My conclusion is that the defendant is liable to the complainant for the profit made on the purchase and sale of the complainant's railroad stock.

The second claim to relief which I shall consider is that in which the complainant insists that she is entitled to have the sum which shall be found to be due her in the transaction just discussed, charged as a lien for unpaid purchase money on certain real estate which she conveyed, at the defendant's instance, to the defendant's wife. This claim rests upon the following facts: In March, 1874, the defendant purchased a house and lot on High street, in the city of Newark, for a residence for himself, for the sum of \$15,000. On the 1st of April, 1874, he procured them to be conveyed to the complainant, and paid the purchase money as follows: The complainant and defendant executed two bonds of \$4,500 each, which were secured by two mortgages, made by the complainant alone, on the property conveyed, and the complainant also assigned to the vendor a mortgage held by her against Leopold and Herman Graf for \$4,000, and the balance of the purchase money, viz., \$2,000, was paid in cash. The defendant admits that at the time he made this payment he might have had \$2,000 of the complainant's money in his hands.

During the year immediately succeeding the conveyance, the defendant says he made improvements on the property which cost \$7,000. The complainant continued to hold the title to the property until she severed her relations with the defendant. On the severance of their relations, the complainant

demanded that the defendant should take the title to the High street property, discharge her from liability on the bonds which she had executed in his behalf, and return to her such part of the purchase money as her money and securities had paid. This was done. The house and lot were conveyed to the defendant's wife January 7, 1880, and the defendant then paid to the complainant, in cash, in satisfaction of the money and securities belonging to her, which he had used in paying for the house and lot, the sum of \$4,594.90. The funds he used in making this payment were the proceeds of the sale of the railroad stock, which the defendant had induced the complainant to transfer to his wife. Under the force of these facts, the complainant insists that inasmuch as the moneys which the defendant paid to her were the proceeds of her property, and were, therefore, in equity hers, and not his, that it should be adjudged that the consideration which the defendant agreed to pay for the conveyance to his wife has not been paid, and consequently that she is entitled to a lien as for unpaid purchase money.

Two things are undisputed. First, that part of the consideration which the defendant was to pay for the conveyance to his wife, was to make restitution to the complainant, in money, of so much of her property as he had used, at the time of the purchase, in paying for the house and lot; and second, that in going through the form of making such restitution, he simply gave to the complainant what in equity was hers already. If the defendant, in going through the form of paying the complainant, had used money in his possession belonging to her, the legal nature of the transaction would have been so conspicuously clear that it would have been impossible to misunderstand it. So too, if he had secretly converted one of her securities into money and handed that over to her as payment, though he might have deceived her for the moment, his act would have not constituted a payment, but a fraud. This is exactly what he did do. He converted property which in equity was hers, into money, and attempted to pay her with her own money. He attempted to use that which was hers as his, and to discharge his obligation to her by giving her that which he had attempted, wrongfully, to take from her and to vest in himself. Except we travesty reason and ridicule truth, it is impossible to call such a transaction a payment.

This conclusion makes it the duty of the court to declare that the whole of the consideration which the defendant agreed to give for the conveyance to his wife has not been given, and this places the complainant in a position before the court where she is entitled to the aid of the court in enforcing her equitable rights against the land conveyed. The right of a vendor of lands to a lien in equity for unpaid purchase money, has been

fully and repeatedly recognized by this court and is now a part of its established jurisprudence. This lien will be enforced, not against the purchaser, but against all who claim under him as volunteers or donees. *Graves v. Coutant*, 31 N. J. Eq. 763.

My judgment is that the complainant is entitled to a lien as for unpaid purchase money, against the house and lot conveyed by her to the defendant's wife, to the extent that the defendant used the money of the complainant in paying the consideration he agreed to give the complainant therefor.

The third claim made by the complainant presents the question whether or not the defendant is liable for \$1,000 of the purchase money of a lot of land conveyed by the complainant to one David Brackin, in July, 1874. The lot was sold for \$1,200, \$200 of which was paid in cash, and the balance, as the complainant alleges, was to be secured by a first mortgage on the property sold. The defendant, she says, had charge of the whole matter, and, instead of securing the balance of the purchase money by a first mortgage on the lot sold, accepted a second mortgage on another lot, and that since then the first mortgage has been foreclosed, the mortgaged premises sold and the whole of her money lost. I shall not restate or discuss the evidence pertinent to this branch of the case. It is enough to say that, according to my view, the evidence entirely fails to establish a case against the defendant. It should be said that it clearly appears that the complainant is entirely wrong in the facts on which she rests her right to relief. It was not the first mortgage that was foreclosed, but the one held by the complainant. At the sale of the mortgaged premises they were bid in by the solicitor employed by the defendant, for the complainant, to foreclose her mortgage, for \$700. The complainant refused to take title to the mortgaged premises, and they were afterwards conveyed to the defendant's daughter by his direction, and he subsequently assumed control over them. The defendant paid the taxed costs of the suit and the expenses of the sale, but nothing more, though he procured the mortgaged premises to be conveyed to his daughter. In stating the account between the parties the defendant must be charged with the sum for which the premises were sold, and credited with whatever he has paid on account thereof.

The complainant also seeks to hold the defendant liable for making an improper or insecure investment of her moneys. In March, 1875, the complainant received from the sale of some land located in Pennsylvania the sum of \$6,000, and handed it over to the defendant to invest for her. The defendant, March 17, 1875, deposited the money to an account he kept in one of the Newark banks, as trustee. He is unable to tell how many different trusts this account represented, or when this particular \$6,000 was

disbursed, or to whom. On March 6, 1875, William A. Pruden and Amos W. Austin executed a second mortgage on a lot in Commerce street, in the city of Newark, to the defendant as executor of Robert C. Stoutenburgh, deceased, for \$6,000. The defendant says he invested the complainant's money in this mortgage. The prior mortgage on this lot secured the sum of \$10,000. The defendant says, before investing the complainant's money in the mortgage just described, he told her it was a second lien, that he was satisfied the security was sufficient and that the mortgagors were good and prompt payers, and that she thereupon directed him to make the investment. The mortgage was not assigned to the complainant at the time the investment was made, but the defendant says he took it from the package containing the papers of the Stoutenburgh estate, and placed it among the papers he held for the complainant. The mortgage was not formally assigned until after the complainant had revoked the defendant's authority as her agent, and called upon him to surrender her property. The defendant made seven indorsements of interest on the bond after he says he placed the mortgage among the papers of the complainant; four of them are made by him as attorney, two as executor and one without any designation.

It is evident at a glance that the defendant's conduct in this transaction is open to the very gravest suspicion. The security, in the first place, was one that a trustee could not accept without rendering himself personally liable in case it proved to be worthless or inadequate. *Gilmore v. Tuttle*, 32 N. J. Eq. 611. The defendant, therefore, occupied a position in respect to this security which entirely disqualified him, as the trusted adviser of the complainant, from giving her such counsel respecting it as she was entitled to have. Simply placing the mortgage among the complainant's papers, without other evidence of her ownership, not only put her title to it in a condition of extreme jeopardy, but left the defendant free to use it, as occasion might seem to require, as a security belonging to both funds, and thus make it answer a double purpose. The defendant kept no account of his transactions on behalf of the complainant, and she was, therefore, deprived of the protection which the performance of that duty would have afforded her. The defendant's conduct in this matter deserves, as I think, the severest condemnation.

But while it appears to be very clear that the defendant's conduct in this transaction has been highly improper, still I think it equally clear on the proofs as they now stand that no case is established against the defendant which can be made the basis of relief to the complainant. It has not been shown that the mortgage in question is either a worthless or an inadequate security. No loss has as yet been sustained, nor has any

attempt been made to show that the complainant must inevitably or will probably suffer loss. All that has been shown is that the defendant has invested the complainant's money in a second mortgage. I know of no authority which goes to the length of declaring that a trustee shall be liable, whether loss is sustained or not, simply because he has invested the funds in his hands in a second mortgage. He is bound to make safe investments, such as will yield a reasonable income and a return of the principal when required. If he does that, though the security he takes may not be the most desirable, he incurs no personal liability. He should not, as a general rule, invest in second mortgages; if he does, he takes the risk of being personally answerable in case loss ensues, but he is not liable, as I understand the rule, simply because he has made such an investment, if no loss has been sustained, and in the absence of evidence that any will be sustained.

The next claim made by the complainant is uncontested. Among the property which the complainant received under the will of her husband were ten shares of the stock of a corporation known by the name of the Peters Manufacturing Company. Dividends, in both cash and stock or bonds, were declared on this stock in 1873, 1874, and 1875. Those of 1873 were 30 per cent. in cash, and 40 per cent. in stock; in 1874, 40 per cent. in cash, 25 per cent. in stock, and 35 per cent. in bonds; and in 1875, 30 per cent. in cash, and 20 per cent. in bonds. The defendant collected all these dividends. He paid the cash dividends to the complainant, but had the stock and bond dividends issued to himself as trustee. His explanation or justification of his conduct in this matter is this: he says when the first stock dividend was declared, he inquired of the complainant what he should do with it, and that she replied he might do with it what he liked, or what he had a mind to, and that he understood her by this form of expression to say to him that she meant that he should take it as a gift. When the subsequent dividends were declared, he says he supposed that she entertained the same intention with respect to them, and he procured them also to be issued to himself, though he made no further inquiry of her respecting her purpose, and she made no further declaration of her intention. The defendant sold the stock and bonds thus obtained, in January, 1877, for \$1,300. But before making the sale, he had received on the stock so obtained by him dividends in cash to the amount of \$561. The defendant, by his answer, admits that he is liable for the value of the stock and the amount that he has received thereon in dividends, and says that he is willing to account to the complainant for the same, if she insists that he shall do so. She does so insist. This claim is one of the foundations of her bill. The defendant, in the accounting, must be charged with what he received on the sale of the stock and

bonds, and also with whatever he has received thereon as dividends.

I shall dispose of the other questions at issue between the parties by simply stating my conclusions, without attempting to review the evidence or stating the argument upon which they rest.

1. The complainant is not entitled to a decree setting aside the deed made by her to the defendant's daughter as compensation for the defendant's services.

2. The defendant, in the accounting, is entitled to a credit of \$50 for money paid to the complainant in December, 1879.

3. The defendant, in the accounting, must

be charged with the dividends received by him for the complainant on her stock in the American Insurance Company, for the years 1876, 1877 and 1878; also with three sums, of \$17.50 each, for unpaid interest on the Graf bonds and mortgages, due February 1, 1873, August 1, 1873, and February 1, 1874; and also with \$6.20 which, in his account, he has erroneously charged against the complainant.

The account between the parties will be stated and settled by the vice chancellor. Either party may bring on the hearing on the accounting on ten days' notice to the other.

The complainant is entitled to costs.

VIRGINIA LAND CO. v. HAUPT.

(19 S. E. 168, 90 Va. 533.)

Supreme Court of Appeals of Virginia. March 8, 1894.

Error to circuit court of city of Roanoke.

Action by the Virginia Land Company against one Haupt. Judgment for defendant, and plaintiff brings error. Affirmed.

Watts, Robertson & Robertson, for plaintiff in error. Griffin & Glasgow, for defendant in error.

LEWIS, P. The defendant in error was sued by the Virginia Land Company to recover certain unpaid assessments on the stock of the company aggregating \$2,800. The principal grounds of defense were (1) fraud in procuring the contract of subscription; and (2) a material variance between the prospectus and the charter of the company. The jury found for the defendant, and the court refused to disturb the verdict. The defendant subscribed for the stock at the instance of one O'Leary, who was a real estate agent at Roanoke, and one of the promoters of the company. It was proposed in the prospectus "to organize a company for the purchase of a certain tract of land, lying near the said city, containing about 550 acres, and to lay it out in residence lots, and to develop its natural attractions." By the charter subsequently obtained the company was authorized to buy land, not exceeding 5,000 acres, also personal property, and to issue mortgage bonds; to loan money to develop lands; to construct street railways, and to use cars impelled by any kind of motive power; to erect and operate motor, gas, and electric works, etc. O'Leary was known to the defendant as a successful business man, and his name headed the subscription list. When he solicited the defendant to subscribe he informed him, in answer to a specific inquiry, that the land proposed to be purchased belonged to Gates, Moorman & Moorman. In point of fact, O'Leary and one Christian, another subscriber to the stock and a promoter of the company, held options on the land, which fact was not mentioned to the defendant. O'Leary recommended the stock to the defendant as a desirable investment, and upon his advice the defendant agreed to take 100 shares. After the organization of the company the land was transferred to the company, and in consequence O'Leary and Christian realized a very large profit. The company was chartered early in March, 1890, and on the 19th of the same month the first stockholders' meeting was held, at which meeting O'Leary represented the defendant as his proxy. At the same meeting an assessment of 10 per cent. of the capital stock was ordered, notice of which was afterwards sent to the defendant; and on the 23d of the ensuing August another assessment of 5 per cent. was ordered. Upon receipt of notice of this last assessment the defendant

wrote the secretary of the company as follows: "Dear Sir: I have your notice of September 1st, calling for an assessment of \$500.00,—five per cent. on one hundred shares of your stock. If you will please refer to my letter of April the 28th, addressed to your treasurer, you will notice that I am not a stockholder in your company. Although I have never received a reply to this letter, I take it, in the absence of such acknowledgment, my stock was, as a matter of course, canceled. So that there may be no further misunderstanding in the matter, however, I beg to advise that I am not a stockholder in the Virginia Land Company, having paid no assessment whatever on the subscription." In the notice of the 10 per cent. assessment of March 19, 1890, it was said: "This amount must be paid promptly, or the stock will be declared forfeited;" and in response to this the defendant's letter of the 28th of April, above referred to, was written, which is as follows: "Dear Sir: I have your favor of the 24th inst., calling attention to ten per cent. assessment of the Virginia Land Company's stock, and in reply beg to say that recent financial arrangements in another direction, that I am suddenly called upon to provide for, will make it impossible for me to pay this assessment now; and to prevent delays, as well as to avoid being a hindrance in any way to the success of the company, I will be glad if you will consider my stock forfeited, as provided for in notice of assessment. * * * I will be glad, therefore, if you will dispose of my stock to other parties. I have been informed that the stock is selling at a premium, so I presume there will be no difficulty in doing this. Having paid nothing on the stock, I am, of course, not entitled to anything from it." At the trial the defendant testified that when he made the contract of subscription he had no other information respecting the proposed enterprise than such as he obtained from the prospectus and what was told him by O'Leary; that he was induced to subscribe by the urgent solicitation of O'Leary, in whose judgment and integrity he had confidence, and who earnestly recommended the scheme as a good investment. He also testified that he had no idea that O'Leary was interested in the land which it was proposed to buy otherwise than as a stockholder, and that, so far from the fact being disclosed to him, O'Leary, when questioned on the subject, represented that it belonged to Gates, Moorman & Moorman. He testified further that he would not have consented to subscribe had he known of the promoter's interest in the land, and that he had no intimation of any such thing as a "promoter's fund" until several weeks after he had subscribed.

The court, among other things, instructed the jury that if they believed from the evidence that O'Leary and Christian held options on the land, and that O'Leary induced the defendant to subscribe in ignorance of

that fact, relying on his (O'Leary's) supposed disinterested and superior judgment, and that he, the defendant, was thereby misled, to his injury, into making a contract that he otherwise would not have made, then the subscription was voidable, at his option. This construction propounds the law correctly. The authorities are abundant in support of the general rule that one who is fraudulently induced by an agent of a corporation—and a promoter is an agent of the proposed corporation—to subscribe to its capital stock may, at his option, repudiate the contract; and that a fraud may consist as well in the suppression of what is true as in the representation of what is false. Indeed, the law is that, where the person solicited to subscribe has no other information on the subject than that the agent chooses to convey, the statement of the agent ought to be characterized by the utmost candor and honesty. *Cook, Stock, Stockh. & Corp. Law* (3d Ed.) § 147; *Crump v. Mining Co.*, 7 Grat. 352; *Bosher v. Land Co.*, 89 Va. 455, 16 S. E. 360; *Directors, etc., v. Kisch*, L. R. 2 H. L. 99. It is contended, however, that the defendant has by his conduct waived the right to annul the contract in question. But there can be no waiver in a case of this sort without full knowledge of the facts, and such knowledge of the facts and such knowledge on the part of the defendant has not been shown. He says he had an intimation a few weeks after the organization of the company that there was a large promoters' fund, but as to who were the parties interested in the fund he was not informed. He made inquiry on the subject, he says, but could ascertain nothing definite; and that he relied on his letter of the 28th of April, in reply to the notice of the first assessment, to which he received no reply. And afterwards, when notified of the 5 per cent. assessment, he promptly replied, calling attention to his said letter, and saying he was not a stockholder. He also called the attention of one of the directors of the company to the intimation he had had in regard to the promoters' fund,

and informed him that he repudiated the contract. It is true, he gave a proxy to O'Leary to represent him at the first stockholders' meeting, at which meeting the facts in regard to the promoters' options on the land were disclosed; but, as was well said in the argument, it would be absurd to hold that he was affected by notice to O'Leary of what the latter knew from the beginning, and failed to disclose to him. And if he was not affected by notice to O'Leary, then there is no proof that he received any certain information of the facts constituting the fraud complained of before the institution of the present action. In treating of laches as a bar to the subscriber's remedies, Cook says: "The date from which laches begins to run is the time when the subscriber is first chargeable with notice that a fraud has been perpetrated upon him. Mere suspicions or random statements, heard in public or in stockholders' meetings, do not necessarily constitute notice. But, after a subscriber's suspicions are reasonably aroused, it is his duty to investigate at once. The corporation has the burden of proof in asserting that the subscriber had notice and was guilty of laches." *Cook, Stock, Stockh. & Corp. Law* (3d Ed.) § 162. Applying these principles to the present case, we are of opinion upon the ground of fraud the case is with the defendant, and that there has been no waiver of the fraud on his part; and, as this view is decisive of the case, it is needless to consider whether the case is within the ruling in *Manufacturing Co. v. Hockaday*, 89 Va. 557, 16 S. E. 877, on the ground of a variance between the prospectus and the charter of the company.

There were a number of exceptions taken to the rulings of the court during the progress of the trial, to review which seriatim would extend this opinion to a great length. It is enough to say in this connection that the case was submitted to the jury in substantial conformity with the views expressed in this opinion, and that the judgment must be affirmed.

ZAHN et al. v. McMILLIN et al.

(36 Atl. 188, 179 Pa. 146.)

Supreme Court of Pennsylvania. Jan. 4, 1897.

Appeal from court of common pleas, Lawrence county; William D. Wallace and S. H. Miller, Judges.

Action by William A. Zahn and others against E. A. McMillin and others. From a judgment for defendants, plaintiffs appeal. Reversed.

S. W. Dana, S. D. Long, A. Leo. Weil, and C. M. Thorp, for appellants. J. Norman Martin, D. B. Kurtz, and L. T. Kurtz, for appellees.

DEAN, J. On April 22, 1891, through negotiations conducted by E. A. McMillin, he and William Smith took by assignment from Thomas A. Book 19 oil and gas leases in Lawrence county. The written assignment was to Smith, he to hold the same in trust as follows: One-eleventh of three-fourths for McMillin, and ten-elevenths of three-fourths for such persons as should contribute towards the common enterprise and the cost of drilling two wells for the development of the common property for oil. Smith resided in Pittsburg, and McMillin in Newcastle; the last named, not far from the territory to be developed. It was alleged by plaintiffs that McMillin got his brother, J. M. McMillin, of Newcastle, to join in the project. Smith induced a number of his friends in Pittsburg to join as contributors, they to share in the profits in proportion to their contributions. From the money, two wells were drilled, which developed as good gas producers, but no oil was struck. At the time he made the assignment to Smith, Book had reserved one-fourth the oil or gas to be developed, which was afterwards purchased by E. A. McMillin, plaintiffs alleged, for himself and brother. As to the three-fourths in name of Smith, he made a written declaration that he held the same in trust for himself, the McMillins, and the other contributors. The production of the wells indicated that the property was valuable for gas purposes, and efforts were made by the parties to sell it at a profit. A committee, of which E. A. McMillin was one, was appointed to bring the property to notice of purchasers and conduct negotiations for a sale. Meetings were held in Pittsburg; two of them, at least, attended by both the McMillins, and others by E. A. McMillin alone. In January, 1893, both the brothers opened negotiations with O. C. Redick for the purpose of selling the property to him. They discovered from him, in their conversations, that the salt water which was obstructing production in one of the wells could be shut off at a small expense, and this would add largely to the value of the property. Full examination of the property by Redick resulted in an offer from him to take the gas, pipe it at his own expense to Newcastle, sell

it, and pay to the owners one-half the gross proceeds of sales. Immediately after securing this offer, E. A. McMillin, on January 17, 1893, wrote to W. A. Zahn, one of his co-owners and one of these plaintiffs, at Pittsburg, asking him if he could get the consent of the contributors to take one-fourth the net earnings, and pay one-fourth the cost of drilling new wells. In this letter he concealed from his co-owner, Zahn, Redick's offer of one-half the gross proceeds of sales. Zahn replied that he thought he could get such consent. E. A. McMillin then went to Pittsburg with a contract drawn, naming the Pittsburg parties as the assignors, and the two McMillins as the assignees. In this agreement it was set forth that all the parties were associated together as owners of the property, and it was stipulated that the McMillins were to take the gas, pipe it to Newcastle, and pay one-fourth the net proceeds to all the owners, including themselves; they to retain three-fourths. The Pittsburg parties were urged to immediately execute the contract, but, as one or more of them desired to consult counsel, its execution was deferred. They finally prepared another draft of a contract, embodying substantially the same terms, with the names of the purchasers left blank. This was executed January 31, 1893. As to this contract, it is not disputed that J. M. McMillin solicited plaintiffs to affix their signatures. No disclosure of the Redick offer was made to the Pittsburg parties when they signed. After signature, the McMillins filled in the blank with their names as purchasers, and the same day contracted with Redick according to the terms of his proposition already noticed. He piped the gas to Newcastle, and paid to the McMillins one-half the gross proceeds of sales. About a year afterwards plaintiffs discovered the facts, and filed this bill against both the McMillins for an account; averring them to be joint owners or tenants in common with them of the leaseholds, and that a fraud had been practiced upon them in obtaining the contract of 31st January, 1893. The defendants made answer, denying all the material averments of plaintiffs' bill. J. M. McMillin especially denied having any interest in common with plaintiffs and his brother prior to the execution of the contract of 31st January, 1893. The court below, after full hearing, dismissed the bill, and from that decree we have this appeal by plaintiffs. The principal errors alleged are the finding of fact that J. M. McMillin was not interested in the original project, and the conclusion of the court that he was not liable to account, on the facts, even if his interest commenced at the date of the second purchase.

The court does not seem to question that on the evidence the bill could have been maintained if filed against E. A. McMillin alone, but being against the brothers jointly, and not sustained as to J. M. McMillin, it must be dismissed. The learned court below, in its

opinion, speaks as follows: "There are two main questions of fact upon which plaintiffs' claim for relief must ultimately rest: First, that J. M. McMillin had an interest in the leases mentioned in plaintiffs' bill, and was a tenant in common with plaintiffs in said leases on January 31, 1893; second, fraud, actual or constructive, on the part of the defendants in procuring from plaintiffs the contract Exhibit A. If either of these grounds fall, the case must fall. * * * An examination of the whole evidence fails to show the relationship of tenant in common between the plaintiffs and J. M. McMillin. We would hesitate to find such a relationship from the evidence of the plaintiffs, if it was not contradicted. Both J. M. McMillin and E. A. McMillin, however, positively deny such relationship in their answer, and also upon the stand as witnesses, and their cross-examination by plaintiffs' counsel does not in the least weaken their evidence. The plaintiffs also contend that, even if J. M. McMillin was not a co-tenant, he occupied such a fiduciary relation towards them which required him to disclose the offer which Redick had made prior to January 31, 1893, and which offer was concluded in the contract of February 1, 1893. They urge that he had so conducted himself as to lead the plaintiffs to believe he was acting with them and for them. They also urge that he misrepresented the facts, by stating that the terms of the contract he was obtaining from them were the best that could be obtained for the property. We have already found that J. M. McMillin was not a co-tenant with the plaintiffs and E. A. McMillin. We find nothing in the evidence which should have induced the plaintiffs to believe that he was a co-tenant, or that he was acting in any fiduciary capacity for them or with them. It is true that he was present at two meetings of the parties in Pittsburg, but there was no evidence to show that he took any part in the proceedings, or acted other than as a spectator. The value of the property was purely speculative, and the plaintiffs had the same opportunity to form an opinion as to its prospective value as J. M. McMillin. It is true, Redick had proposed to him to lease the premises on more favorable terms than what the plaintiffs were to get by their contract, but there was no such fiduciary relation subsisting between J. M. McMillin and them as required him to disclose Redick's offer."

Whether a tenant in common, or merely a partner in a project for gain, E. A. McMillin, on the undisputed facts, by reason of his confidential relation with his co-contributors to the common enterprise, perpetrated upon them a palpable fraud,—not a constructive fraud merely, but an actual fraud. If the brother aided and abetted him in consummating this fraud, that they two might reap the fruits of it, and they have succeeded, they are jointly bound to make restitution. On sufficient evidence, the court below has found that J. M. McMillin had no interest in the purchase from Book, April 22, 1891. There was much evidence to the

contrary, but the error is not so clearly manifest in the finding as to move us to disturb it. Therefore we assume as a fact that his property interest dated from the contract of 31st January, 1893. It is not denied—nor could it be, in the face of the evidence—that by that contract J. M. shares in the fruits of the fraud to which E. A. was an active party, and for which he is answerable in an account. But did J. M., by his declarations and conduct, aid his brother in procuring the fraudulent contract, so as to render him accountable in equity to these plaintiffs? The learned court below thinks not, because he was not one of the contributors to the first enterprise, and therefore must be treated as a stranger dealing at arm's length with the co-partners or co-tenants of his brother. This is a mistake, for that one fact warrants no such conclusion. If he had been a member of the first association, and had untruthfully represented a material fact to his associates, to induce them to part with their interests, that would have been conclusive against him, because of the legal presumption of a confidential relation; but, if there was not presumptively a confidential relation, still was there one in fact, or such relation as warranted them in relying on the truthfulness of his statements? The principle controlling such cases, and deducible from all the authorities, is well stated by Perry on Trusts (volume 1, p. 179): "There are cases where a party must not be silent upon a material fact within his knowledge, although he stands in no relation of trust and confidence. * * * If a party knows that another is relying upon his judgment and knowledge in contracting with him, although no confidential relation exists, and he does not state material facts within his knowledge, the contract will be avoided; for knowingly to permit another to act as though the action was confidential, and yet not state material facts, is fraudulent. It is said that a party in such circumstances is bound to destroy the confidence reposed in him, or to state all the facts that such confidence demands."

The court's twelfth finding of fact is that, at the time the contract was entered into, J. M. McMillin represented to the Pittsburg parties that the terms, one-fourth the net proceeds of the oil, embodied in the contract he was soliciting them to sign, were the best that could be got. This representation was willfully false. He admits that Redick had made an offer of double that price, which had been accepted by him and his brother, on which a contract had been framed, which he had in his pocket, ready to be signed as soon as the Pittsburg parties signed the contract for one-fourth. In whose interest was he acting when this falsehood was uttered? It is argued, his own expectant interest in the contract with the Pittsburg parties. But he was also dealing as the agent of his brother. They two were the purchasers, parties of the second part to the contract which injured to the benefit of both. He was there to conduct the negotiations and close the con-

tract in pursuance of his brother's letter to Zahn of 10 days previous, which did not hint at Redick's offer. There can be no severance of the falsehood by imputing one half of it to E. A., who held a legal, confidential relation, and the other half to J. M., who, if representing himself alone, did not hold the same relation. By taking his brother's place and representing him, he spoke for both, and put himself in a position where the brother's co-tenants were justified in relying on this false statement of a most material fact. This gave him a vantage ground which naturally invited confidence in his statements, and he must be held to the same rule of conduct as E. A. would have been held to had he, on the same representation, personally solicited the assent of his co-partners to a sale at half price. "It is naught, it is naught, saith the buyer; but when he is gone his way he boasteth himself." This is the attitude of a stranger towards the seller whose wares he depreciates, and the one the court below finds J. M. to have held. It is not the one the facts put him in. To hold J. M. answerable, it is not essential that another case exactly like this on the facts should have been decided fraudulent. This, clearly, is within the scope of established principles, where in equity a party dare not falsely represent a material fact. "Courts have never laid down as a general proposition what [facts] shall constitute fraud, or any rule beyond which they will not go, lest other means of avoiding equity will be found" (2 Pars. Cont. 769), and certainly have never held that, where a party aiding in a fraud has not theretofore acquired a fractional interest in the property which is the subject of the fraudulent bargain, he cannot be called to an accounting. But, if he had no direct interest of his own, the misrepresentation went still further than as a representative of his brother, for the very agreement he had asked them to sign says: "Whereas, the said parties of the first part and of the second part are associated together as owners of leases for oil and gas purposes on one thousand acres of land in Shenango and Slippery Rock township, Lawrence county, * * * the said first parties owning one hundred and twenty shares and the said second parties owning fifty-six shares; and whereas, two wells have been drilled at the joint expense of all of said owners; * * * and whereas, all of said owners are desirous of having said gas used * * * so as to realize a profit. * * * True, this was not the agreement signed three days thereafter, but it was one E. A. McMillin had, acting for both, asked them to sign. E. A. was then acting for J. M. in efforts to secure a contract in which both concurred, and which was framed with a view to accepting the Redick proposition, and was therefore a false representation by both. It was not signed only because the Pittsburg parties desired their own counsel to frame it.

The one adopted by the two brothers, and first exhibited to the Pittsburg parties, contained a deliberate declaration in writing that J. M. McMillin was then a co-partner. This was a direct invitation to the co-partners to deal with them in securing the best price. The conduct of J. M. for months before, and during all the negotiations, seems to us, on this printed testimony, reconcilable only with the theory that he was interested in the leases at the date of the contract with the Pittsburg parties. Assuming, however, that, when he said on the witness stand he was not interested, he told the truth, he did not tell the truth to the confidants and partners of his brother when he contracted for himself and his brother at half price for their interests. The law cannot undertake to draw a line between his misrepresentation as agent for E. A. and his misrepresentation in his own interest as a stranger to the original association. And if his declarations and conduct misled, as they plainly did, the Pittsburg parties, and induced them to believe him interested with them in a common enterprise, he is estopped now from denying the truth of the representations. On both grounds the bill is sustained as against him, and both should account to plaintiffs as prayed for in the bill. As to the remark of the court that when the contract was made the value of the property was purely speculative, and all parties had the same opportunity for forming an opinion, it is certainly an error. The court must have overlooked the fact that J. M. McMillin had in his pocket, at the very time he was soliciting the signatures of the plaintiffs, the draft of the proposed agreement with Redick, which was to be signed as soon as the Pittsburg parties had executed their contract, and which was afterwards, on the same day, actually executed by Redick. As concerned the McMillins, there was nothing speculative in their estimate of value. They knew exactly the worth of the property, by knowing what they were to get for it. Their profit depended only on how low they could beat down the price by methods which some dealers call only shrewd, but which the law pronounces fraudulent, and holds the parties to a strict accountability.

It is ordered that the decree of the common pleas be reversed and plaintiffs' bill be reinstated, and further: (1) That the said E. A. McMillin and J. M. McMillin were trustees ex maleficio for all the owners of said leaseholds in making said contract with Oliver C. Redick, and that said contract, and all the rights of the first parties thereunder, are the property of all the present owners of said leaseholds, to whom, through their treasurer, all payments under the same should be made. (2) That the said E. A. McMillin and J. M. McMillin account to the orators for, and pay over to the said treasurer, all moneys received by them under said contract with Oliver C. Redick. (3) That an injunction issue, restraining the said E. A. and J. M. Mc-

Millin from selling, assigning, incumbering, or in any manner disposing of said last-mentioned contract. (4) That an injunction issue, restraining the Big Meadow Gas Company	from paying any further sum or sums of money to the said E. A. and J. M. McMillin under said last-mentioned contract. It is further ordered that defendants pay the costs.
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PHILLIPS v. PULLEN.

(16 Atl. 9, 45 N. J. Eq. 5.)

Court of Chancery of New Jersey. Nov. 13, 1888.

On order to show cause why an injunction shall not issue to restrain the defendant from taking proceedings to enforce a judgment at law.

Bill for injunction by George E. Phillips against Ralph L. Pullen to restrain proceedings to enforce a judgment.

Wm. Y. Johnston and John P. Stockton, Atty. Gen., for complainant. Geo. O. Vanderbilt, C. H. Beasley, and W. D. Holt, for defendant.

McGILL, Ch. The judgment in question was recovered in a suit upon an agreement by the complainant to pay \$7,500 in settlement of an action that had been commenced against him by the defendant for damages for debauching the defendant's wife, enticing her away, and harboring her. Upon a writ of error to Mercer circuit court, where the cause in which the judgment was recovered was tried, the court of errors and appeals affirmed the judgment of the court below, and thereby confirmed the decision of many of the questions sought to be again raised by the bill in this case. That decision determined that the complainant's attorney had authority to make the agreement sued upon; that the agreement did not lack consideration; that the consideration of the agreement was not executory; that there was no abandonment or rescission of the agreement by the defendant, Pullen; and that proof of the fraud, which is here alleged, was admissible in defense in that suit, but that the evidence of it there offered and admitted, was inadequate to establish it. Phillips v. Pullen, 50 N. J. Law, 439, 14 Atl. 222. All those matters must now be considered as settled between the parties to this suit. The doctrine is well settled that this court will not, on the application of the defendant in a judgment at law, who has had a fair opportunity to be heard upon a defense, over which the court pronouncing the judgment had full jurisdiction, enjoin the enforcement of the judgment simply on the ground that it is unjust. A court of equity limits its interference with the enforcement of a judgment at law to cases where that appears which clearly shows it to be against conscience to execute the judgment, and of which the injured party could not have availed himself in the court of law; or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents. Insurance Co. v. Hodgson, 7 Cranch, 332; Hendrickson v. Hinckley, 17 How. 443; Powers' Ex'rs v. Butler's Adm'r, 4 N. J. Eq. 465; Vaughn v. Johnson,

9 N. J. Eq. 173; Moore v. Gamble, Id. 246; Reeves v. Cooper, 12 N. J. Eq. 223; Holmes v. Steele, 28 N. J. Eq. 173; Bank v. Manufacturing Co., 33 N. J. Eq. 486, 35 N. J. Eq. 344; Simpson v. Hart, 1 Johns. Ch. 91; 3 Pom. Eq. Jur. § 1361, and note. It is insisted for the complainant that the contract, upon which the judgment in question is based, was so grossly unconscionable that this court will here interfere, and stay the enforcement of the judgment. The action of the court must depend upon the questions whether the defendant is too late in his application, whether the gross unconscionableness of the contract is a distinct principle of equity which could not be urged in defense of the suit at law, and whether in fact the contract was grossly unconscionable. I will consider these questions in the order in which I have stated them.

The complainant makes his application by supplemental bill, in which he alleges that by his original bill he sought to avoid the agreement for fraud, and because it was grossly unconscionable; and that he was denied an injunction to restrain the suit at law, because the grounds upon which the equity of his bill rested were good defenses to the action, at law. The defendant, by his answer to the supplemental bill, claims that the decision of the chancellor (Runyon) was based upon the defendant's denial of the facts upon which the equity of the complainant's bill was founded. No reasons for the chancellor's decision were given. It appears to me to be better that I shall assume that the merits of the last two questions under consideration were not passed upon, and that the original application for injunction affords an excuse for the apparent laches of the complainant in asking the aid of this court. It is established that for mere inadequacy of consideration, unconnected with fraud, a court of equity will not set aside a contract. Willis v. Jernegan, 2 Atk. 251; Griffith v. Spratley, 1 Cox, 383; Gibson v. Jeyes, 6 Ves. 266; Low v. Barchard, 8 Ves. 133; Osgood v. Franklin, 2 Johns. Ch. 1; Crane v. Conklin, 1 N. J. Eq. 346; Wintermute's Ex'rs v. Snyder's Ex'rs, 3 N. J. Eq. 489; Weber v. Weitling, 18 N. J. Eq. 441; 1 Story, Eq. Jur. 251; 2 Pom. Eq. Jur. § 925. The cases of expectant heirs or reversioners, who have bound themselves in unconscionable bargains with respect to their expectancies, have been regarded in many cases as an exception to this rule. Berny v. Pitt, 2 Vern. 14; Nott v. Hill, Id. 27; Wiseman v. Beake, Id. 121; Twisleton v. Griffith, 1 P. Wms. 310; Curwyn v. Milner, note c, 3 P. Wms. 292; Barnardiston v. Lingood, 2 Atk. 133; Gwynne v. Heaton, 1 Brown, Ch. 9; Coles v. Trecothick, 9 Ves. 246; Evans v. Peacock, 16 Ves. 512. Where, however, such inadequacy of price is so gross that it shocks the conscience, courts of equity will interfere, not upon distinct principle, but upon the

ground that such inadequacy amounts to conclusive evidence of fraud. In *Osgood v. Franklin*, 2 Johns. Ch. 18, Chancellor Kent said: "The doctrine is settled that in setting aside contracts on account of inadequate consideration, the ground is fraud arising from gross inequality." In *Copis v. Middleton*, 2 Madd. 410, the vice-chancellor said: "Mere inadequacy of price, to invalidate a contract, must, per se, be so excessive as to be demonstrative of fraud." In *Wintermute's Ex'rs v. Snyder's Ex'rs*, 3 N. J. Eq. 489, 496, Chancellor Vroom said: "Still there may be such unconscionableness, such palpable and excessive inequality in a bargain, as to induce equitable interference. But in all such cases the court goes on the ground of fraud, being satisfied that gross imposition or undue influence must have been practiced. If the inadequacy be such as to shock conscience, it will amount to evidence of fraud, and will be so considered." In *Gifford v. Thorn*, 9 N. J. Eq. 702, 740, in the court of errors and appeals, Justice Potts uses this language: "Undoubtedly, if this transaction is to be considered as a matter of bargain and sale, here is a gross inadequacy of consideration; such an inadequacy as raises a violent presumption of fraud, deception, ignorance or imbecility." In *Weber v. Weitling*, 18 N. J. Eq. 441, Chancellor Zabriskie said: "For mere inadequacy of consideration equity does not set aside a deed, unless accompanied by fraud, or unless the inadequacy is so gross as to imply fraud." Judge Story, in his work on Equity Jurisprudence (volume 1, p. 256,) after saying that inadequacy of consideration is not of itself a distinct principle of relief in equity, adds: "Still, however, there may be such an unconscionableness or inadequacy in a bargain as to demonstrate some gross imposition or some undue influence, and in such cases courts of equity ought to interfere upon the satisfactory ground of fraud. But then such unconscionableness, or such inadequacy, should be made out as would (to use an expressive phrase) shock the conscience, and amount in itself to conclusive and decisive evidence of fraud." Professor Pomeroy, in his work on Equity Jurisprudence (section 927) says: "Although the actual cases in which a contract or conveyance has been canceled on account of gross inadequacy merely, without other equitable incidents, are very few; yet the doctrine is settled by a consensus of decisions and dicta, that, even in the absence of all other circumstances, when the inadequacy of the price is so gross that it shocks the conscience, and furnishes satisfactory and decisive evidence of fraud, it will be a sufficient ground for canceling a conveyance or contract, whether executed or executory. Even then fraud, and not inadequacy of price, is

the true and only cause for the interposition of equity, and the granting of relief."

At this point we are again confronted with the adjudication already had between the parties to this cause. Equity can interfere only upon the ground of fraud; and the question of fraud in the agreement, as I have stated, has been heard by a court having full jurisdiction over that question, and decided. Justice Magie, who wrote the opinion of the court of errors and appeals in the case there between the parties to this suit, disposed of the suggestion that the price Phillips agreed to pay is evidence of fraud, in the concluding sentences of that opinion, as follows: "In an action on an undertaking to pay a specific sum, the rule for measuring damages is compensation, which can only be afforded by a verdict for that sum, with interest. No reason why this case should be taken out of that rule is suggested, but that the agreement was unreasonable or unconscionable. But, if it might have been avoided in equity upon that ground, nothing short of fraud will affect it at law: and fraud would not be ground for reducing damages, but for defeating recovery. There is nothing in the stipulated sum to justify an inference of fraud. The original suit sought to recover damages incapable of accurate determination. Had it proceeded to trial, the quantum of damages must have been determined by a jury upon the circumstances. Where the parties, knowing the circumstances, liquidated the damages by an agreement not brought about by deceit or imposition, it cannot be said that such damages are unconscionable." If gross unconscionableness of a bargain were a distinct principle upon which equity would relieve, it would be impossible for me to say that the bargain, in this instance, was of that character. Lord Thurlow, in *Gwynne v. Heaton*, 1 Brown, Ch. 8, said of such bargains: "There must be an inequality so strong, gross, and manifest that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it." If there is nothing in the sum agreed to be paid that will justify an inference of fraud in the law courts, it can hardly be that there is so much in it here as to shock the conscience of this court. The reasoning of Justice Magie, in which I concurred in the court of errors and appeals, satisfies me that there is nothing in the stipulated sum to manifest gross inequality. Nor is there anything in the condition of the parties to make such gross inequality apparent. Both are farmers. Pullen has property valued at \$1,000 or \$1,500, and Phillips admits that he is worth \$12,000, while the answer puts his estate at \$40,000. I will discharge the order to show cause, with costs.

RAKESTRAW v. LANIER.

(30 S. E. 735, 104 Ga. 188.)

Supreme Court of Georgia. April 13, 1898.

Error from superior court, Screven county; R. L. Gamble, Judge.

Action by A. B. Lanier against Chauncey Rakestraw. Decree for plaintiff. Defendant brings error. Reversed.

The following is the official report:

On August 10, 1895, Lanier and Rakestraw, physicians residing in the town of Oliver, formed a partnership for the practice of medicine, surgery, and obstetrics. The articles of co-partnership contained, among other stipulations, the following: "In consideration of the advantages and benefits that will flow to said Rakestraw by reason of the formation of said firm and partnership business, he hereby agrees that in the event said firm shall at any time hereafter be dissolved, that he will not locate or engage in the practice of medicine, surgery, or obstetrics at said town of Oliver, or at any place within fifteen miles radius from the drug store of said Lanier, unless he shall first have obtained the written consent of said Lanier. And, in the event the said Rakestraw shall violate the terms of this article, the said Lanier shall be entitled to sue and recover, as his damages, the sum of one thousand dollars annually from said Rakestraw so long as he shall violate the terms of this article; said sum of \$1,000 being agreed now between the parties hereto as damages, and not as a penalty. This partnership shall continue for the space and term of twelve months from the date when signed by the parties hereto, unless sooner dissolved. This partnership may be dissolved by either member giving to the other, in writing, a notice of his intention to withdraw from the partnership; and, at the expiration of thirty days from the service of such notice by either member on the other, said firm shall be dissolved." On June 3, 1896, Lanier wrote to Rakestraw as follows: "Under the provisions of our contract, a thirty-days notice is required to dissolve the same; and you are hereby notified that, on the third day of July next, you may consider the contract between us in the practice of medicine ended. This will enable you to make all collections of your one-third interest in all accounts now on our books, or what may become due within thirty days, at which time I shall expect a partner in the practice here. If you desire, you can fully withdraw from all office practice and drug-store duties from date. I shall expect to abide by the contract in the letter and in the spirit in which it was written." The partnership was accordingly dissolved. After the dissolution, Rakestraw continued to reside in the town of Oliver, and to practice medicine, surgery, and obstetrics there, and within the radius of 15 miles re-

ferred to in the contract. On September 18, 1897, Lanier wrote to Rakestraw, at Oliver, as follows: "Under our contract, you are now due me \$1,000, which you will pay at once, or discontinue practice in this place." Rakestraw refused to comply with this demand; and on October 26, 1897, Lanier brought to the superior court his petition, setting out the foregoing facts, and alleging that Rakestraw was still engaged in the practice of medicine, surgery, and obstetrics in the locality mentioned, contrary to his contract, in violation of equity and good conscience, and in fraud and damage of petitioner; that by reason of this breach of the contract, and under the express terms thereof, defendant became indebted to him in the sum of \$1,000 at the expiration of the year from the date of the dissolution, and is still so indebted; that defendant is hopelessly insolvent; that petitioner has no adequate remedy at law; and that the injury complained of is continuing in its nature, and will necessitate a suit at the expiration of each year, and by reason of the bad faith of the defendant, and the nature of petitioner's business, his age, and his circumstances, the injury is irreparable in damages. Waiving discovery, he prayed a judgment against defendant for \$1,000, a perpetual injunction, and, until the final hearing, a temporary injunction, restraining the defendant from engaging in the practice of medicine, surgery, or obstetrics at the town of Oliver, or any place within a radius of fifteen miles from the drug store of petitioner, unless he shall have first obtained the written consent of petitioner. The defendant demurred and answered, and, at the hearing of the application for temporary injunction, urged that the petition set forth no ground for injunction or other relief against him; that the stipulation in the contract upon which the petition was based is against public policy and illegal, and is not valid or enforceable against the defendant; that it is not a reasonable or proper stipulation, within the meaning of the requirements of the law, and is unjust, unfair, and against good conscience; that it is without sufficient consideration to support it, and is lacking in mutuality, and does not put the plaintiff under such obligation as would make the agreement of the defendant valid and binding; and, further, that, under the facts, the plaintiff was not entitled to the injunction or other relief. Defendant denied that he had acted in bad faith, or was inflicting any legal injury upon the plaintiff. He denied that he was hopelessly insolvent, but admitted that his assets, which consisted of personal property only, would not, if sold at public outcry, net more than enough to pay what he owed. He alleged: Before signing the agreement, plaintiff called his attention to the stipulation in question, and said that it had been put in by the lawyer as a matter of form, and that he (plaintiff) doubted its

legality, and gave defendant to understand that he need not apprehend its enforcement. Before the agreement was entered into, certain residents of the town of Oliver had advertised in the newspaper that a physician was needed in the town, and plaintiff, understanding that defendant might locate in Oliver, induced him to sign the contract, with the purpose of thereby getting rid of defendant's competition. This purpose was fraudulent, and vitiated the contract, if otherwise legal. During the continuance of the partnership, and before any notice of dissolution was given, plaintiff so conducted himself with reference to the defendant as to deprive him of the possibility of gaining any advantage from the association, and made the partnership the means of injuring and damaging defendant, and of efforts to blast his good name and prospects. Plaintiff, before the notice, circulated reports which were untrue and unfounded, reflecting grossly upon the character and life of defendant, and which are set out in the answer. Plaintiff did not comply with his obligations under the contract. He declined upon different occasions to practice with defendant, declined to recognize notes addressed to the firm in the firm name, and announced that he would not notice any request for a visit that was not addressed to him personally. While the co-partnership continued, plaintiff announced that he intended to ruin defendant, and would drive him out of the country. As to these allegations the evidence at the hearing was conflicting. The court, after hearing the evidence, ordered that a temporary injunction as prayed for be granted, unless a bond with security, conditioned to pay the eventual condemnation money, should be given by the defendant within 45 days from the date of the order. Defendant excepted.

Denmark, Adams & Freeman, for plaintiff in error. Giquilliat & Stubbs and Oliver & Overstreet, for defendant in error.

LITTLE, J. Counsel for plaintiff in error, both by his argument and brief, rests his case on the proposition that the petition on which the judge below granted an injunction in default of bond sets forth no cause for relief, because the contract sought to be enforced is not a legal and binding instrument. Hence this court is called upon to determine the question whether the contract which is set out in the foregoing report is void, as contrary to public policy, or whether the same is valid, and therefore to be enforced. This question is to be settled by the rules of law governing contracts made in restraint of trade, and, in seeking to make application of such rules, we find ourselves furnished with precedents which seem to be authority for all phases of the question, and rulings distressingly in conflict. The plaintiff in error submits that the terms of the contract render it invalid, because it is harsh and unreasonable;

it is against public policy; it is not a reasonable or proper contract, within the meaning or the requirements of the law; that it is without consideration to support it. If either one of these contentions is established, then, as we understand the law applicable to contracts of this character, the courts must refuse to enforce the contract relied upon, because agreements which are unlawful, without regard to the manner of execution, never in law become contracts, although frequently denominated and dealt with under the name of illegal contracts. We cannot, within reasonable limits, undertake to reconcile conflicting opinions in treating of contracts in restraint of trade, nor cite the authorities which bear upon the different constituent elements which render such contracts valid, or the want of which make them void, for the reason that the first are irreconcilable, and the latter inharmonious. It must suffice that we shall in this case present the rules which we consider established by the most satisfactorily reasoned cases of other jurisdictions, add the adjudications of our own court.

Mr. Clark, in his work on Contracts, says, on authority, that at one time in England it was considered that a contract was contrary to public policy if it placed any restraint at all on a man's right to exercise his trade or calling, but that, gradually, exceptions were recognized, until at last the court, in a leading case (*Mitchel v. Reynolds*, 1 P. Wms. 181), established the rule that a contract in restraint of trade, upon consideration, which shows it was reasonable for the parties to enter into it, is good; "that whenever a consideration appears to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained," etc. By reference to that case, we find the conclusion of the court to be that "in all restraints of trade, where nothing more appears, the law presumes them bad; but, if the circumstances are set forth, that presumption is excluded, and the court is to judge of those circumstances, and determine accordingly, and if, upon them, it appears to be a just and honest contract, it ought to be maintained." Some question has arisen as to the proper construction of our Code, which declares that "contracts in general in restraint of trade are void" (Civ. Code, § 3668), and as to whether the proper interpretation of these words would have the effect to declare that contracts in general restraint of trade are void, or that contracts generally in restraint of trade are void. Speaking for myself, I interpret the language to mean that contracts generally in restraint of trade are void. The words of this section were not codified from any act of the general assembly, but the same language appeared in our first Code (1863), and ran without change through successive editions and revisions up to and including the Civil Code of 1896, from which I infer that, if the words were not intended to be accepted

as written, subsequent codifiers, if not subsequent legislatures, would, by change or amendment, more clearly have expressed a different meaning. But I take it that the words "contracts in general in restraint of trade are void" (meaning that, generally, contracts in restraint of trade are void) were incorporated into the codification of laws in force in this state as expressing a recognized legal principle sanctioned by the highest authority. In *Ross v. Sadgbeer*, 21 Wend. 168, Mr. Justice Bronson says: "The law starts out with the presumption that a contract in restraint of trade is void." The same rule is stated in *Pol. Cont.* side page 311; is recognized in the leading case from 1 P. Wms., supra; and the principle laid down in *Clark*, *Cont.* p. 447. Besides, such a construction seems to be in harmony with the policy of the law in this state. To one class of persons at least—corporations—contracts of this character are forbidden when they tend to lessen competition in their respective business (*Const.* 1877; *Civ. Code*, § 5800); and various acts of the legislature seem to indicate such a policy to exist. However this may be, it is certain that contracts in unreasonable restraint of trade are contrary to public policy, and void, because they tend to injure the parties making them; diminish their means of procuring livelihoods and a competency for their families; tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions, and expose them to imposition and oppression; tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as to themselves; discourage industry and enterprise, and diminish the products of ingenuity and skill; prevent competition, and enhance prices, and expose the public to all the evils of monopoly. *Clark*, *Cont.* p. 446. Against evils like these, wise laws protect individuals and the public by declaring all such contracts void. *Alger v. Thacher*, 19 Pick. (Mass.) 51. Since the early legislative history both of England and this country, statutes have been of force looking to the prevention of monopoly, and the interdiction of restraints upon the exercise of business, trades, or professions; and in no instance has a contract which imposed an unreasonable restraint upon the same, in the eye of the judiciary, been upheld; and the question of the reasonableness of the restriction is one of law for the court. 1 *Whart. Cont.* § 433; *Bish. Cont.* § 517; *Benj. Sales*, § 527; 2 *Pom. Eq. Jur.* § 934; *Mallan v. May*, 11 Mees. & W. 653; *Wiley v. Baumgardner*, 97 Ind. 66. In determining whether such restriction is reasonable, the court will look alone to the time when the contract was entered into. *Rannie v. Irvine*, 7 Man. & G. 969; *Cook v. Johnson*, 47 Conn. 175. It is, however, satisfactorily established that, as a matter of law, such a contract is to be upheld if the restraint imposed is not unreasona-

ble, is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public. *Clark*, *Cont.* p. 446. In some jurisdictions it is held that a contract in restraint of trade which is unlimited as to space is void on its face, and will not be enforced. *Id.* p. 450, and authorities cited. On the other hand, it has been held that a contract restraining the exercise of a trade or business throughout the kingdom or state may be reasonable, and therefore valid. *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Beal v. Chase*, 31 Mich. 490; *Match Co. v. Roeber*, 35 Hun, 421. In determining, however, whether such a contract is reasonable, the court will consider the nature and extent of the trade or business, the situation of the parties, and all the other circumstances; and even if the presumption to which we have before referred does not exist against the validity of such contracts, so as to require persons seeking to enforce them to show that they were made upon a sufficient consideration, and that the restrictions they impose are reasonable (*Angier v. Webber*, 92 Am. Dec., note on page 753), yet, in law, all such contracts are void, if considered only in the abstract, and without reference to the situation or objects of the parties, or other circumstances under or with reference to which they were made; and this, though the pecuniary consideration paid may have been sufficient to support the contract in any other aspect, or any ordinary contract for a legal purpose, or even though it may be sufficient in value to compensate the restraint imposed. But if, considered with reference to the situation, business, and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them, and not specially injurious to the public, the restraint will be held valid. The true test, therefore, of the validity of such a contract, is whether it is supported by a sufficient consideration, and whether the restraint is reasonable.

The plaintiff in error contends that the contract under review is without sufficient consideration to support it, and that for this reason it is void. That there must be an actual valuable consideration to support such a contract, and such consideration should be shown on the face of the declaration or complaint, although the contract be under seal, are propositions well established. *Bish. Cont.* § 126; *Metc. Cont.* p. 233; 1 *Whart. Cont.* § 434; *Mitchel v. Reynolds*, 1 P. Wms. 181; *Davis v. Mason*, 5 Term R. 118; *Hutton v. Parker*, 7 Dowl. 739; *Pierce v. Fuller*, 8 Mass. 223; *Weller v. Hersee*, 10 Hun, 431. That the consideration must thus be shown is generally said to be the only exception to

the rule that a contract under seal imports a consideration which the party will not be permitted to deny. Metc. Cont. § 233. And in earlier times it was held that the consideration must be adequate. *Mitchel v. Reynolds*, supra; *Gale v. Reed*, 8 East, 80; *Young v. Timmins*, 1 Tyrw. 226. The courts, however, long since departed from this doctrine; and it may now be taken as settled that, if there is a legal consideration, it will not be inquired whether or not it is adequate, or, in other words, equal in value to the restraint agreed upon. See authorities cited in note to case of *Angier v. Webber*, 92 Am. Dec. 754. As was said by Tindal, C. J., in the case of *Hitchcock v. Coker*, 6 Adol. & E. 438: "It is enough that there is actually a consideration for the bargain, and that such consideration is a legal consideration, and of some value." Accordingly, in the case of *Pierce v. Fuller*, 8 Mass. 223, one dollar was held to be a sufficient consideration for a covenant not to run a stagecoach between given points, in opposition to the plaintiff. The consideration upon which the defendant entered into the contract under review as expressed was the advantages and benefits that would flow to him by reason of the "formation of said firm and partnership business." This, under the authorities cited, is a sufficient legal consideration, in so far as such contracts are dependent on a consideration to be sustained. The exact value of the consideration, the court ought not, and, in the nature of things, cannot, undertake to measure. There is nothing in the record of the case which shows such gross inadequacy of consideration as to shock the conscience, and amount in itself to evidence of fraud. See Metc. Cont. p. 271.

The remaining objections urged against the validity of the contract may all be passed upon in considering the other question upon which the validity of the contract depends, namely, is the restraint which it imposes reasonable? While public policy forbids any agreement which unreasonably restrains a person from exercising his trade or business, it is equally true that public policy also requires that the freedom of persons to enter into contracts shall not be lightly interfered with. *Clark*, Cont. p. 447. The contract under consideration imposed a restraint unlimited as to time, but limited as to space. We are aware that it has been repeatedly held that, where the restraint is otherwise reasonable, the circumstances that it is indefinite as to time will not affect its validity (1 *Whart. Cont.* § 432; *Metc. Cont.* p. 232; *Benj. Sales*, § 525; *Hitchcock v. Coker*, 6 Adol. & E. 438; *Pemberton v. Vaughan*, 10 Q. B. 87; *Catt v. Tourle*, 4 Ch. App. 654; *Cook v. Johnson*, 47 Conn. 175; *Bowser v. Bliss*, 7 Blackf. 344); and that our court, in more than one case, which will be presently referred to, held the same doctrine. Nevertheless, if the test of the validity of the contract is, as we have shown it to be, that it must be

founded on a valuable consideration, and that the restraint imposed must be reasonable, and such as is reasonably necessary to protect the interest of the party in whose favor it is imposed, and at the same time not unduly prejudice the interest of the public, it seems to us that the question of time in the restriction imposed cannot be arbitrarily said to have no effect on the validity of a contract which, being reasonable in all other respects except in point of time, is, from the circumstances, unreasonable and oppressive as to the latter. See *Mandeville v. Harman* (N. J. Ch.) 7 Atl. 37; *Keeler v. Taylor*, 53 Pa. St. 469. In the case of *Hitchcock v. Coker*, supra, Lord Denman, construing a contract which imposed a restraint on one who, having entered the service of the plaintiff (who was a druggist), agreed that he would not at any time after leaving such service engage in the business of a druggist in that town, said: "It is not limited to such time as the plaintiff should carry on business in Taunton, nor to any given number of years, nor even to the life of the plaintiff; but it attaches to the defendant as long as he lives, although the plaintiff may have left Taunton, or parted with his business, or be dead;" and he accordingly held the restraint to be unreasonable and oppressive. That case was reversed on writ of error, but the point of reversal was that a restriction so extensive in point of time was necessary for the protection of the promisee in the enjoyment of the good will of his trade; and, as we understand the principle ruled in that case, a restriction so extensive is reasonable, and not oppressive, when it prevents the destruction of a property right or interest or the good will of a trade or business. See review of the case in *Clark*, Cont. pp. 455, 456. The contrary of this doctrine, however, is directly held in *French v. Parker*, 16 R. I. 219, 14 Atl. 870.

With conflicting authorities as to the application of the rules for testing the validity of contracts in partial restraint of trade, upon which all agree, we think a clear distinction must be taken between the class of cases binding one who has sold out a mercantile or other kind of business, and the good will therewith connected, not to again engage in that business within a given territory, and that class of cases binding one to desist from the practice of a learned profession. I can readily perceive that a successor of a merchant, broker, or shopkeeper might reasonably expect to retain the former patronage of the place of business, but fully concur with the views expressed by the court in the case of *Mandeville v. Harman*, supra, that professional skill, experience, and reputation are things which cannot be bought or sold. They constitute part of the individuality of the particular person, and die with him. In that case the court said: "There can be no doubt, I think, that if the complainant was the most distinguished phy-

sician of the city of Newark, and had by far the most lucrative practice in that city, and he should be so unfortunate as to die next month or next year, it would be impossible for his personal representative to sell his good will or practice, as a thing of property distinct from the office which he had occupied prior to his death, for any price; and I think it is equally obvious that, if it were sold in connection with his office, the only possible value which could be ascribed to it would be the slight possibility that some of the persons who had been his patients might, when they needed the services of a physician, go or send there for the next occupant of the office. The practice of a physician is a thing so purely personal, depending so absolutely on the confidence reposed in his personal skill and ability, that, when he ceases to exist, it necessarily ceases also, and after his death can have neither an intrinsic nor a market value. And, if the complainant should make sale of his practice in his lifetime, it is manifest all the purchaser could possibly get would be immunity from competition with him, and, perhaps, his implied approval that the purchaser was fit to be his successor; but it would be impossible for him to transfer his professional skill and ability to his successor, or to induce anybody to believe that he had."

So far as we have been able to examine, the cases which have ruled that, if the restraint is reasonably limited as to space, the fact that it is unlimited as to time will not render the agreement void, were cases in which some business or property, or property right, either of goods or good will, had been sold, and the restriction as to unlimited time was not considered unreasonable, because it affected property rights. Our own court has considered a number of cases involving contracts in restraint of trade, and in some of them held that restraints unlimited in point of time did not render the contracts void; but in every one of such cases, as far as we have examined, a property interest was involved. The first is that of *Holmes v. Martin*, 10 Ga. 503. In that case Holmes conveyed to Martin a house and lot in the town of Lawrenceville, with this restriction in the deed: "That said house and lot shall not be occupied by the said Martin or his assignees as a public tavern or hotel, which right is reserved in said property by Holmes." In that case the court held this contract to be good, and that contracts in partial restraint of trade only may be supported, provided the restraint be reasonable, and the contract founded on a consideration. In the case of *Mell v. Mooney*, 30 Ga. 413, no question arose which called for a ruling of the validity of contracts in restraint of trade, the points in the case relating alone to pleading. In the case of *Jenkins v. Temples*, 39 Ga. 655, it appeared that Jenkins had bought of Temples an entire stock of groceries and confectioneries at very high

prices, and Temples had agreed that he would use all of his influence for Jenkins with his former customers, and bound himself not to deal in any of said articles at Spring Place until January, 1869. Temples violated the agreement. The court below held the contract to be void, and this court ruled, reversing the judge below, that a party might legally bind himself for a valuable consideration not to conduct a particular trade or business in a particular place for a reasonable and definite period of time. In the case of *Spier v. Lambdin*, 45 Ga. 319, Lambdin sold to Spier an unexpired lease of the Barnesville Academy, with the consent of the trustees, for the consideration of \$475, representing that he wished to abandon school teaching, and would use his influence for Spier's benefit. The contract was held to be good and enforceable. In the case of *Ellis v. Jones*, 56 Ga. 504, Ellis & Palmer had purchased a stock of merchandise, consisting of dry goods, groceries, etc., from Jones & Co., and the store house containing the same, together with their custom and good will. Jones & Co. having recommenced business in the same place, Ellis & Palmer filed a bill to enjoin such action. The injunction was refused. It does not satisfactorily appear in the case that Jones & Co. covenanted not to engage in the same business. In the case of *Goodman v. Henderson*, 58 Ga. 567, the suit was upon a written agreement, whereby Goodman, in consideration of \$100 a month for two years, and a further money consideration, agreed to retire from the business of purchasing green hides, sheep skins, etc., in the Savannah market forever, and that he would use his influence in favor of the purchaser, and sold to him the good will of the business. This court held in that case that the limit as to time made no difference if the contract was limited as to space. In the case of *Brewer v. Lamar*, 69 Ga. 656, there was an agreement to sell a certain proprietary medicine, and the seller agreed never to use or permit his name to be used on any preparation for the same class of complaints for which this medicine was made, and agreed also to surrender his trade-mark, and give to the purchasers the exclusive right to sell and manufacture the same under the old name. The consideration of the purchase was \$275. The court held that the contract was in partial restraint of trade, and could be enforced. In the case of *Newman v. Wolfson*, 69 Ga. 764, Newman sold to Wolfson a stock of goods, etc., together with the good will of the business, for \$1,466, and covenanted not to engage in a like business in that city for a period of five years. The court in this case held that the contract was not unreasonable. In the case of *Swanson v. Kirby*, 98 Ga. 586, 26 S. E. 71, this court held that where one has sold out a given business, and contracted not to again carry on the same in a particular locality,

though unlimited as to time, such a contract, being reasonable and proper when limited as to place, and in other respects, was valid. In this case the consideration paid was \$1,500, and the property purchased was a membership in the American Ticket Brokers' Association, a burglar-proof safe, desk, typewriter, and other office fixtures. The covenant was not to open a ticket office in the city of Atlanta without the consent of Kirby. In that case the court held that while contracts in total restraint of trade were void, where the restraint was partial, reasonable, and founded upon a good consideration, the contract would be enforced. It has never been decided in this state that a covenant between professional men (where no property rights were involved in the contract which imposed the restriction) so extensive in duration as that under consideration in the present case is valid. As was said by the court in the case of *Mandeville v. Harman*, supra: "It is one of the natural rights of every citizen of this state to use his skill and labor in any useful employment, not only to get food, raiment, and shelter, but to acquire property; and I think it may be regarded as very certain that the courts will never deprive any one of this right, or even abridge it, except in obedience to the sternest demands of justice."

We test this contract by the rules before referred to, and find it supported by a legal consideration. Being limited as to space, although unlimited as to time, we find that it may properly be classed among contracts in partial restraint of trade. When we seek its terms to ascertain whether it is reasonable, made to protect the promisee, and not oppressive on the promisor, we find that no money was paid by the promisee, and no property sold by the promisor. We find that the promisor, by the nature of the contract, must have rendered service for all the benefits he received. We find that, under the terms of this contract, if the promisee, the defendant in error, should remove from the town of Oliver, from the state of Georgia; if he should become permanently

incapacitated, by disease, from continuing the practice of medicine; if he should die,—the promisor, in any event, would not be at liberty to practice his profession in Oliver, nor within 15 miles radius of that town. No matter what the changed conditions might be, it was so nominated in the bond that he should not exercise his calling within the territory prescribed. It must be clear, therefore, that the restrictions imposed upon the promisor in this contract were larger than were necessary for the protection of the promisee. Full protection would have been afforded to the latter if the time in which the restraint should apply had been limited to the life of the defendant in error, or to the time in which he was engaged in the practice of his profession in the county of Screven. Had this contract been so limited, it is obvious from the view which we take of the law that it should be upheld and would be enforced. But, when the terms of the contract prohibit one party from at any time in the future practicing his profession at a given place, without regard to the fact that the other party should not be engaged in the competitive business, without regard to the fact that he may have removed from the county and state in which such territory was located, without regard to the fact of the inability of the party, from age or physical infirmity, to continue his practice, it would seem to be unreasonable,—not necessary for the protection of the party in whose favor the restraint was imposed, oppressive to the party restrained, and opposed to the interests of the public; and, such being the case, the contract cannot be enforced. If it be said that it would be the right of the plaintiff in error, under any of the circumstances we have mentioned, to pray for a modification or rescission of such contract, the reply is that we are not dealing with such question. We are to construe it as it is written, and, so construing it, we hold it to be void and of no binding force and effect. The judgment of the court below must be reversed. All the justices concurring, except COBB, J., absent for providential cause.

COWEE v. CORNELL.

(75 N. Y. 91.)

Court of Appeals of New York. Nov. 12, 1878.

Appeal from order of the general term of the supreme court in the Third judicial department, reversing a judgment entered upon the report of a referee.

Plaintiff made a claim against the estate of Latham Cornell, of whose will defendants were the executors, for interest upon a promissory note executed by the deceased. This claim was rejected, and was referred by stipulation.

The facts, as stated by the referee, are in substance as follows:

Latham Cornell, the deceased, was the grandfather of Latham C. Strong. He was possessed of large property, consisting of real estate and of personal property invested in stocks, bonds and other securities. He died in 1876 at the age of ninety-five. For four years prior to his death he was partially blind. From July, 1871, until the time of his death, his grandson at his request attended to his affairs, writing his letters, looking after his banking business and his rents, making out his bills, cutting off his coupons, reading to him, and on occasions going away from home to transact other business. In July, 1871, Cornell gave to Strong a deed of two adjoining houses in the city of Troy, valued at about \$32,000, in one of which houses the grandfather lived until the time of his death. The grandson moved into the adjoining house in the spring of 1872, and resided there until after his grandfather's death. During the time that the two thus lived in adjoining residences, they were in daily conference upon business matters of the old gentleman, in the house occupied by the grandson. The grandson with his family consisting of five persons, during all this time lived at the sole expense of the grandfather, and claims to have received, in addition to the note in suit, as gifts from his grandfather, \$30,000 in government bonds and the assignment of a mortgage for about \$1,700. At what particular time it is claimed these gifts were made is not in evidence. Mr. Cornell made his will in 1871, providing a legacy of \$15,000 for Mr. Strong. In the fall of 1872, Mr. Strong expressed a desire to go into business for himself and to be independent of his grandfather, and actually was in negotiation with different persons in Troy and New York with a view of forming business associations. Mr. Cornell became uneasy at the prospect of losing the services of his grandson and caused him to be written for to come home. Mr. Strong came back to Troy, and his grandfather said to him then, as he had previously said, that he wanted him to give up his ideas of leaving and to devote his whole time to the business of his grandfather. Mr. Cornell further said that he had no one else to look after his business, and frequently said that there was money

enough for all of them. Mr. Strong immediately abandoned his business projects and devoted his whole time and attention to his grandfather's business, until the death of the latter. After this Mr. Cornell sent for his legal advisers and proposed to alter his will so as to make provision to compensate his grandson for having devoted himself to his business. What provision was intended is not disclosed by the evidence. The lawyers advised that his will be left unaltered, and that he take some other way of compensating his grandson. Mr. Cornell gave to Mr. Strong the note in question. It is as follows: "\$20,000. Troy, April 1, 1873. Five years after date I promise to pay Latham L. C. Strong, or order, \$20,000, for value received, with interest yearly. L. Cornell."

The note was on a printed form, the name of the payee being printed "Latham Cornell." The note was filled up in the handwriting of the maker, but in striking out with his pen the name of the payee he left the word "Latham" and afterwards interlined the full name, "L. C. Strong." Annexed to the note was a stub with some printed forms, on which Mr. Cornell wrote: "Troy, April 1st, 1873, L. C. Strong, \$20,000 at five years, to make the amount the same as Chas. W. Cornell." The stub was on the note when it was delivered to the payee, but was torn off by him before it was transferred to the plaintiff; and there is no evidence that the plaintiff ever knew of the existence of the stub. The stub and note were taken from a blank book which belonged to decedent. No payment of interest was made upon the note during the lifetime of the maker. The referee found that the note was given for a valuable consideration. Mr. Strong sold the note to the plaintiff for \$19,000, taking his note, payable in one year after date. What that date was has not been disclosed. Mr. Strong testified at the trial that he still held the note. Mr. Strong was one of the executors.

Further facts are stated in the opinion.

Irving Browne, for appellant. John Thompson, for respondents.

HAND, J. The counsel for respondents suggested at the close of his argument before us that there was no evidence of a delivery of the note to Strong, the payee, and the finding of delivery by the referee was entirely unsupported. He does not however make this a point in his printed brief, and did not present it strenuously or with any emphasis in his oral remarks.

It is true that the evidence in this respect was not very satisfactory. Ordinarily the possession and production of the note by the payee will raise a presumption of delivery to him. But this presumption must be very much weakened when the possession is shown not to precede the possession of all the maker's papers and effects by the payee

as executor, when the note appears to have been all in the handwriting of the maker and to have been taken with a stub attached, also in his handwriting, from a bank book belonging to him, and when installments of interest falling due in the maker's life-time were not paid and although years elapsed after they so became due before his death there is no proof of any demand of them by the payee or recognition of liability by the deceased. I am not prepared to say however that these circumstances absolutely destroy the presumption from possession and production of the instrument. While some evidence on the part of the plaintiff, showing that the note had been delivered to Strong in his grandfather's life-time, or at least negating the idea that Strong found it in the bank-book or among the papers of the deceased when he took possession of them as executor, could probably have been easily produced if consistent with the fact, yet we cannot hold its absence conclusive against the plaintiff upon this point, upon the record as it stands. No motion for judgment or to dismiss was made on this ground by the respondents although the trial was in other respects treated by the counsel on both sides as one before a referee appointed in the ordinary way to hear and determine and direct judgment as in an action, and we cannot say but that if the plaintiff had been notified of such an objection, the evidence would have been supplied. The finding of the delivery by the referee was not even excepted to, although there were exceptions to the finding of consideration. Under these circumstances we must, I think, assume an acquiescence in the truth of the finding by the respondents for reasons known to them, and which if disclosed would probably be entirely satisfactory.

The majority of the general term put their reversal of the judgment upon the ground that it conclusively appeared from the stub attached that the note was intended as a gift and was without consideration. In this I am unable to concur.

The referee's finding that the note was delivered not as a gift but for a valuable consideration has some evidence to support it, in the proof of the services rendered by Strong to the deceased, and his abandonment of a profession at the request of the deceased, in the intention expressed by the latter to make some compensation for those services, and the conversation had with his counsel not very long before the date of this note, in which he was dissuaded from making this compensation by will and advised to do it while alive, to which he assented. What appears upon the stub is not in my opinion conclusive against this result.

There is perhaps difficulty in giving any entirely satisfactory construction to this memorandum made by the deceased; but the interpretation of the general term seems to my mind inconsistent with the known facts

of the case. Strong certainly had had and the deceased knew that he had had property of the value of \$32,000 given him before the date of this note, and perhaps \$30,000 more in bonds. The \$20,000 note could not have been therefore as the general term supposes, a gift to make him equal in gifts with his cousin Charles, to whom only \$20,000 had been given in all.

But not only do the circumstances show that the memorandum could not mean that this gift of the \$20,000 to Strong would make him equal in gifts to Charles, but the memorandum itself does not say so. Its language is "to make the amount the same as Chas. W. Cornell." While, as has already been said, there is probably insuperable difficulty in discovering precisely all that the deceased meant by this expression, its intrinsic sense is merely that the amount of this note, \$20,000, is so fixed to make it the same as an amount possessed in some way by Charles, and this is consistent with both amounts being gifts, or the one being fixed upon in the testator's mind as a fair compensation for Strong's services and at the same time equal to an amount he had given or intended to give to Charles. On the whole I think this memorandum was a piece of evidence to be submitted with the other evidence to be considered by the referee on the question of fact. His decision upon all this evidence cannot be disturbed by this court.

The same may be said of the proof of large gifts to Strong either all before, or some before and some after the date of the note.

The reversal by the general term is not stated to be upon the facts, and on the argument it was conceded by the counsel for the respondents to be upon the law merely. It may be that a finding upon all the evidence that the note was without consideration and a gift would not be disturbed, and would be held by us as not unauthorized by the evidence. On the other hand, we cannot accede to the proposition that a finding to the contrary, such as has been made by the referee here, must by reason of the contents of this stub or other testimony be reversed as erroneous in law.

It follows that except as bearing upon undue influence, and the relations of parties hereafter considered, the inadequacy of the services or the extravagance of the compensation are not material. That was a matter purely of agreement between Strong and the deceased, and with which the court will not interfere under ordinary circumstances. *Earl v. Peck*, 64 N. Y. 597; *Worth v. Case*, 42 N. Y. 362; *Johnson v. Titus*, 2 Hill, 606. Although the consideration of a promissory note is always open to investigation between the original parties (and we agree with the court below that the plaintiff here has no better position than Strong himself), yet as pointed out by the chief judge in *Earl v. Peck*, supra, mere inadequacy in value of the

thing bought or paid for is never intended by the legal expression, "want or failure of consideration." This only covers either total worthlessness to all parties, or subsequent destruction, partial or complete.

Assuming then, as I think we must, that there was no error as matter of law in the finding of the referee that this note was given for a valuable consideration, and that the adequacy of that consideration is something with which we have no concern if the parties dealt on equal terms, the only point remaining to consider is the relations existing between the deceased and Strong at the date of the note.

It is insisted strenuously by the learned counsel for the respondents that these were such as to call for the application of the doctrine of constructive fraud, and threw upon the plaintiff the burden of proving not only that the deceased fully understood the act, but that he was not induced to it by any undue influence of Strong, and that the latter took no unfair advantage of his superior influence or knowledge.

The court below were hardly correct in the suggestion that the plaintiff conceded this burden to be upon himself, and for that reason, instead of resting upon the statement of consideration in the note, gave evidence in opening his case of an actual consideration; for this may have been done to show in the first instance that the note was not a gift and hence void under the law applicable to gifts. Indeed it appears from the findings and refusals to find, and the opinion of the referee, that such was not the theory upon which the action was tried or decided.

We return then to the question whether this case was one of constructive fraud. It may be stated as universally true that fraud vitiates all contracts, but as a general thing it is not presumed but must be proved by the party seeking to relieve himself from an obligation on that ground. Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other from weakness, dependence or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood. This doctrine is well settled. *Hunt, J., Nesbit v. Lockman*, 34 N. Y. 167; *Story, Eq. Jur. § 311*; *Sears v. Shafer*, 6 N. Y. 268; *Huguenin v. Basely*, 13 Ves. 105, 14 Ves. 273, and 15 Ves. 180; *Wright v. Proud*, 13 Ves. 138; *Harris v. Tremeneere*, 15 Ves. 40; *Edwards v. Myrick*, 2 Hare, 60; *Hunter v. Atkins*, 3 Mylne & K. 113. And this is I

think the extent to which the well-considered cases go, and is the scope of "constructive fraud."

The principle referred to, it must be remembered, is distinct from that absolutely forbidding a purchase by a trustee or agent for his own benefit of the subject of a trust, and charging it when so purchased with the trust. That amounts to an incapacity in the fiduciary to purchase of himself. He cannot act for himself at all, however fairly or innocently, in any dealing as to which he has duties as trustee or agent. The reason of this rule is subjective. It removes from the trustee, with the power, all temptation to commit any breach of trust for his own benefit. But the principle with which we are now concerned does not absolutely forbid the dealing, but it presumes it unfair and fraudulent unless the contrary is affirmatively shown.

This doctrine, as has been said, is well settled, but there is often great difficulty in applying it to particular cases.

The law presumes in the case of guardian and ward, trustee and cestui que trust, attorney and client, and perhaps physician and patient, from the relation of the parties itself, that their situation is unequal and of the character I have defined; and that relation appearing itself throws the burden upon the trustee, guardian or attorney of showing the fairness of his dealings.

But while the doctrine is without doubt to be extended to many other relations of trust, confidence or inequality, the trust and confidence, or the superiority on one side and weakness on the other, must be proved in each of these cases; the law does not presume them from the fact for instance that one party is a grandfather and old, and the other a grandson and young, or that one is an employer and the other an employé. The question as to parties so situated is a question of fact dependent upon the circumstances in each case. There is no presumption of inequality either way from these relations merely.

In the present case it cannot be said that the fact that the deceased employed Strong as his clerk to read and answer his letters and cut off his coupons, and make out his bills, or as his bailiff to collect his rents, or that at this time he was old and of defective vision, or that Strong lived near him and was his grandson, taken separately or together raise a conclusive presumption of law that their situation was unequal, and that dealings between them as to compensation for these services were between a stronger and a weaker party, a fiduciary in hac re and the party reposing confidence. These relations as a matter of fact may have led to or been consistent with controlling influence on the part of the grandson, or childish weakness and confidence on the part of the grandfather, but this was to be shown, and is not necessarily derivable or presumable

from the relations themselves, as in the case of trustee, attorney or guardian.

From these relations and the large gifts shown from the deceased to Strong, and from the extravagant amount of the compensation in the note, it is very possible the referee might have found as a fact the existence of weakness on the one side, or undue strength on the other, which rendered applicable the doctrine of constructive fraud, and threw upon the plaintiff the burden of disproving such fraud. These circumstances may have well been of a character, if not sufficient to shift the presumption, at least to authorize a setting aside of a contract without any decisive proof of fraud, but upon the slightest proof that advantage was taken of the relation, or of the use of "any arts or stratagems or any undue means or the least speck of imposition." *Whelan v. Whelan*, 3 Cow. 538, Lord Eldon, L. C.; *Harris v. Tremenhare*, 15 Ves. 40, Lord Brougham; *Hunter v. Atkins*, 3 Mylne & K. 135.

But the referee not only has not found as fact any inequality in the situation of the deceased and Strong, but refused to find as a matter of law its existence, and there is really no evidence whatever of any arts or

stratagems or "speck of imposition" on the part of Strong as to this note.

We are not permitted to supply these findings even if we thought them proper for the referee to make, nor can we sustain a reversal of the original judgment upon facts not found and not necessarily inferable from uncontradicted evidence in the case, the general term not having in any way interfered with the findings of the referee.

On the whole therefore we reach the conclusion that there was no good reason for disturbing the judgment of the referee. This large claim upon the estate of the deceased is not so clearly justified and explained in the evidence as we could have wished, and the circumstances are such as to compel this court to look upon the case, if not with suspicion, certainly with anxiety, yet after careful examination we can find no material error in the original decision.

The order granting a new trial must be reversed and judgment for plaintiff affirmed with costs.

All concur, except MILLER and EARL, JJ., absent.

Judgment accordingly.

ALLORE v. JEWELL.

(94 U. S. 506.)

Supreme Court of the United States. Oct., 1876.

Appeal from the circuit court of the United States for the Eastern district of Michigan.

The facts are stated in the opinion of the court.

Alfred Russell, for appellant. A. B. Maynard, contra.

Mr. Justice FIELD delivered the opinion of the court.

This is a suit brought by the heir at law of Marie Genevieve Thibault, late of Detroit, Mich., to cancel a conveyance of land alleged to have been obtained from her a few weeks before her death, when, from her condition, she was incapable of understanding the nature and effect of the transaction.

The deceased died at Detroit on the 4th of February, 1864, intestate, leaving the complainant her sole surviving heir at law. For many years previous to her death, and until the execution of the conveyance to the defendant, she was seised in fee of the land in controversy, situated in that city, which she occupied as a homestead. In November, 1863, the defendant obtained from her a conveyance of this property. A copy of the conveyance is set forth in the bill. It contains covenants of seisin and warranty by the grantor, and immediately following them an agreement by the defendant to pay her \$250 upon the delivery of the instrument; an annuity of \$500; all her physician's bills during her life; the taxes on the property for that year, and all subsequent taxes during her life; also, that she should have the use and occupation of the house until the spring of 1864, or that he would pay the rent of such other house as she might occupy until then. The property was then worth, according to the testimony in the case, between \$6,000 and \$8,000. The deceased was at that time between sixty and seventy years of age, and was confined to her house by sickness, from which she never recovered. She lived alone, in a state of great degradation, and was without regular attendance in her sickness. There were no persons present with her at the execution of the conveyance, except the defendant, his agent, and his attorney. The \$250 stipulated were paid, but no other payment was ever made to her; she died a few weeks afterwards.

As grounds for cancelling this conveyance, the complainant alleges that the deceased, during the last few years of her life, was afflicted with lunacy or chronic insanity, and was so infirm as to be incapable of transacting any business of importance; that her last sickness aggravated her insanity, greatly weakened her mental faculties, and still more disqualified her for business; that the defendant and his agent knew of her infirmity, and that there was no reasonable prospect of

her recovery from her sickness, or of her long surviving, when the conveyance was taken; that she did not understand the nature of the instrument; and that it was obtained for an insignificant consideration, and in a clandestine manner, without her having any independent advice.

These allegations the defendant controverts, and avers that the conveyance was taken upon a proposition of the deceased; that at the date of its execution she was in the full possession of her mental faculties, appreciated the value of the property, and was capable of contracting with reference to it, and of selling or otherwise dealing with it; that since her death he has occupied the premises, and made permanent improvements to the value of \$7,000; and that the complainant never gave him notice of any claim to the property until the commencement of this suit.

The court below dismissed the bill, whereupon the complainant appealed here. The question presented for determination is, whether the deceased, at the time she executed the conveyance in question, possessed sufficient intelligence to understand fully the nature and effect of the transaction; and, if so, whether the conveyance was executed under such circumstances as that it ought to be upheld, or as would justify the interference of equity for its cancellation.

Numerous witnesses were examined in the case, and a large amount of testimony was taken. This testimony has been carefully analyzed by the defendant's counsel; and it must be admitted that the facts detailed by any one witness with reference to the condition of the deceased previous to her last illness, considered separately and apart from the statements of the others, do not show incapacity to transact business on her part, nor establish insanity, either continued or temporary. And yet, when all the facts stated by the different witnesses are taken together, one is led irresistibly by their combined effect to the conclusion, that, if the deceased was not afflicted with insanity for some years before her death, her mind wandered so near the line which divides sanity from insanity as to render any important business transaction with her of doubtful propriety, and to justify a careful scrutiny into its fairness.

Thus, some of the witnesses speak of the deceased as having low and filthy habits; of her being so imperfectly clad as at times to expose immodestly portions of her person; of her eating with her fingers, and having vermin on her body. Some of them testify to her believing in dreams, and her imagining she could see ghosts and spirits around her room, and her claiming to talk with them; to her being incoherent in her conversation, passing suddenly and without cause from one subject to another; to her using vulgar and profane language; to her making immodest gestures; to her talking strangely, and making singular motions and gestures in her neighbors' houses and in the streets. Other

witnesses testify to further peculiarities of life, manner, and conduct; but none of the peculiarities mentioned, considered singly, show a want of capacity to transact business. Instances will readily occur to every one where some of them have been exhibited by persons possessing good judgment in the management and disposition of property. But when all the peculiarities mentioned, of life, conduct, and language, are found in the same person, they create a strong impression that his mind is not entirely sound; and all transactions relating to his property will be narrowly scanned by a court of equity, whenever brought under its cognizance.

The condition of the deceased was not improved during her last sickness. The testimony of her attending physician leads to the conclusion that her mental infirmities were aggravated by it. He states that he had studied her disease, and for many years had considered her partially insane, and that in his opinion she was not competent in November, 1863, during her last sickness, to understand a document like the instrument executed. The physician also testifies that during this month he informed one Dolsen, who had inquired of the condition and health of the deceased, and had stated that efforts had been made to purchase her property, that in his opinion she could not survive her sickness, and that she was not in a condition to make any sale of the property "in a right way."

This Dolsen had at one time owned and managed a tannery adjoining the home of the deceased, which he sold to the defendant. After the sale, he carried on the business as the defendant's agent. Through him the transaction for the purchase of the property was conducted. The deceased understood English imperfectly, and Dolsen undertook to explain to her, in French, the contents of the paper she executed. Some attempt is made to show that he acted as her agent; but this is evidently an afterthought. He was in the employment of the defendant, had charge of his business, and had often talked with him about securing the property; and in his interest he acted throughout. If the deceased was not in a condition to dispose of the property, she was not in a condition to appoint an agent for that purpose.

The defendant himself states that he had seen the deceased for years, and knew that she was eccentric, queer, and penurious. It is hardly credible that, during those years, carrying on business within a few yards of her house, he had not heard that her mind was unsettled; or, at least, had not inferred that such was the fact, from what he saw of her conduct. Be that as it may, Dolsen's knowledge was his knowledge; and, when he covenanted to pay the annuity, some inquiry must have been had as to the probable duration of the payments. Such covenants are not often made without inquiries of that nature; and to Dolsen he must have looked for information, for he states that he conversed

with no one else about the purchase. With him and with his attorney he went to the house of the deceased, and there witnessed the miserable condition in which she lived, and he states that he wondered how anybody could live in such a place, and that he told Dolsen to get her a bed and some clothing. Dolsen had previously informed him that she would not sell the property; yet he took a conveyance from her at a consideration which, under the circumstances, with a certainty almost of her speedy decease, was an insignificant one compared with the value of the property.

In view of the circumstances stated, we are not satisfied that the deceased was, at the time she executed the conveyance, capable of comprehending fully the nature and effect of the transaction. She was in a state of physical prostration; and from that cause, and her previous infirmities, aggravated by her sickness, her intellect was greatly enfeebled; and, if not disqualified, she was unfitted to attend to business of such importance as the disposition of her entire property, and the securing of an annuity for life. Certain it is, that, in negotiating for the disposition of the property, she stood, in her sickness and infirmities, on no terms of equality with the defendant, who, with his attorney and agent, met her alone in her hovel to obtain the conveyance.

It is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that, from her sickness and infirmities, she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred. In the case of *Harding v. Wheaton*, 2 Mason, 378, Fed. Cas. No. 6,051, a conveyance executed by one to his son-in-law, for a nominal consideration, and upon a verbal arrangement that it should be considered as a trust for the maintenance of the grantor, and after his death for the benefit of his heirs, was, after his death, set aside, except as security for actual advances and charges, upon application of his heirs, on the ground that it was obtained from him when his mind was enfeebled by age and other causes. "Extreme weakness," said Mr. Justice Story, in deciding the case, "will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity; and though a contract, in the ordinary course of things, reasonably made with such a person, might be admitted to stand, yet if it should appear to be of such a nature as that such a person could not be capable of measuring its extent or importance, its reasonableness or its value, fully and fairly, it cannot be that the law is so much at variance with common sense as to uphold it." The case subsequently came before this court; and, in de-

ciding it, Mr. Chief Justice Marshall, speaking of this, and, it would seem, of other deeds executed by the deceased, said: "If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case is among its best-settled principles." *Harding v. Handy*, 11 Wheat. 125.

The same doctrine is announced in adjudged cases, almost without number; and it may be stated as settled law, that whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside. And the present case comes directly within this principle.

In the recent case of *Kempson v. Ashbee*, 10 Ch. Cas. 15, decided in the court of appeal in chancery in England, two bonds executed by a young woman, living at the time with her mother and step-father,—one, at the age of twenty-one, as surety for her step-father's debt, and the other, at the age of twenty-nine, to secure the amount of a judgment recovered on the first bond,—were set aside as against her, on the ground that she had acted in the transaction without independent advice; one of the justices observing that the court had endeavored to prevent persons subject to influence from being induced to enter into transactions without advice of that kind. The principle upon which the court acts in such cases, of protecting the weak and dependent, may always be invoked on behalf of persons in the situation of the deceased spinster in this case, of doubtful sanity, living entirely by herself, without friends to take care of her, and confined to her house by sickness. As well on this ground as on the ground of weakness of mind and gross inadequacy of consideration, we think the case a proper one for the interference of equity, and that a cancellation of the deed should be decreed.

The objection of the lapse of time—six years—before bringing the suit cannot avail the defendant. If during this time, from the death of witnesses or other causes, a full presenta-

tion of the facts of the case had become impossible, there might be force in the objection. But as there has been no change in this respect to the injury of the defendant, it does not lie in his mouth, after having, in the manner stated, obtained the property of the deceased, to complain that her heir did not sooner bring suit against him to compel its surrender. There is no statutory bar in the case. The improvements made have not cost more than the amount which a reasonable rent of the property would have produced, and the complainant, as we understand, does not object to allow the defendant credit for them. And as to the small amount paid on the execution of the conveyance, it is sufficient to observe, that the complainant received from the administrator of the deceased's estate only \$113.42; and there is no evidence that he ever knew that this sum constituted any portion of the money obtained from the defendant. A decree must, therefore, be entered for a cancellation of the deed of the deceased and a surrender of the property to the complainant, but without any accounting for back rents, the improvements being taken as an equivalent for them.

Decree reversed, and cause remanded with directions to enter a decree as thus stated.

Mr. Chief Justice WAITE and Mr. Justice STRONG, concur.

Mr. Justice BRADLEY (dissenting). I cannot concur in the judgment given in this case. Were there no other reason for my dissent, it would be enough that the complainant has been guilty of inexcusable laches. He knew every thing of which he now complains, in February, 1864, when the grantor of the defendant died, and when his rights as her heir vested; and yet he waited until six years and nine months thereafter before he brought this suit, and before he made any complaint of the sale she had made. Meanwhile, he accepted the money the defendant had paid on account of the purchase, and he stood silently by, asserting no claim, while the defendant was making valuable improvements upon the lot, at a cost of \$6,000 or \$7,000, a sum about equal to the value of the property at the time of the purchase. To permit him now to assert that the sale was invalid, because the vendor was of weak mind, is to allow him to reap a profit from his own unconscionable silence and delay. I cannot think a court of equity should lend itself to such a wrong.

GREENE et al. v. ROWORTH et al.

(21 N. E. 165, 113 N. Y. 462.)

Court of Appeals of New York. April 23, 1889.

Appeal from common pleas of New York city and county, general term.

Action originally brought by William Roworth, to vacate transfers of certain property made by him to his sons, Joseph G. and John W. Roworth. Pending the decision, William Roworth died, and the action was revived in favor of the present plaintiffs, Emma T. Greene and others. A judgment for plaintiffs was reversed in part and affirmed in part on appeal to the general term of the supreme court, and defendants now appeal to this court.

Thomas Darlington, (*Samuel Jones*, of counsel,) for appellants. *J. M. & A. H. Van Cott*, for respondents.

RUGER, C. J. The reversal by the general term of so much of the judgment of the special term as awarded relief to the plaintiffs in respect to the conveyance of personal property, eliminated from the case all questions predicated upon rulings in relation thereto. This determination left the issues in respect to the validity of the conveyances of two parcels of real estate as the only subjects of controversy on the appeal to this court.

The evidence of the exercise of fraud and undue influence by the defendants Joseph and John Roworth, in obtaining from their father, William Roworth, deeds of such property, was quite sufficient to sustain the findings of the trial court respecting the same. The evidence tended to show that for many years prior to January, 1877, William Roworth and his son Samuel carried on the business of manufacturing confectionery at 354 Pearl street in the city of New York, under the firm name of Samuel W. Roworth & Co., and had established a prosperous business. William Roworth was then the owner of a one-half interest in the assets of said firm; of a three-quarters interest in the lot and building in which the business was carried on; of a house and lot in Devoe street, Brooklyn; and another in Fifth street in the same city; a mortgage on property in Detroit for \$2,000; and deposits in bank of about \$500. In January, Samuel W. Roworth died, devising his interest in the assets of said firm equally to the defendants, his two brothers, John and Joseph, and to his two sisters. Between the time of Samuel's death, in January, 1877, and March, 1880, the defendants John and Joseph had obtained from William Roworth, without consideration except a promise to pay him a small sum weekly from the partnership business, all of the property possessed by him. This was effected by transfers and conveyances of such property, or its proceeds, made successively at different times by William Roworth to one or both of said defendants, between the dates aforesaid. At the time of the death of Samuel the two defend-

ants were each upwards of 45 years of age, and had been unsuccessful in the business operations theretofore carried on by them respectively, and were not then possessed of any property. They were supporting themselves as workmen, upon a small salary, in the employ of Samuel W. Roworth & Co. In 1877, William Roworth was 76 years of age, and had become quite infirm in health. His memory had greatly failed, and he was practically incapable of taking an active and responsible part in the management of his business, although he continued for some time thereafter to attend at the store and factory, and make entries in the books, draw up bills, and render other small services which he had been theretofore accustomed to perform. He had become very nervous and susceptible, being frequently overcome by emotion, and easily affected to tears, and subject to the influence of those surrounding him. He had an aged wife, who survived him, and was dependent upon him for support. The findings of fact made by the trial court as the basis of its judgment with respect to the two deeds which remain as the subject of controversy on this appeal are substantially the same, and that one relating to the transfer of No. 354 Pearl street, New York, reads as follows: That "the said William Roworth, at the time of the execution and acknowledgment of said instrument, did not know or comprehend the legal effect of the said instrument," and that its "execution, acknowledgment, and delivery * * * were procured by fraud and undue influence, exercised upon said William Roworth by the said defendants, Joseph G. Roworth and John W. Roworth, and by their taking advantage of his age and infirmities, and his confidence and trust in them, and his dependence and reliance upon them; and the signing and delivery of the same by William Roworth was reckless and improvident, was done without proper advice of counsel, and upon a grossly inadequate consideration, and while he was acting under the influence of said defendants, unduly exercised upon him." The evidence, as we have said, fully supports this finding, and, indeed, we are of the opinion that the proof would not have justified the contrary conclusion. In the consideration of this case the court cannot shut its eyes to the significant fact that William Roworth has been substantially stripped of all of his property by some one; and however or to whomever it passed originally, either the property or its proceeds found their way to a common end, viz., to the benefit and possession of the defendants. Whatever the defendants advanced, if anything, towards the acquisition of any part of the property, has been for their own advantage, and substantially from funds which they had received from their father.

The only material question in this case arises over an alleged inconsistency between the findings made by the trial court as the basis of its judgment, and a single one also found by the court out of 105 special requests

to find on questions of fact submitted by the defendants at the close of the trial. It is undoubtedly an established rule of this court, where findings of fact, made by the court or referee, which are material to the determination of the case, are irreconcilably conflicting, that we will be governed by that finding which is most favorable to the party appealing; but this rule presupposes such a difference in the findings. So, far, therefore, as these findings are conflicting, it is the duty of the court to endeavor to reconcile them, and give to each some office to perform. It is only when this cannot, by a reasonable construction, be accomplished, that the court are bound to accept that finding most favorable to the appellant. *Bennett v. Bates*, 94 N. Y. 354; *Redfield v. Redfield*, 110 N. Y. 671, 18 N. E. Rep. 373. It was said in the latter case that "we have held that, where the special findings of a judge or referee differ from the findings formally made as the basis of the judgment, the appellant has the right to rely upon such findings as are most favorable to him. Those decisions were made at a time when the practice authorized the submission of proposed findings * * * after the decision of the case was rendered; and under that practice such findings were passed upon, generally weeks, and frequently months, after the formal findings had been made. And we held that where such findings differed from the prior findings, and contradicted them, that the appellant had the right to rely upon them if most favorable to him. *Tompkins v. Lee*, 59 N. Y. 662; *Schwinger v. Raymond*, 83 N. Y. 192; *Bonnell v. Griswold*, 89 N. Y. 122. Since those decisions, the practice has been changed, and now the proposed findings must be presented at the submission of the case, and the presumption is that those findings are passed upon when the case is decided and the formal findings made. Hence, for the purpose of construing the findings, we must look at all of them, both the general and special findings, and if they are in conflict we must attempt to reconcile them." In accord with the rule thus stated, we must look at the findings in question, to see how far they are inconsistent. The formal finding will be found much broader than the one alleged to be inconsistent therewith, as it especially finds that the deed was fraudulently procured, in ignorance of its effect by the grantor, and these facts are not negated by any subsequent finding. There is undoubtedly an apparent inconsistency between the additional and some parts of the formal findings, but upon examination we think it does not necessarily nullify the effect of the formal finding. The additional finding is as follows: "That the said Joseph G. and John W. Roworth did not, about said month of April, or at any time, persuade or influence said William Roworth to sign said alleged paper, or make any representations in respect thereto." We infer that this finding relates to the deed in question. In the same connection the court re-

fused to find that the said William Roworth was not "by reason of bodily infirmities unable and incapacitated from participating in or taking part in the management and control of his business, property, and affairs," or that "Joseph G. and John W. Roworth were not intrusted by William Roworth * * * with the exclusive and entire management and control of his property and business," or that "he was not dependent upon the said Joseph G. and John W. Roworth for the proper management and control of his property and business, and was not solely reliant upon their advice in regard thereto," or that he was cognizant of "the real purpose and effect of his deed to Joseph G. and John W. Roworth." It seems quite evident, by these refusals to find, that the court did not intend, by its informal finding, to nullify the general force and effect of the formal findings. The court had, in its original findings, on seven distinct and separate occasions applying to as many different transfers of property, reiterated in substance the findings of fraud and undue influence on the part of these defendants in obtaining such transfers. The several findings were presumptively passed upon at the same time, and it is quite improbable that the court intentionally determined to leave two findings in the case radically inconsistent with each other, or to nullify and contradict its repeated findings, often expressed and confirmed in its previous statement of facts.

We are of the opinion that the court, by the additional finding, intended only to say that there was no direct or positive evidence of any special influence or persuasion with reference to the procurement of the deed in question, but left the judgment to stand upon the legal presumption of fraud arising upon the facts and circumstances of the case. The informal finding was substantially a finding as to the inferences to be drawn from the evidence, and not upon an existing and independent fact itself, and in that respect was rather a finding upon a question of law than one of fact. In that view it may be said to be erroneous, and as not affecting the judgments rendered. The leading facts of the case have been found, and are not impaired by any contradictory finding. They were, substantially, that the deed was secured by parties who had already obtained the larger portion of the grantor's property, without any adequate consideration therefor; that this conveyance left him comparatively destitute of property, and was made without consideration, in the absence of any legal adviser, by an aged man, whose mental and physical condition was much enfeebled, and in ignorance of its legal effect, to persons occupying a confidential relation towards him, and who had the management and control of his property and business affairs, and upon whose advice and counsel he was accustomed to rely. That these facts afford sufficient ground to support a finding of fraud and undue influence, even without positive or direct proof of persuasion or in-

fluence, cannot be questioned. They present a situation from which fraud is legally imputable to those benefited, and requiring an explanation from them, which was not furnished by the defendants.

As was said by Judge HAND in *Cowee v. Cornell*, 75 N. Y. 99: "We return, then, to the question whether this case was one of constructive fraud. It may be stated as universally true that fraud vitiates all contracts, but as a general thing it is not presumed, but must be proved by the party seeking to relieve himself from an obligation on that ground. Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that, either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or, on the other, from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary, and well understood." The remarks of Judge ANDREWS in *Re Will of Smith*, 95 N. Y. 516, are so pertinent to the question that we repeat them here: "Undue influence, which is a species of fraud, when relied upon to annul a transaction *inter partes*, or a testamentary disposition, must be proved, and cannot be presumed. But the relation in which the parties to a transaction stand to each other is often a material circumstance, and may of itself, in some cases,

be sufficient to raise a presumption of its existence. * * * and, when the situation is shown, then there is cast upon the party claiming the benefit or advantage the burden of relieving himself from the suspicion thus engendered, and of showing, either by direct proof or by circumstances, that the transaction was free from fraud or undue influence, and that the other party acted without restraint and under no coercion, or any pressure, direct or indirect, of the party benefited. This rule does not proceed upon a presumption of the invalidity of the particular transaction, without proof. The proof is made in the first instance when the relation and the personal intervention of the party claiming the benefit is shown." The general rule is stated in 1 Story, Eq. Jur. § 238: "The doctrine, therefore, may be laid down as generally true that the acts and contracts of persons who are of weak understandings, and who are therefore liable to imposition, will be held void in courts of equity if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning or artifice or undue influence." If, therefore, we should give full effect to the special finding, and come to the conclusion that the giving of the deed in question was the voluntary, unrestricted act of the grantor, it would not, under the circumstances of this case, justify the retention by the grantee of the property conveyed, or furnish a reason for refusing relief to the improvident grantor. We are therefore of the opinion that the judgment should be affirmed. All concur.

BROWN v. PIERCE.

(7 Wall. 205.)

Supreme Court of the United States. Dec., 1868.

Error to the supreme court, Nebraska territory.

Brown filed his bill in September, 1860, in the court below against three persons, Pierce, Morton, and Weston, alleging that in the spring of 1857, he settled upon and improved a tract of land near Omaha; that he erected a house on the tract and continued to occupy it until August 10th, 1857, when he entered the tract under the pre-emption laws of the United States; that Pierce claimed the land by virtue of the laws of an organization known as the Omaha Claim Club; that this organization, consisting of very numerous armed men, sought to, and did to a great extent, control the disposition of the public lands in the vicinity of Omaha in 1857, in defiance of the laws of the United States; that it frequently resorted to personal violence in enforcing its decrees; that the fact was notorious in Omaha, and that he, Brown, was fully advised in the premises; that as soon as he had acquired title to the land, Pierce, together with several other members of the club, came to his house and demanded of him a deed of the land, threatening to take his life by hanging him, or putting him in the Missouri river, if he did not comply with the demand; that the club had posted handbills calling the members together to take action against him; and that knowing all this, and in great fear of his life, he did, on the 10th of August, 1857, convey the land by deed to Pierce; that he, Brown, received no consideration whatever for the conveyance; that from the date of his settlement upon said land, until the time of filing the bill, he had continued to keep possession either actually or constructively; that Morton claimed an interest in the premises by virtue of a judgment lien, and that Weston also made some claim.

The prayer was, that the deed might be declared void, and Pierce be decreed to reconvey, and for general relief.

The bill was taken pro confesso as to all the defendants, except Morton, who answered.

This answer, stating that he, Morton, was not a resident of the territory, and had no knowledge or information about the facts alleged in the bill, but on the contrary was an utter stranger to them, and therefore could not answer as to any belief concerning them,—set forth that on the 28th August, 1857, Pierce was “the owner and in possession of, and otherwise well seized and entitled to, as of a good and indefeasible estate of inheritance in fee simple,” the tract in controversy; that being so, and representing himself to be so, and having need of money in business, he applied to him, Morton, to borrow the same, and that he, Morton, being in-

duced by reason of the representation, and also by the possession, and believing that he, Pierce, was the owner, he was thereby induced to lend, and did lend to him \$6,000, on the personal security of him, Pierce; that before the filing of this bill by Brown, he, Morton, had obtained judgment against Pierce for \$3,400, part of the loan yet unpaid; that this judgment was a lien on the lands; and that as he, Morton, was informed and believed, if he could not obtain his money from this land, he would be wholly defrauded out of it.

The answer further stated that the defendant was informed and believed that Brown, the complainant, entered upon the lands as the tenant of Pierce, and that the suit by the complainant was being prosecuted in violation of the just rights of Pierce, as well as of him, Morton.

There was no replication. Proofs were taken by the complainant, and they showed to the entire satisfaction of the court that all the matters alleged in the bill and not denied by the answers, were true. See 7 Wall. 213. There thus seemed no doubt as to the truth of all the facts set out in the bill.

The court below declared Brown's deed void, and decreed a reconveyance from Pierce to him, and that neither Morton nor Weston had any lien on the premises. Morton now brought the case here for review.

Carlisle & Woolworth, for appellant. Redick & Briggs, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Representations of the complainant were, that on the tenth of August, 1857, he acquired a complete title to the premises described in the bill of complaint, under the pre-emption laws of the United States, and that thereafter, on the same day, he was compelled, through threats of personal violence and fear of his life, to convey the same, without any consideration, to the principal respondent. Framed on that theory, the bill of complaint alleged that the first-named respondent was at that time a member of an unlawful association in that territory, called the Omaha Claim Club, and that he, accompanied by three or four other persons belonging to that association, came to his house a few days before he perfected his right of pre-emption to the land in question, and told the complainant that if he entered the land under his pre-emption claim, he must agree to deed the same to him, and added, that unless he did so, he, the said respondent and his associates, would take his life; and the complainant further alleged, that the same respondent, accompanied, as before, by certain other members of that association, came again to his house on the day he perfected his pre-emption claim, and repeated those threats of personal violence, and did other acts to intimidate him, and induce him to believe that they would carry out their threats

if he refused to execute the deed as required.

Based upon those allegations, the charge is that the complainant was put in duress by those threats and acts of intimidation, and that he signed and executed the deed, and conveyed the land by means of those threats and certain acts of intimidation, and through fear of his life, and without any consideration; and he prayed the court that the conveyance might be decreed to be inoperative and void, and that the grantee might be required to reconvey the same to the complainant.

Two other persons were made respondents, as claiming some interest in the land in controversy. Pierce, the principal respondent, and Weston, one of the other respondents, were non-residents, and were served by publication pursuant to the rules of the court and the law of the jurisdiction. They never appeared, and failing to plead, answer, or demur, and due proof of publication in the manner prescribed by law having been filed in court, a decree was rendered as to them, that the bill of complaint be taken as confessed. *Nations v. Johnson*, 24 How. 201.

Morton, the other respondent, appeared and filed an answer, in which he alleged that the principal respondent, on the twenty-eighth of August, 1857, and for a long time before, was the owner in fee of the premises; that he was informed, and believed, that the complainant entered upon the land as the tenant of the principal respondent, and that he was prosecuting this suit in violation of the just rights of all the respondents; that the principal respondent wanting to borrow money, he, the respondent before the court, loaned him a large sum, and accepted bills of exchange for the payment of the same, drawn to the order of the borrower of the money, and which were indorsed by the drawer; that the bills of exchange not having been paid when they became due, he brought suit against the drawer and indorser, and recovered judgment against him for three thousand one hundred dollars; that the judgment so recovered is in full force and unsatisfied, and that the same is a lien on the premises described in the bill of complaint.

No answer, from any knowledge possessed by the respondent, is made to the allegation that the complainant acquired a complete title to the land under the pre-emption laws of the United States, nor to the charge contained in the bill of complaint, that the deed was procured by threats of personal violence amounting to actual duress. On the contrary, the answer alleged that the respondent before the court was an utter stranger to all those matters and things, and that he could not answer concerning the same, because he had no information or belief upon the subject.

Authorities are not wanting to the effect, that all matters well alleged in the bill of complaint, which the answer neither denies nor avoids, are admitted; but the better opinion is the other way, as the sixty-first rule

adopted by this court provides that if no exception thereto shall be filed within the period therein prescribed, the answer shall be deemed and taken to be sufficient. *Young v. Grundy*, 6 Cranch, 51; *Brooks v. Byam*, 1 Story, 297, Fed. Cas. No. 1,947.

Material allegations in the bill of complaint ought to be answered and admitted, or denied, if the facts are within the knowledge of the respondent; and if not, he ought to state what his belief is upon the subject. If he has any, and if he has none, and cannot form any, he ought to say so, and call on the complainant for proof of the alleged facts, or waive that branch of the controversy; but the clear weight of authority is, that a mere statement by the respondent in his answer, as in this case, that he has no knowledge that the fact is as stated, without any answer as to his belief concerning it, is not such an admission as is to be received as full evidence of the fact. *Warfield v. Gambrill*, 1 Gill & J. 503.

Such an answer does not make it necessary for the complainant to introduce more than one witness to overcome the defence, and the well-known omissions and defects of such an answer may have some tendency to prove the allegations of the bill of complaint, but they are not such an admission of the same as will constitute a sufficient foundation for a decree upon the merits. *Young v. Grundy*, 6 Cranch, 51; *Parkman v. Welch*, 19 Pick. 234.

Proper remedy for a complainant, in such a case, is to except to the answer for insufficiency within the period prescribed by the sixty-first rule; but if he does not avail himself of that right, the answer is deemed sufficient to prevent the bill from being taken pro confesso, as it may be if no answer is filed. *Hardeman v. Harris*, 7 How. 726; *Stockton v. Ford*, 11 How. 232; 1 Daniell, Ch. Prac. 736; *Langdon v. Goddard*, 3 Story, 13, Fed. Cas. No. 8,061.

Attention is called to the fact, that no replication was filed to the answer; but the suggestion comes too late, as the respondent proceeded to final hearing in the court below without interposing any such objection.

Mere formal defects in the proceedings, not objected to in the court of original jurisdiction, cannot be assigned in an appellate tribunal as error to reverse either a judgment at law or decree in equity.

Legal effect of a replication is, that it puts in issue all the matters well alleged in the answer, and the rule is, that if none be filed, the answer will be taken as true, and no evidence can be given by the complainant to contradict anything which is therein well alleged. 1 Barb. Ch. Prac. 249; *Mills v. Pitman*, 1 Paige, Ch. 490; *Peirce v. West*, 1 Pet. C. C. 351, Fed. Cas. No. 10,909; *Story*, Eq. Pl. 878; *Cooper*, Eq. Pl. 329.

Undenied as the answer is by any replication, it must have its fair scope as an admission; but the court is not authorized to

supply anything not expressed in it, beyond what is reasonably implied from the language employed. Proofs were taken by the complainant, and they show, to the entire satisfaction of the court, that all the matters alleged in the bill of complaint, and not denied in the answer, are true, and the conclusion of the court below was, that the complainant acquired a complete title to the land under his pre-emption claim, and that the deed from him to the principal respondent was procured in the manner and by the means alleged in the bill of complaint.

Nothing is exhibited in the record to support any different conclusion, or to warrant any different decree, unless it be found in one or the other of the first two defences set up in the answer.

First defence is, that the principal respondent, on the twenty-eighth of August, 1857, and long before that time, was the owner in fee of the premises; but neither that part of the answer, nor any other, denied that the complainant acquired a complete title to the land, as alleged in the bill of complaint, nor set up any defence in avoidance of those allegations, nor made any attempt to present any defence against the direct charge, that the deed under which the respondent claimed title was procured from the complainant through threats of personal violence and by means of duress. Indefinite as the allegation of title is, the answer must be construed as referring to the title under the deed in controversy, as it is not pretended that the respondent ever had any other, and, if viewed in that light, it is in no respect inconsistent with the conclusion adopted by the supreme court of the territory.

Such an indefinite allegation cannot be considered as presenting any sufficient answer, either to the alleged title of the complainant or to the charge made in the bill of complaint.

Briefly stated, the second defence set up in the answer is, that the respondent was informed and believed that the complainant entered upon the land as a tenant, but the time when the supposed entry was made is not alleged, nor are the circumstances attending the entry set forth, nor is any reason assigned why the allegations were not made more definite, nor is there any fact or circumstance alleged which shows or tends to show that there was any prior owner to the land, except the United States, nor that the respondent ever pretended to have any other title to the same than that derived from the complainant.

Viewed in any light, those allegations must be regarded as evasive and insufficient; and they are not helped by the omission of the complainant to file the general replication. Those parts of the answer being laid out of the case as insufficient to constitute a defence, the conclusion is inevitable that the title to the land was in the complainant as alleged, and that he parted with it through

threats of personal violence and by duress, and without any consideration.

Argument to show that a deed or other written obligation or contract, procured by means of duress, is inoperative and void, is hardly required, as the proposition is not denied by the respondent. Actual violence is not necessary to constitute duress, even at common law, as understood in the parent country, because consent is the very essence of a contract, and, if there be compulsion, there is no actual consent, and moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient, in law, to destroy free agency, without which there can be no contract, because, in that state of the case, there is no consent.

Duress, in its more extended sense, means that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness. *Chit. Cont.* 217; 2 *Greenl. Ev.* 283.

Text-writers usually divide the subject into two classes, namely, duress per minas and duress of imprisonment, and that classification was uniformly adopted in the early history of the common law, and is generally preserved in the decisions of the English courts to the present time. 2 *Inst.* 482; 2 *Rolls, Abr.* 124.

Where there is an arrest for an improper purpose, without just cause, or where there is an arrest for a just cause, but without lawful authority, or for a just cause, but for an unlawful purpose, even though under proper process, it may be construed as duress of imprisonment; and if the person arrested execute a contract or pay money for his release, he may avoid the contract as one procured by duress, or may recover back the money in an action for money had and received. *Richardson v. Duncan*, 3 N. H. 508; *Watkins v. Baird*, 6 Mass. 511; *Strong v. Granuis*, 26 Barb. 124.

Second class, duress per minas, as defined at common law, is where the party enters into a contract (1) for fear of loss of life; (2) for fear of loss of limb; (3) for fear of mayhem; (4) for fear of imprisonment; and many modern decisions of the courts of that country still restrict the operations of the rule within those limits. 3 *Bac. Abr. tit. "Duress,"* 252.

They deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or loss of goods, can be avoided on that account, and the reason assigned for this qualification of the rule is, that such threats are held not to be of a nature to overcome the mind and will of a firm and prudent man, because it is said that if such an injury is inflicted, sufficient and adequate redress may be obtained in a suit at law.

Cases to the same effect may be found also in the reports of decisions in this country, and some of our text-writers have adopted the rule, that it is only where the threats uttered excite fear of death, or of great bodily harm, or unlawful imprisonment, that a contract, so procured, can be avoided, because, as such courts and authors say, the person threatened with slight injury to the person, or with loss of property, ought to have sufficient resolution to resist such a threat, and to rely upon the law for his remedy. *Skeate v. Beale*, 11 Adol. & El. 983; *Atlee v. Backhouse*, 3 Mees. & W. 642; *Smith v. Monteith*, 13 Mees. & W. 438; *Shep. Touch. 6*; 1 Pars. Cont. 393.

On the other hand, there are many American decisions, of high authority, which adopt a more liberal rule, and hold that contracts procured by threats of battery to the person, or the destruction of property, may be avoided on the ground of duress, because in such a case there is nothing but the form of a contract, without the substance. *Foshay v. Ferguson*, 5 Hill, 158; *Bank v. Copeland*, 18 Md. 317; *Eadie v. Slimmon*, 26 N. Y. 12; 1 Story, Eq. Jur. (9th Ed.) 239; *Harmony v. Bingham*, 12 N. Y. 99; *Id.*, 1 Duer, 229; *Fleetwood v. New York*, 2 Sandf. 475; *Tutt v. Ide*, 3 Blatchf. 250; *Astley v. Reynolds*, 2 Strange, 915; *Brown v. Peck*, 2 Wis. 277; *Oates v. Hudson*, 5 Eng. Law & Eq. 469.

But the case under consideration presents no question for decision which requires the court to determine which class of those cases is correct, as they all agree in the rule that a contract procured through fear of loss of life, produced by the threats of the other party to the contract, wants the essential element of consent, and that it may be avoided for duress, which is sufficient to dispose of the present controversy. 2 Greenl. Ev. 283; 1 Bl. Comm. 131.

Next question which arises in the case is, whether the judgment set up by the appellant creates a superior equity in his favor over that alleged and proved by the appellee.

Before proceeding to examine this question, it will be useful to advert briefly to the material facts exhibited in the record.

Title was acquired by the complainant under the pre-emption laws of the United States, and on the same day the principal respondent, through threats to take his life, if he refused, compelled him to convey the same to that respondent, and the record shows that the respondent before the court, within the same month, loaned the money to the grantee in that deed, for which he recovered judgment, although the grantor was then in possession of the land, and has remained in possession of the same to the present time.

The judgment is founded upon the bills of exchange received for that loan. Judgments were not liens at common law, but several of the states had passed laws to that effect before the judicial system of the United States was organized, and the decisions of

this court have established the doctrine that congress, in adopting the processes of the states, also adopted the modes of process prevailing at that date in the courts of the several states, in respect to the lien of judgments within the limits of their respective jurisdictions. *Williams v. Benedict*, 8 How. 111; *Ward v. Chamberlain*, 2 Black, 438; *Bayard v. Lombard*, 9 How. 530; *Riggs v. Johnson Co.*, 6 Wall. 166.

Different regulations, however, prevailed in different states, and in some neither a judgment nor a decree for the payment of money, except in cases of attachment or mesne process, created any preference in favor of the creditor until the execution was issued, and had been levied on the land. Where the lien is recognized, it confers a right to levy on the land to the exclusion of other adverse interests acquired subsequently to the judgment; but the lien constitutes no property or right in the land itself. *Conard v. Insurance Co.*, 1 Pet. 443; *Massingill v. Downs*, 7 How. 767.

Such judgments and decrees were made liens by the process acts in the federal districts where they have that effect under the state laws, and congress has since provided that they shall cease to have that operation in the same manner, and at the same periods, in the respective federal districts, as like processes do when issued from the state courts. Federal judgments and decrees are liens, therefore, in all cases, and to the same extent, as similar judgments and decrees are, when rendered in the courts of the state.

Express decision of this court is, that the lien of a judgment constitutes no property in the land, that it is merely a general lien securing a preference over subsequently acquired interests in the property, but the settled rule in chancery is, that a general lien is controlled in such courts so as to protect the rights of those who were previously entitled to an equitable interest in the lands, or in the proceeds thereof.

Specific liens stand upon a different footing, but it is well settled that a judgment creates only a general lien, and that the judgment creditor acquires thereby no higher or better right to the property or assets of the debtor, than the debtor himself had when the judgment was rendered, unless he can show some fraud or collusion to impair his rights. *Drake, Attach. § 223*.

Correct statement of the rule is, that the lien of a judgment creates a preference over subsequently acquired rights, but in equity it does not attach to the mere legal title to the land, as existing in the defendant at its rendition, to the exclusion of a prior equitable title in a third person. In *re Howe*, 1 Paige, Ch. 128; *Ells v. Tousley*, *Id.* 283; *White v. Carpenter*, 2 Paige, 219; *Buchan v. Sumner*, 2 Barb. Ch. 181; *Lounsbury v. Purdy*, 11 Barb. 494; *Keirsted v. Avery*, 4 Paige, Ch. 15.

Guided by these considerations, the court

of chancery will protect the equitable rights of third persons against the legal lien, and will limit that lien to the actual interest which the judgment debtor had in the estate at the time the judgment was rendered. *Averill v. Loucks*, 6 Barb. 27.

Objection is also made, that the affidavit

showing that the defendants were non-residents, was not in due form, and that the order of notice, and the publication of the same, were insufficient to give the court jurisdiction; but the proposition is not supported by the record, and must be overruled.

Decree affirmed.

FRANCIS et al. v. WILKINSON et al.

(35 N. E. 150, 147 Ill. 370.)

Supreme Court of Illinois. Oct. 26, 1893.

Appeal from circuit court, Stark county; T. M. Shaw, Judge.

Bill by Charity Francis and others against Sylvester Wilkinson and others. From a decree dismissing the bill, complainants appeal. Affirmed.

The other facts fully appear in the following statement by MAGRUDER, J.:

This is a bill filed on the 2d day of September, A. D. 1886, by Charity Francis, of Kansas, Rachel Curfman, of Kansas, and Nancy Cox, of Stark county, Ill., daughters of Solomon Wilkinson, deceased, formerly of Stark county, Ill., against Sylvester Wilkinson, Alonzo Wilkinson, and Newton Wilkinson, of said county of Stark, sons of said Solomon Wilkinson, deceased, and Frances Leffler, of said county, also a daughter of said Solomon, and John Leffler, of said county, a son of said Frances Leffler, and grandson of said Solomon, to set aside certain deeds executed to the defendants by the said Solomon in his lifetime, and for partition of the lands described in said deeds among the said children of the said Solomon. Answers were filed by said defendants denying the material allegations of the bill. Since the beginning of the suit Rachel Curfman, Frances Leffler, and John Leffler have died, and their representatives have been made parties. After hearing had upon testimony oral and documentary, and upon evidence submitted in the form of depositions, the circuit court dismissed the bill for want of equity, and the present appeal is prosecuted from said decree of dismissal.

Solomon Wilkinson came from Ohio to Stark county, Ill., in 1849, being at that time about 50 years old. He brought some money with him, and at once purchased a farm of 200 acres, on which he lived until his death. He died on April 2, 1885, leaving seven children, the four daughters and three sons above named, to wit, Rachel, Charity, Nancy, Frances, Sylvester, Alonzo, and Newton. His wife died in the spring of 1871. The oldest daughter, Frances, married in 1850, but her husband died in about six weeks, leaving one child, John Leffler. She never left her father, but kept house for him, and managed the household affairs after her mother's death; and she and her son John, who became of age in 1872, lived with the old man on the home place until his death. Charity married in 1853, Rachel in 1856, and Nancy in 1857 or 1858, each leaving home at the date of her marriage. It is in evidence that the last three daughters assisted in the work of the farm up to the dates of their respective marriages. Sylvester became of age in 1863, Alonzo in 1865, and Newton in 1868. The three sons remained on the home farm, Alonzo until his marriage in 1875, Sylvester until his marriage

in 1876, and Newton until his marriage in 1881. Up to the latter date and longer they and John Leffler "worked" the home farm and adjoining farms purchased by their father. The deeds sought to be set aside are the following: A deed of 160 acres, executed on January 5, 1869, by Robert B. McChance to Sylvester Wilkinson; a deed of 80 acres, executed on February 16, 1870, by James A. McChance and his wife to Alonzo Wilkinson; four deeds executed by Solomon Wilkinson, all dated May 27, 1873,—one of 133 acres to Sylvester Wilkinson, one of 187 acres to Newton Wilkinson, one of 111 acres to John Leffler, and one of 169 acres to Frances Leffler; a deed dated May 27, 1873, executed by said Sylvester to said Alonzo, conveying one-half of the 160 acres conveyed to Sylvester by Robert B. McChance; a deed of 160 acres, dated October 21, 1874, executed by Davis Lowman and wife and Daniel Burge and wife to said Sylvester, Alonzo, Newton, and John. The first two deeds were recorded on the respective dates of their execution. The five deeds executed on May 27, 1873, were recorded on July 28, 1876. By the above deeds there were conveyed to Sylvester 253 acres, to Alonzo 200 acres, to Newton 227 acres, to John Leffler 151 acres, to Frances Leffler 169 acres, making 1,000 acres in all. The evidence showed that the sons participated in the profits and produce realized from the business of the farms, and received their respective shares of such business up to 1873, or perhaps 1881.

Miles A. Fuller and Frank A. Kerns, for appellants. O. C. Wilson and Frank Thomas, for appellees.

MAGRUDER, J., (after stating the facts.) The grounds upon which the bill seeks to set aside the deeds are: First, want of mental capacity; second, the exercise of undue influence. The three daughters of Solomon Wilkinson who filed the bill do not claim that he showed any want of mental capacity until after the death of his wife, in the spring of 1871. He was not able to read or write, but there is no testimony on either side that he was not a vigorous man, both mentally and physically, prior to 1871. Hence the deed of 160 acres, executed in January, 1869, to his son Sylvester Wilkinson, by Robert B. McChance, and the deed executed in February, 1870, to his son Alonzo Wilkinson, by James A. McChance, cannot be invalidated because of any want of mental capacity. Nor are we able to discover that the execution of those deeds was procured by any kind of fraud, deceit, or undue influence. The two tracts were purchased by Solomon Wilkinson, but the proof shows that he knew of and consented to the conveyances of them to his sons Sylvester and Alonzo, who had remained with him after reaching the age of majority, and had assisted him, the one for six and the other for five years, in his busi-

ness of farming and stock raising. Ordinarily, where a purchase of real property is made by a father in the name of his legitimate child, no trust results in favor of the father, but the transaction is presumed to be a gift for the benefit of the child. 2 Pom. Eq. Jur. § 1039. Undue influence will not be inferred from the relation of parent and child where the gift is from the parent to the child, unless the former at the time of the gift is under the control and dominion of the latter. *Oliphant v. Leversidge*, 30 N. E. Rep. 334, 142 Ill. 160; *Burt v. Quisenberry*, 132 Ill. 399, 24 N. E. Rep. 622. J. H. Cox, the husband of one of the complainants, says that the deceased directed the deed of the 160 acres to be made in 1869 to Sylvester, because he had then concluded to give each of his children 160 acres of land. If such was his intention at the time, he did not subsequently carry it out as to the complainants. The fact that a grantor, many years before making a final distribution of his property by the execution of deeds, expressed an intention to divide it equally among his children, affords no evidence of undue influence, or mental incapacity, where a different disposition of his property is made. *Rutherford v. Morris*, 77 Ill. 397. The labor of the sons for their father during a number of years constituted some consideration for the conveyances which were made to them by his vendors at his direction. Where a father disposes of property by way of advancement or distribution to his children during his life, instead of disposing of it by will, courts will not be as rigid in considering the adequacy of the consideration paid as if the transaction was with strangers. *Clearwater v. Kimler*, 43 Ill. 272. The deceased had the legal right to dispose of the two tracts in question as he pleased, and, if he saw proper to make his two sons the recipients of his bounty, the other children have no cause of complaint. Id.

But the main contention between the parties is as to the deeds executed by the deceased on May 27, 1873, thereby dividing 600 acres among his sons, his grandson, and his daughter Mrs. Leffler. It is first insisted that these deeds were invalid for an alleged want of mental capacity in Solomon Wilkinson to make them. We have frequently decided that a man has sufficient mental capacity to dispose of his property by will or deed if he is capable of transacting ordinary business, and of acting rationally in the ordinary affairs of life. Buying and selling property, settling accounts, collecting and paying out money, or borrowing or loaning money, have been mentioned as instances of what is meant by the transaction of the ordinary affairs of business. *Meeker v. Meeker*, 75 Ill. 260; *Brown v. Riffin*, 94 Ill. 560; *Schneider v. Manning*, 121 Ill. 376, 12 N. E. Rep. 267; *Freeman v. Easley*, 117 Ill. 317, 7 N. E. Rep. 656; *Perry v. Pearson*, 135 Ill. 218, 25 N. E. Rep. 636. The burden is upon

the complainant who seeks to set aside an executed deed for want of mental capacity or for the exercise of undue influence to prove the allegations of his bill by a preponderance of the evidence. *English v. Porter*, 109 Ill. 285.

We do not think that there is in this case a preponderance of the evidence in favor of a want of mental capacity. In 1873, Solomon Wilkinson was about 72 or 73 years old. Witnesses for complainants swear that, after the death of his wife in the spring of 1871, he showed signs of feebleness, was much affected by the loss of his wife, was not as clear and active in his mind as he had been, was complaining and despondent, would sometimes shed tears in talking of his wife, showed the infirmities of age, complained of not being able to attend to his business as he had done, etc. Some of these witnesses give it as their opinion, based upon their conversations with him, that he was not competent to do business in 1873. On the contrary, an equal number of witnesses testifying for the defendants say that they saw no particular change in him after 1871, except such as was incident to advancing age; that they saw no difference in his business capacity; that he seemed to know as much as he ever did; that, although he fretted about his wife, "his mind was all right;" that "he was a very smart old man." One of the physicians who attended upon him for eight or ten years before his death and in his last sickness says that he would sit by his fireside and talk with him about the common topics of the day, and that he noticed no falling except what old age would account for. Another doctor, who was called in as consulting physician during his last illness, and had known him and his wife for 30 years, says that he was low-spirited after her death, but with that exception he noticed no difference in his mind. All the witnesses on both sides agree that he was a strong man physically, and before 1871 was an unusually competent man as a farmer and stock dealer. Particular instances are mentioned where he transacted business after 1873. In 1876 or 1877 he went to Peoria, 25 miles from his home, and paid a judgment of about \$1,800 which had been obtained against himself and his son-in-law, Cox, upon a note signed by him as security for Cox; and the owner of the judgment states that at that time his mental condition was good, "his mind was as strong and reasonable as anybody's," and "he was capable of attending to any other business." In 1884, the year before his death, at the age of 83 or 84, he went to the office of a lumber merchant in Wyoming, distant about two miles and a half from his house, and directed an answer to be written to a letter about a pension claim, which he had received from the commissioner of pensions, dictating the replies to be made to the questions in the letter, listening to each answer when it was read to him, and approving of

it as being what he wanted. In 1878 he sold a horse, making the trade himself, and the party buying the horse from him says that "his mind was all right," and that he was giving directions about the work on the farm. A merchant in Wyoming swears that he sold him hardware in 1876 and 1878, to be used on the farm, and that his mind was sound, and he was able to transact ordinary business. Another merchant swears that the old man did business with him at his store from 1873 to 1881, and paid the accounts from 1873 to 1876, and understood the nature of the business he was transacting, and that there was no impairment of his mind.

The grantor at the time of making the deed must know and comprehend the transaction in which he is engaged; or, in other words, the mental capacity to be considered is that which exists at the time of the execution of the deed. 1 Redf. Wills, p. 124; *Campbell v. Campbell*, 130 Ill. 466, 22 N. E. Rep. 620. The notary who wrote the deeds made on May 27, 1873, and before whom they were acknowledged, swears that Solomon Wilkinson came to his office in Wyoming on that day, in pursuance of a previous appointment; that he had his title papers with him, arranged and classified, so as to enable him to know what piece of land he wanted to convey to each grantee; that there was no one present while he was writing the deeds, although his son Sylvester may have come into the office with him; that the old man seemed to understand just what he wanted; that he said he was going to divide a portion of his property; that he would hand over one package of title deeds and then another, and direct how the property described in each should be conveyed; that the conveyances written on that day were read over to him after they were drawn up, and were signed by him by his mark; that he was not especially feeble, except so far as there was feebleness incident to declining years; that his hands were trembling, and tears came into his eyes, and he said he had reached that age when he did not feel able or competent to attend to his business; that he said he intended to provide for his other children in some other manner. While the evidence shows that on May 27, 1873, the deceased was somewhat infirm by reason of old age, and that he was conscious of not possessing as much vigor as would enable him to manage his large farms, and attend to the raising of stock thereon, with the efficiency of former years, yet we think that he was mentally capable of executing the deeds signed by him, and of making the division of property consummated by him on that day. Old age and loss of memory do not necessarily and of themselves indicate a want of capacity to make a conveyance. *Burt v. Quisenberry*, 132 Ill. 399, 24 N. E. Rep. 622; *Pooler v. Cristman*, (Ill. Sup.) 34 N. E. Rep. 57. There was here no such mental weakness as will justify a court of equity in setting aside the deeds, inasmuch as the grantor

was not thereby rendered incapable of understanding and protecting his own interests. A deed will be permitted to stand notwithstanding the fact that the intellectual powers have been somewhat impaired by age, if it appears that the grantor retained a full comprehension of the meaning, design, and effect of his acts. *Perry v. Pearson*, supra.

It is next insisted that these deeds were obtained by the undue influence of the grantees therein over Solomon Wilkinson, and that for that reason they ought to be set aside. Undue influence which will justify the setting aside of an executed deed must have been of such a nature as to deprive the grantor of his free agency, and thus to render his act more the offspring of the will of another than of his own will. *Rutherford v. Morris*, 77 Ill. 397; *Burt v. Quisenberry*, supra. Some of the witnesses for the complainants testify that after the death of his wife in 1871, Solomon Wilkinson left the management of his business more to his sons than he had formerly done, while witnesses for the defendants say that he seemed to exercise no less control after that date than before. The sons themselves swear that each of them was given an interest in the proceeds and earnings of the farm after he became of age, on condition of his remaining at home and assisting his father. But, even if it be true that the father gave his sons greater control over his business affairs after 1871 than they had previously had, that fact alone does not establish such a dependence upon them that he could not freely exercise his own will in reference to the disposition of his property. There was money in the bank, which he had a right to draw when he pleased. He came and went as he saw fit. *Burt v. Quisenberry*, supra. Where the natural position of parent and child is so changed that the former becomes subject to the dominion of the latter, and where their situation is such that the child has a controlling influence over the will and conduct and interests of the parent, equity will interpose its jurisdiction to set aside instruments executed between them, and, under such circumstances, gifts from parents to children will be set aside, unless most satisfactory evidence is produced that they were not obtained by undue influence. *Burt v. Quisenberry*, supra; *Harvey v. Sullens*, 46 Mo. 147; *Brice v. Brice*, 5 Barb. 533. But the fraud or undue influence which will render a will or deed invalid must be connected with the execution of the instrument, and operating when it is made; *Pooler v. Cristman*, (Ill. Sup.) 34 N. E. Rep. 57; *Guild v. Hull*, 127 Ill. 523, 20 N. E. Rep. 665; and although a father may act under the advice of his son in his ordinary affairs, and may be influenced by that advice, yet such relation and influence do not tend to prove the exercise of undue influence in the execution of a conveyance by the former to the latter, (*Brownfield v. Brownfield*, 43 Ill. 148; *Rutherford v. Morris*, supra.) We discover nothing in

the testimony in this case to indicate that the deceased was under any such control as that he was not able at all times to act freely and according to his own judgment. The circumstances already detailed in regard to the transaction of May 27, 1873, show that the execution of the deeds made by the deceased on that day was his own act, and not the offspring of another's will. He made no conveyance to Alonzo, but, in addition to the 80 acres conveyed to the latter in 1870, his brother Sylvester deeded to him 80 of the 160 acres which he obtained the title to in 1869. The notary testifies that Sylvester thus conveyed the 80 acres to his brother Alonzo at the request of their father, and that such conveyance was referred to by the father as a part of his arrangement for the division of his property. The same considerations already presented apply to the deed made by Lowman and Burge to the sons and grandson in 1874. Burge swears that he made the deed to the sons and grandson while they and Solomon were present; that Solomon gave his notes for a part of the purchase money, and that his mind was perfectly sound. This conveyance was a consummation of the division made in 1873, and, while it does not appear when the notes were paid, yet the evidence shows that the land was paid for out of the proceeds of the farm, as earned by the labors of the grantees in the deeds. The father may have been influenced by affection for the three sons and grandson who remained with him and aided him in managing his farms, and for the widowed daughter, who stayed at his home, and kept house for him, and managed his household affairs. "But influence secured through affection is not wrongful, and therefore, although a deed be made to a child at his solicitation, and because of partiality induced by affection for him, it will not be undue influence" if it is not such as to deprive the grantor of his free agency. *Burt v. Quisenberry*, *supra*.

The testimony shows that the complainants and their husbands received from their father from time to time about \$2,000 apiece, paid in land and money and in the discharge of security debts. They had married many years before their father's death, and had left home, and reared families, and acquired property of their own. The husband of one of the complainants was a witness to the execution of the deeds made on May 27, 1873. They knew of those deeds soon after their execution, and two of them received

money from their father a short time thereafter. The fact that they did not receive as much as the defendants is no ground for invalidating the deeds to the latter. Inequality in the distribution of the property is not of itself conclusive evidence of undue influence, although it may be considered as a circumstance tending to establish undue influence. The grantor or testator may give one child more than another without invalidating the conveyance or will. *Salisbury v. Aldrich*, 118 Ill. 199, 8 N. E. Rep. 777; *Schneider v. Manning*, 121 Ill. 376, 12 N. E. Rep. 267; *Burt v. Quisenberry*, *supra*; *Pooler v. Cristman*, *supra*.

Nearly all the testimony introduced by the complainants in this case for the purpose of showing the exercise of undue influence consists of proof of declarations made by Solomon Wilkinson after his execution of the deeds herein attacked. Those declarations were to the effect—First, that he had been persuaded by his sons; second, that he put the title out of himself in order to keep the property from being lost through suits brought against him on account of his signing notes for his son-in-law, Cox. But it is well settled that the declaration of a grantor when the grantee is not present cannot be admitted for the purpose of invalidating the deed. Parties making deeds or wills cannot invalidate them by their own parol declarations, made previously or subsequently. *Dickie v. Carter*, 42 Ill. 376; *Bennett v. Stout*, 98 Ill. 47; *Bentley v. O'Bryan*, 111 Ill. 53; *Guild v. Hull*, 127 Ill. 523, 20 N. E. Rep. 665; *Burt v. Quisenberry*, *supra*.

There was also some evidence of declarations made by one or more of the sons of Solomon Wilkinson, to the effect that he made the conveyances to them in order to keep the property from being swept away by the debts incurred as security for Cox. If such declarations made by the father and sons were properly admissible, the fraud upon creditors which they tended to show could in no way operate to the benefit of these complainants, who sue as heirs of the fraudulent grantor. The general rule is that voluntary conveyances, although void as to creditors, are valid as to the parties, and cannot be set aside by the grantor or his heirs. 1 Story, Eq. Jur. § 371; *Miller v. Marekle*, 21 Ill. 152; *Harmon v. Harmon*, 63 Ill. 512; *Rawson v. Fox*, 65 Ill. 200; *Campbell v. Whitson*, 68 Ill. 240; *McElroy v. Hiner*, 133 Ill. 156, 24 N. E. Rep. 435. The decree of the circuit court is affirmed.

ROSS v. CONWAY et al. (No. 13,341.)

(28 Pac. 785, 92 Cal. 632.)

Supreme Court of California. Jan. 6, 1892.

Department 2. Appeal from superior court, Sonoma county; S. K. DOUGHERTY, Judge.

Suit by James E. Ross against John M. Conway et al. to annul, on the ground of undue influence, a trust-deed made by his mother, Elizabeth G. Ross, for the benefit of defendants. Plaintiff had judgment, and defendants appeal. Affirmed.

George D. Collins and *George A. Johnson*, (*D. M. Delmas*, of counsel,) for appellants. *John A. Wright*, for respondent.

HARRISON, J. The plaintiff, as the sole heir of his mother, Elizabeth G. Ross, brought this action to cancel and annul two certain deeds of trust conveying certain real estate in Santa Rosa, executed by his mother, August 11, 1888, and August 18, 1888, respectively, alleging that at the time of their execution his mother was weak in body, and that her mind was impaired, and that the defendant Conway, who was the pastor of the Roman Catholic church of Santa Rosa, of which she had been for many years a member, and who was also her spiritual adviser, had thereby acquired great influence over her, and, taking advantage of such influence and of her mental weakness, had caused her to execute the said deeds of trust for the benefit of himself and of the church of which he was the pastor. The defendants denied these allegations, and the cause was tried by the court, a jury having been called in as advisory to the court upon certain issues. The verdict of the jury and the findings of the court were in support of the allegations of the complaint, and judgment was rendered in favor of the plaintiff. A motion for a new trial having been made and denied, an appeal has been taken from both the judgment and the order denying a new trial.

The two deeds of trust are substantially the same, the last one having been executed merely for the purpose of correcting an erroneous description in the first. Under the trust created by the deeds the trustees are directed to sell one of the parcels of land "as soon as practicable," and out of the proceeds thereof apply \$8,000 in the improvement of the other parcel, and pay the remainder of the proceeds to the defendant Conway. Out of the income to be derived from the parcel to be improved, \$75 per month was to be paid to the plaintiff, and the remainder monthly "to the pastor of the Roman Catholic church in Santa Rosa, to be disbursed by him in such manner as he may deem charitable." Other provisions contingent upon the death or change in circumstances of the plaintiff are unnecessary to be repeated here. The issues before the court were, in substance, whether Mrs. Ross was, at the respective dates on which the deeds of trust were executed, of weak mind, or able to comprehend the provisions of the instruments; and whether the defendant Conway used the influence which he had acquired over her, by virtue of being her

spiritual adviser, for the purpose of procuring her to make such disposition of her property. Upon these issues there was much conflicting evidence before the court, both in the testimony of the witnesses who were examined, as well as in the circumstances under which the instruments were executed, and the purposes held by Mrs. Ross with reference to her son and to the church. Upon the evidence before it the court found in favor of the plaintiff. This finding was in accordance with the verdict of the jury, and upon a motion for a new trial, in which the evidence was again brought before the court for consideration, it adhered to its former conclusion. Under these circumstances we cannot disregard its finding. Inasmuch, however, as counsel have elaborately argued the facts, we have examined the record, and are of the opinion that the evidence fully justifies the findings of the court.

The court finds that at the dates of the execution of the deeds of trust Mrs. Ross was of weak mind, and in a dying condition, and that she died on the 20th of August; that the defendant Conway was, and had for a long time previously been, the pastor of the Roman Catholic church at Santa Rosa, and the spiritual adviser of Mrs. Ross; that a confidence was reposed in him by her, and that there existed on his part an influence and apparent authority over her arising out of his relation to her as her spiritual adviser, and that he took an unfair advantage of this influence, and used this confidence and authority for the purpose of procuring her to execute the two deeds of trust. The court also finds that Mrs. Ross had in December, 1887, executed a will of all her estate, with the exception of some minor legacies, in favor of the plaintiff herein, and that the provision in the deeds of trust for the defendants, other than the defendant Conway, were without any consideration from them, but were made solely through the influence of Conway.

The rule is inflexible that no one who holds a confidential relation towards another shall take advantage of that relation in favor of himself, or deal with the other upon terms of his own making; that in every such transaction between persons standing in that relation the law will presume that he who held an influence over the other exercised it unduly to his own advantage; or, in the words of Lord LANGDALE in *Casborne v. Barsham*, 2 Beav. 78, the inequality between the transacting parties is so great "that, without proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this court will impute an exercise of undue influence;" that the transaction will not be upheld unless it shall be shown that such other had independent advice, and that his act was not only the result of his own volition, but that he both understood the act he was doing and comprehended its result and effect. This rule finds its application with peculiar force in a case where the effect of the transaction is to divert an estate from those who, by the ties of nature, would be its natural recipients, to the person through whose influ-

ence the diversion is made, whether such diversion be for his own personal advantage, or for the advantage of some interest of which he is the representative. It has been more frequently applied to transactions between attorney and client or guardian and ward than to any other relation between the parties, but the rule itself has its source in principles which underlie and govern all confidential relations, and is to be applied to all transactions arising out of any relation in which the principle is applicable. It is termed by Lord ELDON "that great rule of the court that he who bargains in any matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence." *Gibson v. Jeyes*, 6 Ves. 278. It was said by Sir SAMUEL ROMILLY in his argument in *Huguenin v. Baseley*, 14 Ves. 300, that "the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another,"—a principle which was afterwards affirmed by Lord COTTENHAM in *Dent v. Bennett*, 4 Mylne & C. 277, saying that he had received so much pleasure from hearing it uttered in that argument that the recollection of it had not been diminished by the lapse of more than 30 years.

That the influence which the spiritual adviser of one who is about to die has over such person is one of the most powerful that can be exercised upon the human mind, especially if such mind is impaired by physical weakness, is so consonant with human experience as to need no more than its statement; and in any transaction between them, wherein the adviser receives any advantage, a court of equity will not enter into an investigation of the extent to which such influence has been exercised. Any dealing between them, under such circumstances, will be set aside as contrary to all principles of equity, whether the benefit accrue to the adviser, or to some other recipient who, through such influence, may have been made the beneficiary of the transaction. These principles have been so invariably announced whenever the question has arisen that a mere reference to the authorities will suffice. *Norton v. Rely*, 2 Eden, 286; *Huguenin v. Baseley*, 14 Ves. 273; *Thompson v. Heffernan*, 4 Dru. & War. 291; *Dent v. Bennett*, 4 Mylne & C. 269; *In re Welsh*, 1 Redf. Sur. 246; *Richmond's Appeal*, 59 Conn. 226, 22 Atl. Rep. 82; *Ford v. Hennessy*, 70 Mo. 580; *Pironi v. Corrigan*, 47 N. J. Eq. 135, 20 Atl. Rep. 218; *Connor v. Stanley*, 72 Cal. 556, 14 Pac. Rep. 306; 1 *Bigelow*, Fraud, 352; *Story*, Eq. Jur. § 311.

The finding of the court that Mrs. Ross did not have any independent advice upon the subject of making the deeds of trust is fully sustained by the evidence. It appears from the record that the attorney who prepared the instruments was introduced to her by Conway, and that the only persons with whom she had any interview, or from whom she could receive any advice respecting the same, were this attorney and the defendant Conway. On

the 9th of August she had expressed to Conway a desire to make a testamentary disposition of her property, and, upon his suggestion that Mr. Collins was a suitable person, she requested that he would send him to her at the hospital where she was lying. He thereupon sought Collins, and, telling him the wish of Mrs. Ross, accompanied him to the hospital. On their way he told Collins of the mode in which she proposed to dispose of her property, and, after their arrival, remained in the room with them while she was giving directions about the will, going out, however, occasionally, for short intervals to visit other people in the hospital, and leaving the building before the will was formally executed. Two days later he visited Collins at his office, and, after hearing the will read, he made to Collins a suggestion of some changes, and whether a deed of trust would not be preferable to a will. An appointment was then made between him and Collins to meet that afternoon in the room of Mrs. Ross at the hospital. After their arrival at the hospital, Conway made a suggestion to her that she execute a deed of trust instead of a will, and also other suggestions in reference to her disposition of the property. Only himself and Collins were in the room during this consultation, he, however, leaving it temporarily a few times during the period over which the interview extended, but remaining until Collins had received all the directions that she gave. Assuming that, by virtue of his relation to her, he had acquired an influence over her, it must be held that in the transaction under investigation there was an undue exercise of such influence; that by not insisting that she should have independent advice, and by continuing to remain in her presence during the interview with the only other person whom he permitted to see her, he exercised an influence over her actions which, though unseen and inaudible, was none the less effective in its results. "The question is," said Lord ELDON in *Huguenin v. Baseley*, 14 Ves. 300, "not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and providence was placed round her, as against those who advised her, which from their situation and relation with respect to her they were bound to exert on her behalf." While the contract of purchase made between the defendant Conway and the trustees under the instruments sought to be annulled was irrelevant to any material issue before the court, and would have been properly excluded from evidence, we are unable to see that its admission could in any way have been prejudicial to the rights of the appellants. The judgment and order denying a new trial are affirmed.

We concur: DE HAVEN, J.; McFARLAND, J.

Hearing in bank denied.

TATE v. WILLIAMSON.

(2 Ch. App. 55.)

Court of Appeals in Chancery. Dec. 17, 1866.

This was an appeal by the defendant, Robert Williamson, from a decree of Vice Chancellor Wood, setting aside a sale, on the ground that the purchaser stood in a fiduciary relation to the vendor, and did not make a full disclosure to him of all material facts within his knowledge relating to the value of the property. The facts of the case fully appear in the report of the case before the vice chancellor (L. R. 1 Eq. 528) and the judgment of the lord chancellor.

Mr. W. M. James, Q. C., and Mr. Little, in support of the decree. Attorney General (Sir J. Rolt), and Mr. Bristowe, for the appellant.

Solicitors for the plaintiff: Messrs. N. C. & C. Milne.

Solicitors for the appellant: Messrs. Clowes & Hickley.

LORD CHELMSFORD, L. C. In this case the vice chancellor has made a decree that an agreement for the sale by the intestate, William Clowes Tate, to the defendant, Robert Williamson, of the undivided moiety of an estate called the "Whitfield Estate," in the county of Stafford, consisting of messuages, lands, and coal mines, ought to be set aside, upon the ground of the defendant not having communicated to the intestate all the information which he had acquired with reference to the value of the property, and, in particular, of his not having communicated an estimate of the value of the mines which was obtained by the defendant pending the agreement.

The question raised by the appeal is whether any such relation existed between the defendant and the intestate as to render it the duty of the defendant to make the communication.

The jurisdiction exercised by courts of equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well-known decisions, but the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

Did, then, the defendant, R. Williamson, when he put himself in communication with the intestate, clothe himself with a character which brought him within the range of the principle?

In considering this question, it will be necessary to bear in mind the situation of both the parties at the time when the agreement for the sale of the property was entered into.

The intestate, when he was quite an infant, had become possessed of the property in question independently of his father. He contracted habits of extravagance at the university, and in consequence of some displeasure which he had occasioned to his father on the subject of his debts, the father's doors were closed against him. He was thus thrown upon the world at an early age without any one to control him, and with scarcely a friend to counsel him, and towards the close of his life he became addicted to drinking and died prematurely at the age of twenty-four. The defendant is the nephew of Mr. Hugh Henshaw Williamson, the great uncle by marriage of the intestate, who had been the trustee and manager of the property, and the receiver of the rents, which latter duty the defendant had for some short time been deputed to perform for him. It does not appear that the defendant by his employment acquired any particular information respecting the property, but as he states in his answer that he had "previously" (to his first interview with the intestate) "some idea of endeavoring to be the purchaser of the estate, in case the same should come into the market," it is reasonable to suppose that he was not altogether ignorant of its character, and must have formed some idea of its value.

I think no stress can be laid upon the circumstance of Mr. H. H. Williamson having been the trustee of the property. The trusteeship, as to the intestate's moiety, had come to an end upon his attaining his majority, in July, 1857. The accounts had been settled, and Mr. Williamson, in surrendering his trust, had behaved generously to the intestate. Though he continued after this period to receive the rents and manage the property, yet there appears to have been nothing in the office which he undertook after his trusteeship expired which would have prevented his dealing with the intestate upon the same terms as a mere stranger. Much less could the mere receipt of the rents for his uncle have placed Robert Williamson in a different position from that of any ordinary purchaser. But a new and peculiar relation arose out of the circumstances which afterwards occurred. In the year 1859 the debts which the intestate owed at the university were causing him considerable embarrassment. He had been pressed by Mr. Holloway, acting for his Oxford creditors, for payment of an amount of £1,000. He was unable, in consequence of the unfor-

tunate quarrel with his father, to apply to him for advice, and, having before experienced the kindness of Mr. H. H. Williamson, he turned to him again in his difficulties. The letter by which the intestate made his situation known to Mr. Williamson is not forthcoming. The defendant, in his answer, says that he was informed by Mr. H. H. Williamson that it stated he was again involved, and either asked for assistance, or for advice as to the mode of procuring assistance. I should have been glad if we could have seen the terms of this letter, as it might have explained the exact nature of the office which Mr. Williamson was asked to undertake. In the answer to this letter, dated the 30th of July, 1859, which is set out in the bill, in paragraph 52, Mr. Williamson invited the intestate to his house, and desired him to bring with him "a correct account of his debts, omitting nothing, and he would see what could be done." The intestate did not accept the invitation, and nothing more was heard of the matter until about the 26th of August following, when Mr. H. H. Williamson received a list of the intestate's debts due to Oxford creditors, amounting, as already mentioned, to £1,000. The defendant, in his answer, says "that the list was given to him by Mr. H. H. Williamson, and that he, after perusing the same, remarked that the charges were excessive, and that the bills might probably be settled for half the amount; that Mr. H. H. Williamson thereupon requested him to see the intestate, and ascertain upon what terms he could be relieved from his debts, and, if this could be done for £500 or a little more, he authorized the defendant to advance the intestate that amount on further security of the property." The defendant accordingly wrote to the intestate on the 26th of August, 1859, the letter, which is set out in paragraph 58 of the bill, in which he states that his uncle is not sufficiently well to attend to business; that the list of debts owing forms a very heavy amount, which Mr. Holloway expects to have paid immediately; and adds, "I will meet you in the course of a few days in London, upon having a couple of days' notice, and, after hearing your views on the subject, will talk over the matter, and see in what way it can be arranged." The counsel for the defendant say that his office was merely to see whether a compromise of the debts could be effected, and that, at the time of the purchase, his mission was at an end. One can hardly believe that his advice and assistance could have been understood to be of this limited character. He knew that Mr. Holloway was pressing for immediate payment to the Oxford creditors, and that if he refused to reduce the amount the whole must be paid. It does not appear that, if Mr. Holloway had insisted on a payment in full, Mr. H. H. Williamson would not have been disposed to advance a larger sum than

that which he had mentioned, as the property would have been an ample security for any amount required to cover the whole of the debts. And the defendant must have been perfectly aware that the intestate's property in Staffordshire was the only fund out of which the debts could be discharged.

The account of the defendant's interview with the intestate we have from the answer alone. He states that he offered to negotiate with the intestate's creditors for an abatement of their claims, telling him "that he was authorized by his uncle to advance £500 or more if required" (I suppose he must have added "upon the security of the property"), "but that the intestate positively refused to allow him to ask for any deduction from his debts, saying that any such application would injure his character." The answer then proceeds: "But he at the same time stated that he was desirous to sell his share of the Whitfield estate." Mr. Bristowe, for the defendant, said the instant the intestate refused to allow any attempt to compromise his debts, the defendant's office of adviser came to an end, and from that moment the parties, to use the familiar expression, were dealing "at arms' length." I cannot accept this view of the defendant's position. I think that his visit to London was not solely for the compromise, but generally for the arrangement of the intestate's debts; that he came with authority which involved a dealing with the property of the intestate, as he was to advance his uncle's money on the security of this property. And it may be observed that he had his attention particularly directed to the mode of satisfying the debts by a mortgage. He knew, too, that if the payment of the debts in full was insisted upon, and his uncle refused to advance a larger sum than "£500 or a little more," a sufficient amount to discharge all the debts could easily be raised upon the security of the property, which was subject only to a mortgage for £1,000. It seems to me that the defendant had placed himself in a position which rendered it incumbent upon him to give the best advice to the intestate how to relieve himself from his debts, and no one can doubt that if his judgment had been unbiased that he would have recommended a mortgage, and not a sale. But it appears, from the defendant's own statement, that he had a reason for not giving his advice. As already stated, he had previously thought of purchasing the estate in case it should come into the market for sale, "an event," he says, "he thought was not unlikely to happen." I asked the defendant's counsel what he understood by these words, and was answered that the defendant's expectation was founded upon the inconvenient nature of property consisting of an undivided moiety. This may have first led the defendant to expect that he might have an opportunity of purchasing the property at no distant period, but his belief in the probability of a sale must have been considerably strengthened at the time of his interview with

the intestate, from the knowledge he had of his embarrassments. Whether the conversation between the defendant and the intestate turned so abruptly from the intestate's refusal to compromise his debts, to the expression of his desire to sell his share of the Whitfield estate, as represented by the defendant or not, it is quite clear to my mind that the confidential relation between the parties had not terminated when the negotiation for the purchase of the property by the defendant commenced, and that he did not then, or at any time afterwards, stand in the situation of an ordinary purchaser.

This being so, the defendant, pending the agreement, was bound to communicate all the information he acquired which it was material for the intestate to know in order to enable him to judge of the value of his property. It was admitted that the valuation of Mr. Cope was in the hands of the defendant at the time he wrote his letter of the 10th September, 1859. The defendant is charged with making untrue representations in that letter. If he had done so, it would of course strengthen the case against him, but I find nothing in the letter which amounts to a misrepresentation, nor anything more than a disparagement of the property, not uncommon with a purchaser when he desires to stimulate the owner of the property to close with his offer.

Having stated my opinion with regard to the duty cast upon the defendant to communicate Cope's valuation to the intestate, it seems unnecessary to pursue the case further. The fair dealing, in other respects, of the defendant during the negotiation, and before the agreement was signed, becomes almost irrelevant. The refusal of the solicitors to proceed with the agreement unless the young man had some legal assistance, the recommendation of the defendant that the intestate should apply to his father for advice, the opportunity afforded him pending the negotiation of consulting any friends who were capable of advising him, the reference to Mr. Payne whether merely for the purpose of completing the agreement, or to afford the intestate an opportunity of obtaining his opinion as to the value, all these considerations are of no consequence, when once it is established that there was a concealment of a material fact, which the defendant was bound to disclose.

Nor, after this, is it of any importance to ascertain the real value of the property.

Even if the defendant could have shewn that the price which he gave was a fair one, this would not alter the case against him. The plaintiff, who seeks to set aside the sale, would have a right to say, "You had the means of forming a judgment of the value of

the property in your possession, you were bound, by your duty to the person with whom you were dealing, to afford him the same opportunity which you had obtained of determining the sufficiency of the price which you offered; you have failed in that duty, and the sale cannot stand." But, in truth, there are strong grounds for thinking that the price agreed to be paid by the defendant is quite inadequate to the value of the property. There is no occasion to weigh the opposite opinion of the engineers and surveyors, and to form a conclusion from them. It is sufficient to take the valuation of the mines by Cope, amounting to £20,000, and the valuation of the surface by the defendant's own witnesses, ranging from £10,000 to £11,200, and making every allowance for a reduction of the value of the intestate's share, in consequence of its being an undivided moiety, it will appear that the value, by the defendant's own shewing, must have been at the least £14,000. For this property the defendant agreed to pay £7,000 apparently about half the value, and that not at once, but £1,500 was to be advanced to the intestate, which was to bear interest till the day for the completion of the purchase, which advance must have been intended to enable the intestate to pay off his debts immediately; £2,000 was to be paid on the 25th March, 1860, and the residue by yearly instalments in the four following years.

It appears to me, upon a careful review of the whole case, that it would be contrary to the principles upon which equity proceeds, in judging of the dealings of persons in a fiduciary relation, to allow the purchase by the defendant, Robert Williamson, to stand.

I am satisfied that the defendant had placed himself in such a relation of confidence, by his undertaking the office of arranging the intestate's debts by means of a mortgage of his property, as prevented him from becoming a purchaser of that property without the fullest communication of all material information which he had obtained as to its value; that this openness and fair dealing were the more necessary when he was negotiating with an extravagant and necessitous young man, deprived at the time of all other advice, eager to raise money, and apparently careless in what manner it was obtained; and the defendant having, by concealment of a valuation which he had privately obtained, procured a considerable advantage in the price which the seller was induced to take, and which even the defendant's witnesses prove to be grossly inadequate, he cannot be permitted so to turn the confidence reposed in him to his own profit, and the sale ought to be set aside. Decree affirmed. Petition of appeal dismissed, with costs.

PRICE v. THOMPSON et al.

(1 S. W. 408, 84 Ky. 219.)

Court of Appeals of Kentucky. Sept. 14, 1886.

Appeal from circuit court, Barren county.

This is an action by appellant for a new trial in the case of Buford W. Thompson, etc., against George R. Price, Administrator of Joseph Price, Deceased. The court below refused to grant a new trial. From that judgment George R. Price prosecuted this appeal. Buford W. Thompson, etc., against George R. Price, Administrator of Joseph Price, was an action to settle the accounts of said administrator, and sell lands of his decedent to pay debts. By the commissioner's report in said action the administrator was found to be indebted to the estate in the sum of \$295.50. This report was confirmed, and an order entered directing the administrator to pay said sum to commissioner, in default of which execution issued, and land belonging to administrator was levied on and sold. The equity of redemption was afterwards levied on, but, before the sale, this action was brought.

W. P. D. Bush, Finlay Bush, and Bales, Nuckols & Gorin, for appellant, George R. Price, Adm'r, etc. W. L. Porter, for appellees, B. W. Thompson and others.

BENNETT, J. The appellee filed his petition in the Barren circuit court against the appellees, Buford W. Thompson, and T. M. Dickey, the master commissioner of the Barren circuit court, and others. In his petition he alleges that appellee Thompson filed his petition in the Barren circuit court against him, as the administrator of Joseph Price, deceased, for the purpose of having the decedent's estate settled, and the sale of land to pay debts, etc.; that appellee T. M. Dickey, to whom the case was referred as the master commissioner of the court, reported that appellant was indebted to said estate, as administrator, in the sum of \$295.59; that said report was confirmed without objection, and appellant was ordered to pay said sum to the commissioner, and in default of which execution was ordered to issue; no payment having been made, execution issued in the name of the commissioner, and by his direction, against appellant, which was levied on a tract of land containing 99 acres, belonging to appellant; that said land was sold at execution sale for the sum of \$250, which was less than two-thirds of its appraised value. The appellee Dickey purchased it. Afterwards a second execution was issued, and levied on the equity of redemption in said land. He alleged that he had paid off and discharged various just claims and demands against the estate of his decedent, exceeding in amount the sum of \$295.56; that he gave the receipts and vouchers evidencing these payments to his attorney, to file with the commissioner; that said receipts

and vouchers had been lost, either by his attorney or by the commissioner, after they had been so given him; that he was not present when the commissioner's report was made, or when it was confirmed, or when the order was made directing him to pay said sum to the commissioner, nor did he know that such orders were made, or that his receipts and vouchers were lost, until after execution had issued against him. He prayed the court to set aside the report of the commissioner, the order and judgment directing him to pay said sum to the commissioner, the sale of his land, and grant him a new trial, etc. The court granted him an injunction until further orders, but, on final trial, dissolved the injunction, and dismissed his petition. From that judgment he appeals to this court.

The appellee Dickey made a joint answer with the other defendants. They do not deny that appellant did not know that the commissioner had reported an indebtedness against him of \$295.56, and that the court had confirmed the report, and ordered him to pay the money to the commissioner, etc., or that his receipts and vouchers had been lost, until after execution had been issued against him. Besides, he swears in his deposition to the same thing. The evidence, therefore, as to that matter is conclusive.

The allegation of the petition is that the receipts and vouchers were placed in the hands of the attorney "to file with the commissioner in making said settlement, and they were either lost by said Bales (the attorney) or by said commissioner after they were given to him." The answer in reference to that allegation is: "They have no knowledge or information sufficient to form a belief as to whether they were placed in the hands of said Bales to be filed with the commissioner." So the answer does not deny that said receipts and vouchers were filed with the commissioner, or that "they had been lost by the commissioner after they had been given to him." The commissioner certainly knew whether such was the fact or not, and his silence is conclusive against him. Besides, the attorney, Bales, swears: "I placed them, as I now believe, and after the judgment in the cause was rendered then believed, in the hands of T. M. Dickey, master commissioner of the Barren circuit court. If I did not so place them, I lost them; but they were all put together in a paper, and handed to Dickey, and I find a part of them allowed, and the others not, and, as they were not disallowed or rejected, I took it Mr. Dickey mislaid them." Appellant swears that he did pay said claims against the estate, which were properly proved, etc. Mr. Bales also swears that said claims were properly proved, etc. No witness contradicts them, nor did appellees offer any evidence at all. So it may be regarded as conclusively proven (1) that appellant had paid and discharged said debt; (2) that he

had placed the receipts and vouchers evidencing the payment in the hands of his attorney, to be filed with the commissioner; (3) that they were placed in the hands of the commissioner, and were lost or mislaid, so that they were not allowed by him in his settlement, and, by reason thereof, judgment was obtained against appellant on a demand which he had already paid.

We understand the general rules of law governing applications for new trials to be: (1) When for newly-discovered evidence, "the names of the witnesses who have been discovered;" (2) that the applicant has been vigilant in preparing his case for trial; (3) that the new facts were discovered after the trial, and would be important; (4) that the evidence discovered will tend to prove facts which were not directly in issue on the trial, or were not then known, nor investigated by the proof; (5) that the new evidence is not merely cumulative, etc.

Here the evidence was not newly discovered, but was known to appellant before the trial, and had been prepared by him to be used on the trial; and, judging from the record, had it been used on the trial, the issue would certainly have been decided for the appellant. So the question now is, was the appellant vigilant in preparing his case for trial? Ordinarily, we would say not. Had the trial of the case been before a jury, or before the court by depositions, it would have been his duty to see that his witnesses were duly subpoenaed to attend court to testify, or that their depositions were duly taken. Nor would it be reckoned proper vigilance to leave these matters in the hands of his attorney to attend to; for the attorney is but his agent, and his want of proper vigilance is also that of the principal. But a different case is presented here. The commissioner is the officer of the court,—“the hand of the court,”—whose duty it is in such cases to receive all vouchers presented to him, and preserve them, and, if properly proven, to allow and report them to court. This being his official duty, and the presumption being that he will discharge his duty, it cannot be said that after a person has filed his vouchers with him, properly proven, that it is his duty to keep a watch over him, as in the case of a private person, to see that he discharges that duty by reporting the claim to be allowed by the court. Had appellant's attorney, with whom he intrusted these vouchers to be delivered to the commissioner, failed to deliver them, then it could be truly said that he was wanting in proper vigilance; for in that case his attorney's negligence would be his negligence. But his attorney having delivered the vouchers to the officer of the court,—the hand of the court, in such matters,—properly proven as vouchers, that was all that was necessary, under the circumstances. That officer having lost them, and appellant not being apprised of it until after judgment and execution had been obtained against him, he should have

had a new trial, and the injunction sustained, and the report of the commissioner charging him with \$295.56 set aside, and the order directing the payment of it to the commissioner set aside.

Appellant also asks that the sale of his land under said execution be set aside. It is contended that this should not be done, for the reason that the reversal of an erroneous, not void, judgment does not and cannot set aside the sale of property made thereunder. That is, no doubt, the general rule. But in this case the return of the officer who made the sale shows that the appellee T. M. Dickey, the master commissioner, to whom the case was referred, was the purchaser of the property at the execution sale. It is also alleged in the petition that he was the purchaser at that sale. The answer says that the return of the officer in that regard was a mistake; that he was not the purchaser, but he offers no proof as to that matter, and, the return of the officer being presumptively correct, the commissioner must be regarded as the purchaser. So the question arises, was his purchase valid? Had he been free from a fiducial character, there can be no doubt that his purchase would have been valid; but, standing in a fiducial relation to decedent's estate, equity devolved upon him the duty to protect the interest of that estate. In such cases the fiduciary cannot avail himself of the influence which his position gives, for the purposes of his own gain or benefit, to the prejudice or injury of those interests which it is his duty to protect. It is a rule of equity that no man can acquire an interest where he has a duty to perform inconsistent with that interest. The rule which prevents a person, standing in a fiducial relation, from acquiring an interest which is inconsistent with those fiducial duties, stands mainly upon motives of general public policy; nor can a man, standing in such relation with respect to property, be allowed to purchase the property at a judicial or execution sale, unless the entire responsibility of obtaining the highest price has been removed or taken out of his hands. If he continues under the duty of seeing the property bring its highest price, he is incapacitated from purchasing.

These principles apply, not only to trustees proper, but to all persons invested with fiducial power; such as executors, administrators, assignees of a bankrupt, commissioners of bankrupts, sheriffs, and judicial officers in general. See *Kerr, Frauds*, 150, 160. See, also, *Stapp v. Toler*, 3 Bibb, 450.

While the same general principle governs all persons occupying a fiducial character, yet there are two classes controlled by “different special rules.” The first class includes all those instances in which the fiduciary and those with whom he stands in that relation consciously and intentionally deal with each other, each knowingly taking a part in the transaction from which results a contract or conveyance. Here the contract is not neces-

sarily voidable,—it may be valid; but a presumption of its invalidity arises, and that so strong that nothing short of clear evidence of good faith, of full knowledge, of adequate consideration, and of independent thought, consent, and action, can overcome it. The second class is where the fiduciary, acting with reference to his trust, deals with himself in his private or individual character; as where an agent to sell, sells the property to himself, or a sheriff buys the property at his own sale. Such transactions are always voidable at the suit of the party concerned. They are not merely presumptively invalid, as in the first class, where good faith, full knowledge, adequate consideration, independent thought, consent, and action, may be proved; because the sale or purchase, if made privately, is not known, or, if made publicly, by coercive authority, cannot be controlled. Therefore the good faith, full knowledge, etc., do not control. For these reasons the presumption of invalidity in the first class is rebuttable, and the presumption of invalidity in the second class is conclusive. 3 Pom. Eq. Jur. §§ 956, 957. These rules being sound, and so well sustained by authority, this court does not hesitate to adopt them for the government of all persons occupying a fiduciary character, whether of a private or a public nature.

Officers whose powers are not merely persuasive, but coercive, ex parte, and arbitrary, should be held to strict impartiality, fidelity, and integrity in the discharge of their trusts. All temptation to make private gain, to take unfair advantage, directly or indirectly, should be removed. The most effective way to do so is to declare all such transactions conclusively invalid. The master commissioner, Dickey, was still acting as commissioner in the case at the time he purchased the land at execution sale. It was to the interest of the estate that the land should bring its full value. It was his duty to encourage its bringing its full value. Therefore, for him to become a bidder for it at the sale antagonized his private interest with his fiducial duty. This he had no right to do. For these reasons the injunction should have been sustained, a new trial granted, the report of the commissioner allowing the \$295.56, and the order of court directing its payment, set aside, and the sale of said land set aside, and appellant allowed credit for any sums proved to have been paid by him for said estate, not otherwise allowed. Wherefore the judgment of the lower court is reversed, and cause remanded for further proceedings consistent with this opinion.

LEWIS, J., not sitting.

ELMORE v. JOHNSON et ux.

(32 N. E. 413, 143 Ill. 513.)

Supreme Court of Illinois. Oct. 31, 1892.

Appeal from superior court, Cook county; Kirk Hawes, Judge.

Bill by Susie K. Elmore against Frank A. Johnson and Annie C. Johnson to set aside a deed. The bill was dismissed for want of equity, and complainant appeals. Affirmed.

The other facts fully appear in the following statement by Magruder, J.:

This is a bill filed in the superior court of Cook county on December 11, 1890, by the appellant against the appellee and his wife for the purpose of setting aside a deed made by the appellant to the appellee on January 17, 1884, conveying to him the W. $\frac{1}{2}$ of lots 6, 9, 20, and 23, in the subdivision of S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 22, township 39 N., range 13 E., etc., in Cook county; said west half consisting of 16 of the 32 sublots into which said lots 6, 9, 20, and 23 were subdivided. Also for the purpose of requiring Annie C. Johnson, the wife of appellee, to convey to appellant the title held by her to said west half; and also for the purpose of taking an account of moneys paid out by appellee for appellant, and of moneys received by him for her, and of services by her to him and by him to her, and of losses alleged to have been caused by want of diligence and skill and by alleged misconduct, etc. The defendants answered the bill. Replications were filed to the answers. Proofs were taken, and, the cause coming on to be heard in May, 1891, the bill was dismissed for want of equity, etc. The present appeal is prosecuted from such decree of dismissal.

The deed was executed by appellant to appellee in payment for his services to her as her solicitor and attorney in the matter hereinafter mentioned. The bill charges that the defendant Johnson was negligent and unskillful in the conduct of the complainant's business; that his services were worth less than the value of the 16 sublots conveyed to him; that the complainant was without means, and when defendant began to insist upon pay for his services she agreed to pay him \$400 if he would obtain title for her to the 4 lots or 32 sublots; that, after a decision had been rendered in her favor, and before the execution of the master's deed to her, the defendant induced her, by fraudulent representations and false promises, to convey to him the west half of said lots; that she supposed the deed made by her to be a deed of an undivided one-half part of the lots when she signed it; that between the summer of 1883 and November, 1888, she did certain typewriting work for the defendant in his office, for which he had not paid her; that an execution issued in the attachment suit herein-

after mentioned was returned no part satisfied; that the executions issued upon the decree for alimony hereinafter mentioned could have been collected or secured; that a mortgage suit against the property was allowed to go by default; that the lots had been sold for taxes; that complainant did not know any of the facts in regard to said executions, or the abandonment of the mortgage suit, or the value of defendant's services in the chancery case until the day before filing her bill; that she first retained the defendant to collect her alimony, and obtain title to the lots "for a reasonable fee and reward;" that she did not learn of the tax sales until "somewhat over a year" before filing her bill; that she first discovered the facts as to defendant's negligence and misconduct, etc., within a few days before filing the bill.

The answer of the defendant denies all the allegations of the bill as to fraud, neglect, or misconduct, and as to the agreement to take \$400 for services, and sets forth a history of his professional relations with the complainant, and gives his explanation of the various matters referred to in the bill, and charges laches, etc.

On September 24, 1879, the complainant, who was then about 33 years old, and had been divorced from a former husband named Elmore, delivered to one Collins Pratt, an attorney in Chicago, government bonds, owned by her, to the amount of \$600, to be by him converted into money, and loaned out upon real-estate security. Pratt used this money to purchase said lots 6, 9, 20, and 23, and obtained a deed of the same to himself on September 24, 1879. He then executed his own note, dated October 4, 1879, for \$600, payable in two years, to the order of complainant, with interest at 8 per cent., and also a trust deed to secure the same, upon said lots, to one Paul Mackenhaupt, as trustee, and delivered said note and trust deed to the complainant. On March 8, 1880, Pratt, who was at that time engaged to be married to the complainant, obtained the note and trust deed from her upon some representation that it would be necessary to change the securities in view of their approaching marriage, and applied to Mackenhaupt for a release of the trust deed, which was executed and delivered to Pratt on said 8th day of March, 1880. On March 24, 1880, the complainant and Pratt were married, and lived together until about May 1, 1880, when he abandoned her. During said marriage, and on April 13, 1880, Pratt borrowed \$500 of one Eimers, and executed his note of that date for that amount, payable in two years, to the order of Eimers, and to secure said note he and appellant conveyed said lots 6, 9, 20, and 23 to Charles Thornton, trustee, by trust deed of same date. On the same day, April 13, 1880, there was filed for record a warranty deed, executed by Pratt, and purporting to have been also executed

by complainant as his wife, conveying said lots 6, 9, 20, and 23 to one Addie Pratt, a reputed sister of Collins Pratt, in whose name subdivision was made of the 4 lots into the 32 sublots above referred to. On April 30, 1880, the defendant executed his unsecured note to the complainant for \$600, payable two years after date, with 8 per cent. interest. This latter note complainant claims to have known nothing about until long afterwards, when she was trying to collect the \$600 from Pratt, and he stated that he had given his note therefor. She says that she then examined her trunk and papers, and found the note for the first time. On November 1, 1881, complainant obtained a decree of divorce from Collins Pratt upon the ground of adultery, which decree required him to pay her \$40 every month as alimony, and changed her name to Susie K. Elmore. Mr. John W. Waughop was her solicitor in the divorce suit. Soon after the separation between complainant and Pratt, she employed Mr. Leonard Swett to collect the \$600 from Pratt, and Mr. Swett succeeded in obtaining \$250 of that amount for her. About the time of the decree of divorce, or soon thereafter, Mr. Waughop had made an agreement for her with Pratt, by the terms of which Pratt was to pay \$500 in full discharge of alimony and of the balance due upon the claim for \$600, said sum of \$500 to be paid at the rate of \$5 per week. She was paid \$5 per week up to and until February 18, 1882. It would appear that Mr. Swett received \$50 for his services, and Mr. Waughop nothing. By deed dated January 7, 1879, one Arnold and his wife sold and conveyed to Collins Pratt and Edgar M. Wilson lots 2, 13, 16, and 27 in said subdivision for an expressed consideration of \$600; and to secure their note for \$500, payable in three years, to order of William Fitzgerald, with 10 per cent. interest, Pratt and Wilson executed a trust deed, dated January 21, 1879, conveying said last-named lots to O. T. Hartigan, trustee.

Such being the condition of affairs, the complainant, about the middle of February, 1882, applied to the defendant Johnson to act as her attorney and solicitor in recovering what might be due to her in money or property from her former husband, Collins Pratt. Accordingly, on February 23, 1882, the defendant filed a bill for the complainant, as her solicitor, in the circuit court of Cook county, against the said Collins Pratt, Addie Pratt, Eimers, and Thornton. This bill was sworn to by Mrs. Elmore. It sets up the facts hereinbefore stated. It charges that the note of April 30th was never delivered to her or accepted by her; that Pratt obtained the \$600 to use for himself, and deceived her in respect thereto, and attempted to defraud her out of the money; that either her signature to the deed to Addie Pratt was forged, or obtained from her by fraud and misrepresentation, and without

consideration; that lots 2, 13, 16, and 27 are of the value of \$1,000, and are the only property owned by Pratt; that said \$600 was not loaned to Pratt, but intrusted to him for conversion into real-estate securities drawing 8 per cent.; that the note and Mackenhaupt trust deed were obtained from her in order to cheat and defraud her, and get a release of the trust deed; that the Eimers note and Thornton trust deed were without consideration, or accepted with notice of her rights, and with the intent to cheat and defraud her. The bill offers to return and cancel the note of April 30th. It contains the following averment: "Your oratrix believes, and on belief avers the fact to be, that said defendant purchased said real estate (lots 6, 9, 20, and 23) with the money so intrusted to him as aforesaid, to be invested by him in good real-estate securities." The bill prays that the release deed made by Mackenhaupt may be set aside and canceled, and that the trust deed to him may be declared to be in full force, and a valid lien upon said lots for the balance of the \$600 due from said Collins; and for such other relief as the nature of the case may require and may seem meet. On March 18, 1882, the bill was amended by averring that Pratt was then the owner of said lots 6, 9, 20, and 23, and held an unrecorded deed, dated February 9, 1882, from Addie Pratt to himself. On March 10, 1883, the prayer of the bill was amended as follows: "Or that Pratt may be declared to hold the title * * * in trust, * * * and may be required to convey the same to your oratrix, and that the said deed * * * to said Addie Pratt may be declared null and void, and may be set aside," etc. At the April term, 1882, Collins Pratt answered the bill, alleging that complainant loaned her money upon his note secured by the trust deed to Mackenhaupt, after investigation and advising with others; that said trust deed was released in order to borrow \$500 to buy household furniture in view of the approaching marriage; that complainant has some of the goods bought with the money borrowed of Eimers; that she accepted the note of April 30th; that he has paid \$290, instead of \$250; that she fully understood the contents of the deed to Addie Pratt. The answer admits the purchase of lots 6, 9, 20, and 23, and the ownership of an undivided half of lots 2, 13, 16, and 27, and denies all charges of deception and fraud or forgery or misrepresentation, and also denies that he now owns lots 6, 9, 20, and 23, or holds an unrecorded deed of the same from Addie Pratt. Addie Pratt also filed an answer to the bill, denying that the deed to her was without consideration, or obtained by fraud, or that complainant's signature thereto was forged, or that defendant had made a deed to Collins Pratt; and averring that said deed to defendant was executed for a good consideration, and was under-

stood by complainant when she signed it. April 13, 1882, replications were filed to the answers. March 17, 1883, the bill was dismissed as to Eimers and Thornton, and the cause placed upon the trial calendar. The hearing took place on November 23 and 27, 1883, the defendants being represented by counsel. The decision was in favor of the complainant, and a decree in accordance with the decision was entered on December 8, 1883. The decree found that Pratt purchased lots 6, 9, 20, and 23 with complainant's money; that the note to Eimers and trust deed to Thornton were valid, but that the \$500 borrowed of Eimers was used by Pratt, and exceeded the amount which had been paid by him to complainant; that a resulting trust had therefore arisen in favor of complainant, and she was entitled to have the title acquired by Pratt in said lots conveyed to her; that the deed to Addie Pratt had been procured by fraud; that the lots had been sold under decree in favor of Eimers; that the unsecured note of April 30th had been surrendered on the hearing; the decree set aside the deed made by Collins Pratt to Addie Pratt, and ordered said Collins to execute a deed of the lots to complainant, subject to the right of the purchasee under the foreclosure decree of Eimers, within 30 days, and upon his failing to do so that the master execute said deed. On January 16, 1884, the master executed to the complainant a deed of lots 6, 9, 20, and 23, and on the next day, January 17, 1884, complainant executed and delivered to the defendant the deed of the west half of said lots above referred to. The deed from the master to her was not recorded until January 17, 1884. Some time in June, 1882, Eimers filed a bill to foreclose the trust deed securing his note upon lots 6, 9, 20, and 23. Appellee entered the appearance of appellant in said foreclosure suit, but a decree of sale was entered therein, and said lots were sold under said decree on September 3, 1883, to Eimers, for \$676.23. The certificate of sale was purchased by appellee and appellant from Eimers on August 23, 1884, for \$731; one half—\$365.50—having been paid by appellee, and the other \$365.50 by appellant. The certificate was assigned to Mrs. Johnson. As soon as the time for redemption expired, which was on December 3, 1884, the master took up the certificate, and made a deed conveying the whole of the four lots to Mrs. Johnson. Thereupon, on December 8, 1884, Mrs. Johnson and appellee, her husband, united in a deed conveying all their interest in the east half of the lots to the appellant.

In addition to the chancery suit, appellee took other proceedings. On March 1, 1882, he began an attachment suit to recover \$388.38 sworn by the complainant to be the balance of the \$600 then due to her, charging that the debt had been fraudulently contracted. The attachment writ was levied

upon lots 6, 9, 20, and 23, and also upon lots 2, 13, 16, and 27. Judgment was rendered therein on April 5, 1882, and general and special execution issued on November 15, 1882. No levy, however, was made under the execution, but it was returned unsatisfied. Proceedings were also commenced to enforce the decree for alimony, and to set aside the agreement to settle for \$500, payable at the rate of \$5 per week. On March 6, 1882, appellee filed in the divorce suit an affidavit sworn to by complainant on March 2, 1882, setting up the decree for alimony, the receipt of \$5 per week up to February 18, 1882, the delivery to Pratt of the \$600, the release of the trust deed, etc., and alleging that there was due to her \$388.38; that the settlement for \$500 had been made upon representations as to Pratt's poverty, and had never been fully approved of by her; that she had given notice of her intention not to accept the \$500; that Pratt had purchased lots 6, 9, 20, and 23 on September 29, 1879, for \$600, "and affiant is informed that they are now worth about \$3,000, and are incumbered to the extent of \$540 only;" that Pratt owns lots 2, 13, 16, and 27, incumbered for \$600; that he refuses to pay \$75 due to her for alimony. A rule was entered by the court after a contest and after reading other affidavits, requiring Pratt to pay the \$75 within a certain time. Upon his failure to do so, an attachment was issued, and he was arrested for contempt of court, and entered into a recognizance to appear in May, 1882, to answer the charge of contempt. He did not appear, however, but fled from the state, and went to Dakota, where he has remained ever since. During the period from April 8, 1882, to August 21, 1883, appellee caused six executions to be issued upon the decree for alimony for the amounts thereof accruing from time to time, but realized nothing. On May 6, 1882, Hartigan sold lots 2, 13, 16, and 27 under the trust deed to him for default in the payment of the principal of the note secured thereby, and interest thereon, and executed a trustee's deed to the purchasers, Edgar M. Wilson and Edward B. Holmes. All the lots were so sold for \$682.43.

Alex. S. Bradley, for appellant. James E. Munroe and F. A. Johnson, for appellees.

MAGRUDER, J., (after stating the facts.) Appellee testifies that the deed made to him by appellant, conveying to him the west half of the lots in controversy, was executed by her in pursuance of a previous contract which she had made with him in reference to payment for his legal services. He swears that by the terms of this contract she was to pay all the costs, and he was to have a contingent fee of one-half of what should be recovered both in the suit for alimony, and in the chancery suit in regard to the lots. The evidence shows that this contract was

made during the pendency of the legal proceedings which the appellee was conducting for the appellant. It was not entered into before or at the time of his original employment, which took place on February 15, 1882, nor did it exist when he filed the bill on February 23, 1882. His answer states that "early in the spring or summer of 1882 * * * it was * * * mutually agreed that this defendant should have and receive as a contingent fee for his services one-half." He testifies that he cannot fix the date of the agreement, but that, to the best of his recollection, "it was in March or April, possibly in May, after I discovered I had a pretty good-sized job on hand, and a good deal of work to do, and had done a good deal of work. * * * She claimed to have no money early in the proceedings, and could not pay my fees in money, and that was why I subsequently made a different arrangement with her." Appellant swears that she never made an agreement with the appellee to give him one-half of the money or of the land to be recovered. The deed to appellee was also executed while the relation of attorney and client existed between himself and the appellant. That deed was made on January 17, 1884, and he concedes that he did not cease to be appellant's solicitor until some time thereafter. In England "it is a settled doctrine of equity that an attorney cannot, while the business is unfinished in which he had been employed, receive any gift from his client, or bind his client in any mode to make him greater compensation for his services than he would have a right to demand if no contract should be made during the relation." Weeks, Attys. at Law (2d Ed.) § 364. More than 50 years ago the English doctrine was adopted by the supreme court of Alabama in an able opinion in the case of *Lecatt v. Sallee*, 3 Port. 115, where it was held that "an agreement made by a client with his counsel, after the latter has been employed in a particular business, by which the original contract is varied, and greater compensation is secured to the counsel than may have been agreed upon when he was first retained, is invalid, and cannot be enforced." The reason for the doctrine is to be found in the nature of the relation which exists between attorney and client. That relation is one of confidence, and gives the attorney great influence over the actions and interests of the client. In view of this confidential relation, transactions between attorney and client are often declared to be voidable which would be held to be unobjectionable between other parties. The law is thus strict, "not so much on account of hardship in the particular case as for the sake of preventing what might otherwise become a public mischief." *Lewis v. J. A.*, 4 Edw. Ch. marg. p. 599, top p. 622. "No single circumstance has done more to debase the practice of the law in the popular estimation, and even to lower the lofty standard of professional eth-

ics and self-respect among members of the legal profession itself in large portions of our country, than the nature of the transactions, often in the highest degree champertous, between attorney and client, which are permitted, and which have received judicial sanction. It sometimes would seem that the fiduciary relation and the opportunity for undue influence, instead of being the grounds for invalidating such agreements, are practically regarded rather as their excuse and justification." 3 Pom. Eq. Jur. § 960, note 1. Before the attorney undertakes the business of the client, he may contract with reference to his services, because no confidential relation then exists, and the parties deal with each other at arm's length. The same is true in regard to dealings which take place after the relation has been dissolved. 1 Story, Eq. Jur. (13th Ed.) §§ 310-313. But the law watches with unusual jealousy over all transactions between the parties which occur while the relation exists. In the case at bar it does not appear that any definite contract in regard to fees existed between appellant and appellee prior to the spring of 1882; but, inasmuch as he undertook to manage her legal interest before that time, there was an implied contract, created by operation of law, which entitled him to receive such reasonable compensation as his services might be worth. "If the amount of compensation be not fixed by the terms of the contract by which an attorney or solicitor was employed, he would be entitled to be paid such reasonable fees as have been usually paid to others for similar services." *Lecatt v. Sallee*, supra.

The question, then, arises, what was a reasonable compensation for the services rendered by the appellee to the appellant? He has introduced no independent evidence upon this subject. His only witness is an office companion, who says that, in his opinion, appellee's legal services were worth \$30 per day, but does not claim to have full knowledge of the services rendered in the matter herein involved. Appellee is unable to state, except approximately, the time spent by him in attending to appellant's matter, but he says: "I believe that in the whole matter * * * I spent at least forty days." Forty days' services at \$30 per day would be \$1,200. We do not think, however, that the proof establishes \$1,200 as the value of the services. Mr. W. J. Culver swears that the customary and usual charge for all the work done by appellee in the divorce attachment and "resulting trust" case would be \$250 in money. Mr. B. F. Richolson, the attorney for Pratt, swore that appellee's services in the chancery or "trust" suit in regard to the land were reasonably worth from \$300 to \$350, and he made the following statement: "If the fee was contingent upon services, I think he would be justified in charging somewhat more. I hardly think double that, because I think the success was so reason-

ably assured there was not very much doubt." What was the value of the lots of which appellee was to have one-half? In the affidavit filed by appellant in the divorce proceeding on March 6, 1882, she swore that she had been informed that the lots were then worth \$3,000, and were incumbered for \$540, only. This affidavit was drawn by appellee, and was presented to the court upon an application to set aside the agreement of settlement for \$500. We cannot suppose that the value of the lots was exaggerated in order to induce the court to believe that Pratt was not too poor to pay more than \$500. Taking \$3,000 as the estimated value of the lots on March 6, 1882, then, by appellee's agreement for fees, he was to get property worth \$1,500, less \$270 of incumbrance, amounting to \$1,230. This amount exceeded the reasonable compensation to which appellee would have been entitled under the implied contract under which he began his services for appellee. We have recently held in *Morrison v. Smith*, 130 Ill. 304, 23 N. E. 241, that a sale by a client to an attorney will be sustained if it is fair and honest, and in no manner tainted with fraud, undue influence, or corruption, and that the law does not go so far as to hold such a sale voidable at the election of the client. In that case the subject-matter of the purchase by the attorney from the client was a judgment obtained by the former for the latter. The judgment debtor was insolvent, except as to his ownership of an undivided interest in land which was subject to a life estate. The doctrine of that case is the law of this court as applied to such a purchase by an attorney from a client as is there described. The litigation had reached the point where judgment had been obtained. The judgment was a lien upon a reversionary interest in land. Its value could, therefore, be easily ascertained by ascertaining the value of the interest in the land subject to the life estate. But there is a manifest distinction between a purchase by an attorney from a client and a contract made during the pendency of a litigation for the conveyance or transfer by the client to the attorney of a part of the property involved in the litigation as a compensation for his legal services therein. Where a purchase is proposed, the seller is always, to a certain extent, put on his guard. He knows that it is for the interest of the buyer to get the property as cheaply as possible. He has every motive to inquire into and learn the value of the thing to be sold. But, in case of the contract above indicated, the client is at a great disadvantage. The value of the property in litigation depends upon the result of the litigation, and, being unable to understand the legal aspects of the case, he is unable to foresee what such result will be. He must rely, not upon his own judgment, but upon the judgment and statements of his attorney. Moreover, he is unable to judge as to the

value of his attorney's services, because he cannot know what legal steps are necessary to be taken in the conduct of the case. The advantage is overwhelmingly on the side of the attorney where such a contract is made. Whatever may be the rule as to a purchase by an attorney from a client, we think that, where the title to property is so involved in litigation that the value of the property depends upon the decision as to such title, a contract made during the pendency of the litigation to compensate the attorney for his legal services with a part of the property involved therein should be held to be voidable at the election of the client, irrespective of the fairness or unfairness of the contract, provided such election is exercised within a reasonable time. Such a rule as this is demanded by public policy, and in the interests of a wholesome administration of justice. The distinction here noted is pointed out in *Berrien v. McLane*, 1 Hoff. Ch. 420, where it is said: "A voluntary gift, made while the connection of attorney and client subsists, is absolutely void, and the property transferred by it can only be held as security for those charges which the attorney can legally make. Next, * * * a transfer of property, made upon an ostensibly valuable consideration, such as a lease or sale, is presumptively void. The client has the advantage of driving the attorney to produce evidence to prove its fairness, and to show that the price or terms were as beneficial as could have been obtained from a stranger. And, lastly, * * * a transfer of a part of the property actually in litigation, or a contract to transfer a part, * * * is void,—illegal,—because of the existing relation of the parties. * * * Such a contract will not be enforced on the application of the attorney; and, if the client applies, will be canceled on equitable terms." The above passage from the *Berrien Case* is quoted for the purpose of showing that a distinction is recognized between a sale and a transfer of a part of the property in litigation in payment of fees or a contract to transfer the same; but we do not go so far as to hold with the learned vice chancellor in that case that such a contract or transfer is absolutely void, but that it is voidable at the option of the client. The view here expressed is supported by the following authorities: *Rogers v. Marshall*, 3 McCrary, 76, 9 Fed. 721, and note to the first opinion, and cases cited in note; 4 Kent, Comm. (12th Ed.) p. 449, note b; *Wallis v. Loubat*, 2 Denio, 607; *Lecatt v. Sallee*, supra; *Pearson v. Benson*, 28 Beav. 598; *Newman v. Payne*, 2 Ves. Jr. 199; *Wood v. Downes*, 18 Ves. 119; *Lewis v. J. A.*, supra; *Starr v. Vanderheyden*, 9 Johns. 253; *West v. Raymond*, 21 Ind. 305; *Simpson v. Lamb*, 40 Eng. Law & Eq. 59; *Hall v. Hallett*, 1 Cox, 134; *Hawley v. Cramer*, 4 Cow. 717; *Weeks, Attys. at Law*, (2d Ed.) § 273; *Armstrong v. Huston's Heirs*, 8 Ohio, 552; *Gray v. Em-*

mons, 7 Mich. 533; *Merritt v. Lambert*, 10 Paige, 352; *Bolton v. Daily*, 48 Iowa, 348; 1 Perry, Trusts (3d Ed.) § 202.

But even if the rule which applies to a purchase by an attorney from his client should be held to be applicable in the present case, the contract and the deed made in pursuance thereof must be subject to a rigid test. In case of such a purchase, the transaction is presumptively fraudulent, and the burden is on the attorney to show "fairness, adequacy, and equity." *Lewis v. J. A.*, *supra*. He must remove the presumption against the validity of the transaction "by showing affirmatively the most perfect good faith, the absence of undue influence, a fair price, knowledge, intention and freedom of action by the client, and also that he gave his client full information and disinterested advice." 2 Pom. Eq. Jur. § 960. In order to sustain the deed made to appellee on January 17, 1884, it must appear that the consideration received by appellant was "adequate," and that the appellee paid "a fair price." This involves the determination of the question whether the services rendered to appellant were worth what the property was worth on the day of the delivery of the deed. Counsel on both sides have presented this as one of the material issues in the case, and have introduced testimony to show the value of the lots in January, 1884. Of appellant's witnesses three swore that the lots were then worth \$3,200, two that they were worth \$4,000, and two that they were worth \$4,800. Of appellee's witnesses two placed the value of the lots at that time at about \$900, one at from \$1,000 to \$1,400, one at \$1,200, and one at from \$1,950 to \$2,400. It is claimed by counsel for appellee that the valuations of his witnesses are based upon actual sales, while the valuations proved by appellant are matters of opinion, formed from a general knowledge of values. It has been well said that "there is no more important factor in determining the value of particular property than the sale of similar property in the same neighborhood at about the time in question." *Lewis*, *Em. Dom.* § 443. We have held that "actual sales of property in the vicinity and near the time are competent evidence, as far as they go." *Culbertson & Blair Packing & Provision Co. v. City of Chicago*, 111 Ill. 651. But, while such sales may be the most satisfactory evidence of value, yet they are only one of the modes of proving value, and not the only mode. *Railroad Co. v. Haller*, 82 Ill. 208. It is true that the witnesses of appellant do not testify to actual knowledge of sales made in the neighborhood where these lots are located in the year 1884, or about that time, and that some of the witnesses of appellee do refer to sales. Purchases made in 1879 are not an exact criterion of values in 1884. Nor are forced sales under trust deeds and foreclosure decrees always a correct indication of value. After making allowance for the difference thus indicated between the testimony produced by

appellee and that produced by appellant, we are unable to reach the conclusion that the value of the services rendered to the appellant was equal to the value of the lots conveyed to appellee in January, 1884.

We cannot say, however, after a careful review of the evidence, that the contract for compensation, and the deed made in pursuance thereof, are liable to any other objections than these two: First, they were executed during the existence of the relation of attorney and client; second, they secured a larger compensation for legal services than those services were really worth. We see no evidence of any undue influence exercised by the appellee over the appellant, except, perhaps, in the matter of obtaining from her a renewal of the contract. In the fall of 1882 appellee seemed to fear that appellant would make a settlement with Pratt without consulting him, or upon a basis not approved by him; and on November 24, 1882, he wrote her a letter, in which, after referring to her previously expressed desire that he should conduct her business "upon a contingent fee of 50 per cent. of the amount recovered," he said, "A definite understanding is therefore necessary before any further action is taken." He says that after this date she renewed the contract for one-half of what should be recovered; and thereafter, in March, 1883, as the record shows, he amended the bill by praying that Pratt be declared a trustee, etc. It was said in *Bolton v. Daily*, *supra*: "We think that where an attorney sets up an express agreement to pay more than an ordinary fee, exacted of a client where the work was two-thirds done, under a threat of withdrawing from the case if the agreement was not made, nothing but the best of reasons would be sufficient to uphold the agreement." Here, however, the implied threat to take no further action without a definite understanding had reference to reaffirming a contract already made, rather than to the making of a contract for the first time. Appellee had perhaps good reasons for asking for a definite understanding. The appellant had thrown out intimations of a settlement for her litigation. She had shown herself to be changeable in her humor, and had already employed two attorneys besides appellee in her lawsuit. She had repudiated the agreement of settlement entered into with her second husband. She had made some incorrect statements to her counsel; for example, she had charged that the note to Eimers and the trust deed to Thornton had been obtained by fraud, when the evidence overwhelmingly established the fact that those securities represented a bona fide loan, and that she herself had voluntarily united in the execution of the trust deed. Aside from the haste with which appellee secured his deed on January 17, 1884, we are satisfied that the action of appellant in the execution of that deed was free and voluntary. She admits that she was pleased with the result reached in getting a

decree for the lots. The proof does not sustain her in the claim which she now makes,—that she thought she was conveying to appellee an undivided one-half of the lots, so that as cotenant she would have the benefit of his services in the further management of the property. On the contrary, the proof shows that the deed was fully explained to her, and that she well understood it to be a conveyance of the west half of the lots, and that she chose the east half in preference to the west half upon being given her choice. We think the proof also shows that appellant was fully advised of all the steps taken in the suit. She was acquainted with the value of the lots, and received information in relation thereto from the beginning of her troubles, having accepted a trust deed thereon in 1879, and having executed a trust deed thereon in 1880. In 1882 she had made an affidavit as to the value of the lots. Afterwards she is shown to have talked with a number of persons in regard to the future outcome of the property. She was a shrewd, capable, business woman; had been engaged in business before she married Pratt; and, though without much ready money, owned a house and two lots in a suburb called Melrose.

If appellant had filed her bill within a reasonable time, we are of the opinion that she would have been entitled to have the deed to appellee set aside, either upon the ground that both the deed and the contract which preceded it were obtained from her while the relation of client and attorney existed between herself and appellee, or upon the ground that the property agreed to be given and subsequently conveyed to appellee as compensation for his legal services was worth more than the reasonable and customary value of those services. But, inasmuch as the contract, which appellee could not have enforced, was fully completed and executed by the conveyance to him of one-half the property, the question arises whether or not appellant has not been guilty of laches in not sooner filing her bill to have the deed set aside. From January, 1884, when the deed was made, to December, 1890, when the present bill was filed, a period of almost seven years elapsed. In connection with the question of laches it is a fair subject of inquiry, under the facts of this case, whether the conduct of the appellant does not show acquiescence, if not confirmation, on her part. Where bills are filed to set aside contracts or deeds between parties standing in a confidential relation to each other, the defense of laches is not usually regarded with favor. It has been said that "length of time weighs less in such a case than in any other," and that it is "extremely difficult for a confidential agent to set up an available defense grounded on the laches of his employer." *Wood v. Downes*, 18 Ves. 120, note 1. But even in cases where it has been held that such contracts and sales, without reference to their fairness or honesty, will be set aside

upon the application of the party in interest, it has at the same time been held that such application must be made within a reasonable time, to be judged of by the court under all the circumstances of the case. *Hawley v. Cramer*, 4 Cow. 717; *Smith v. Thompson's Heirs*, 7 B. Mon. 310; *Fox v. Mackreth*, 1 White & T. Lead. Cas. Eq. pt. 1 (4th Am. Ed.) p. 188, § 115; *Id.*, p. 257; *McCormick v. Malin*, 5 Blackf. 509; *Williams v. Reed*, 3 Mason, 405, Fed. Cas. No. 17,733. What is a "reasonable time" cannot well be defined, but must be left, in large measure, to the determination of the court in view of the facts presented. Equity does not always follow the period of limitation fixed by statute and enforced in courts of law. Parties will be required to assert their rights within a shorter time in states where the values of real estate increase rapidly, and greater temptations are thereby afforded for speculative litigation. *Burr v. Borden*, 61 Ill. 389. But the party who is entitled to set the transaction aside cannot be charged with delay, or with acquiescence or confirmation, unless there has been knowledge of all the facts, and perfect freedom of action. Acts which might appear to be acts of acquiescence will not be held to be such if the client or cestui que trust is ignorant of the circumstances, or under the control of the original influence, or otherwise so situated as not to be free to enforce his rights. *Rogers v. Marshall*, supra; *Hawley v. Cramer*, supra. Confirmation may be evidenced by long acquiescence, "as by standing by and allowing the purchaser to lay out money in the firm belief that her title would not be contested." *Pearson v. Benson*, 28 Beav. 598.

Let us see how the appellant stood related to the two objections theretofore pointed out on January 17, 1884, and for nearly seven years thereafter. She must be held to have known that the property which she conveyed to appellee was worth more than his services. She alleges in her bill in this case that she agreed to pay him \$400, and, while that allegation is not sustained by the proof, she must be held to be bound by it. In her testimony, after stating that appellee introduced the subject of his fees after Pratt's arrest, she says: "I asked him * * * what would be his fees for attending to all my business, and making everything perfectly clear and straight for me. * * * He said there was a great deal of work about the case, and would probably be a great deal more, and he would have to have \$400." She swears that she thus knew the value of his services as fixed by himself. On January 17, 1884, with knowledge, according to her own evidence, that his services were estimated by himself to be worth only \$400, she conveyed to him one-half of property which she had sworn to be worth \$3,000 in March, 1882, and which was of greater value in 1884. With admitted knowledge as to the disparity between the value

of the land and the value of the services, she permitted the appellee to deal with the west half of the land as his own, and recognized him as the owner thereof, for 6 years and 11 months, without giving any intimation that she intended to disturb his title. In December, 1884, he paid off one half of the incumbrance held by Eimers, and she not only permitted him thus to spend his own money on the property, but furnished him with the money to pay off the other half of the incumbrance for herself. From June 30, 1884, down to the time of filing the present bill, she paid taxes on the east half of the property, and suffered him to pay taxes on the west half; sometimes taking the money over to the treasurer's office for him, and paying his taxes for him on the west half. A little more than a month before filing the bill she paid \$83.35 for an outstanding tax title against the east half, and he at the same time, with her consent, paid the same amount for a tax deed to himself of the same outstanding title against the west half. In 1888 and 1889 she made efforts not only to sell her own lots in the east half, but also to sell for him the lots in the west half which she had conveyed to him. She went out to the property in 1885, and employed a man to plant trees for her on the east half, telling him that appellee owned the west half. In 1886 she had some negotiation with one Whittemore about selling one of her lots in the east half to him, and spoke of Johnson as the owner of the west half by deed from herself for services. At another time she was present when appellee offered to sell his lots in the west half for \$75 a lot, and talked to the same party about buying her own lots in

the east half. In 1887 she occupied a part of the office of a real-estate agent named Hopson, and proposed to him that he should sell her lots, referring to appellee as the owner of the adjoining lots, and as being willing to sell them. The evidence shows that between January, 1884, and December, 1890, a belt line railroad was built to the west of these lots, and the Wisconsin Railroad Company laid its tracks in the neighborhood, and certain locomotive works were located in that vicinity. On account of these improvements, the lots, which had been bought for \$600 in 1879, had become worth \$16,000 in 1890.

It appears from the evidence that the defendant went into the office of the appellee as a typewriter in 1883, and did the business of a typewriter for several years. The appellee and two other attorneys had each a private room, and a large reception or waiting room. The appellant was permitted to use a typewriter belonging to appellee, occupying the reception room for that purpose. She was allowed the use of the room and of the typewriter without charge, and, in consideration thereof, she did for appellee such typewriting as he required. We cannot see that the appellee owed her anything for work done under this arrangement. While she was in his office she seems to have done a profitable business as a typewriter for outside parties. When she procured a typewriter of her own, and took another office in the same building, he paid her for the services which she rendered. Upon the ground of laches and acquiescence we think that the court below properly dismissed the bill. The decree of the superior court of Cook county is affirmed.

SOLINGER v. EARLE.

(82 N. Y. 393.)

Court of Appeals of New York. Nov. 9, 1880.

Appeal from judgment entered upon an order reversing a judgment for plaintiff upon an order overruling a demurrer to the complaint. The judgment of the general term sustained the demurrer and dismissed the complaint.

The facts appear in the opinion.

Abram Kling, for appellant. William M. Ivens, for respondents.

ANDREWS, J. The complaint alleges in substance that the plaintiff, to induce the defendants to unite with the other creditors of Newman & Bernhard in a composition of the debts of that firm, made a secret bargain with them to give them his negotiable note for a portion of their debt, beyond the amount to be paid by the composition agreement. He gave his note pursuant to the bargain, and thereupon the defendants signed the composition. The defendants transferred the note before due to a bona fide holder, and the plaintiff having been compelled to pay it, brings this action to recover the money paid. The complaint also alleges that the plaintiff was the brother-in-law of Newman, and entertained for him a natural love and affection, and was solicitous to aid him in effecting the compromise, and that the defendants knowing the facts, and taking an unfair advantage of their position, extorted the giving of the note as a condition of their becoming parties to the composition.

We think this action cannot be maintained. The agreement between the plaintiff and the defendants to secure to the latter payment of a part of their debt in excess of the ratable proportion payable under the composition was a fraud upon the other creditors. The fact that the agreement to pay such excess was not made by the debtor, but by a third person, does not divest the transaction of its fraudulent character.

A composition agreement is an agreement as well between the creditors themselves as between the creditors and their debtor. Each creditor agrees to receive the sum fixed by the agreement in full of his debt. The signing of the agreement by one creditor is often an inducement to the others to unite in it. If the composition provides for a pro rata payment to all the creditors, a secret agreement, by which a friend of the debtor undertakes to pay to one of the creditors more than his pro rata share, to induce him to unite in the composition, is as much a fraud upon the other creditors as if the agreement was directly between the debtor and such creditor. It violates the principle of equity, and the mutual confidence as between creditors, upon which the agreement is based, and diminishes the motive of the creditor

who is a party to the secret agreement, to act in view of the common interest in making the composition. Fair dealing and common honesty condemn such a transaction. If the defendants here were plaintiffs seeking to enforce the note, it is clear that they could not recover. *Cockshott v. Bennett*, 2 Term R. 763; *Leicester v. Rose*, 4 East, 372. The illegality of the consideration upon well-settled principles would be a good defense. The plaintiff, although he was cognizant of the fraud, and an active participator in it, would nevertheless be allowed to allege the fraud to defeat the action, not, it is true, out of any tenderness for him, but because courts do not sit to give relief by way of enforcing illegal contracts, on the application of a party to the illegality. But if he had voluntarily paid the note, he could not, according to the general principle applicable to executed contracts void for illegality, have maintained an action to recover back the money paid. The same rule which would protect him in an action to enforce the note, protects the defendants in resisting an action to recover back the money paid upon it. *Nellis v. Clark*, 4 Hill, 429.

It is claimed that the general rule that a party to an illegal contract cannot recover back money paid upon it does not apply to the case of money paid by a debtor, or in his behalf, in pursuance of a secret agreement, exacted by a creditor in fraud of the composition, and the cases of *Smith v. Bromley*, 2 Doug. 696, note; *Smith v. Cuff*, 6 Maule & S. 160; and *Atkinson v. Denby*, 7 Hurl. & N. 934,—are relied upon to sustain this claim. In *Smith v. Bromley* the defendant, being the chief creditor of a bankrupt, took out a commission against him, but afterward finding no dividend likely to be made, refused to sign the certificate unless he was paid part of his debt, and the plaintiff, who was the bankrupt's sister, having paid the sum exacted, brought her action to recover back the money paid, and the action was sustained. Lord Mansfield in his judgment referred to the statute 5 Geo. II. c. 30, § 11, which avoids all contracts, made to induce a creditor to sign the certificate of the bankrupt, and said: "The present is a case of a transgression of a law made to prevent oppression, either on the bankrupt or his family, and the plaintiff is in the case of a person oppressed, from whom money has been extorted and advantage taken of her situation and concern for her brother." And again: "If any near relation is induced to pay the money for the bankrupt, it is taking an unfair advantage and torturing the compassion of his family." In *Howson v. Hancock*, 8 Term R. 575, Lord Kenyon said that *Smith v. Bromley* was decided on the ground that the money had been paid by a species of duress and oppression, and the parties were not in *pari delicto*, and this remark is fully sustained by reference to Lord Mansfield's judgment. *Smith v. Cuff* was an action brought to recover money paid by the plaintiff to take up his note given to

the defendant, for the balance of a debt owing by the plaintiff, which was exacted by the latter as a condition of his signing with the other creditors a composition. The defendant negotiated the note and the plaintiff was compelled to pay it. The plaintiff recovered. Lord Ellenborough said: "This is not a case of *par delictum*; it is oppression on the one side and submission on the other; it never can be predicated as *par delictum* where one holds the rod and the other bows to it." *Atkinson v. Denby* was the case of money paid directly by the debtor to the creditor. The action was sustained on the authority of *Smith v. Bromley and Smith v. Cuff*.

It is somewhat difficult to understand how a debtor who simply pays his debt in full can be considered the victim of oppression or extortion because such payment is exacted by the creditor as a condition of his signing a compromise, or to see how both the debtor and creditor are not in *pari delicto*. See remark of Parke, B., in *Higgins v. Pitt*, 4 Exch. 312. But the cases referred to go no further than to hold that the debtor himself, or a near relative who out of compassion for him pays money upon the exaction of the creditor, as a condition of his signing a composition, may be regarded as having paid under duress and as not equally criminal with the creditor.

These decisions cannot be upheld on the ground simply that such payment is against public policy. Doubtless the rule declared in these cases tends to discourage fraudulent transactions of this kind, but this is no legal ground for allowing one wrongdoer to recover back money paid to another in pursuance of an agreement, illegal as against public policy. It was conceded by Lord Mansfield in *Smith v. Bromley*, that when both parties are equally criminal against the general laws of public policy, the rule is "*potior est conditio defendentis*," and Lord Kenyon in *Henson v. Hancock*, said that there is no case where money has been actually paid by one of two parties to the other upon an illegal contract, both being *particeps criminis*, an action has been maintained to recover it back.

It is laid down in *Cro. Jac.* 187, that "a man shall not avoid his deed by duress of a stranger, for it hath been held that none shall avoid his own bond for the imprisonment or danger of any one than himself only." And

in *Robinson v. Gould*, 11 Cush. 57, the rule was applied where a surety sought to plead his own coercion as growing out of the fact that his principal was suffering illegal imprisonment as a defense to an action brought upon the obligation of the surety given to secure his principal's release. But the rule in *Cro. Jac.* has been modified so as to allow a father to plead the duress of a child, or a husband the duress of his wife, or a child the duress of the parent. *Wayne v. Sands*, 1 Freem. 351; *Baylie v. Clare*, 2 Brownl. & G. 276; 1 Rolle, Abr. 687; *Jacob*, Law Dict. "Duress."

We see no ground upon which it can be held that the plaintiff in this case was not in *par delictum* in the transaction with the defendants. So far as the complaint shows he was a volunteer in entering into the fraudulent agreement. It is not even alleged that he acted at the request of the debtor. And in respect to the claim of duress, upon which *Smith v. Bromley* was decided, we are of opinion that the doctrine of that and the subsequent cases referred to can only be asserted in behalf of the debtor himself, or of a wife or husband, or near relative of the blood of the debtor, who intervenes in his behalf, and that a person in the situation of the plaintiff, remotely related by marriage, with a debtor who pays money to a creditor to induce him to sign a composition, cannot be deemed to have paid under duress by reason simply of that relationship, or of the interest which he might naturally take in his relative's affairs.

The plaintiff cannot complain because the defendants negotiated the note, so as to shut out the defense, which he would have had to it in the hands of the defendants. The negotiation of the note was contemplated when it was given, as the words of negotiability show. It is possible that the plaintiff while the note was held by the defendants, might have maintained an action to restrain the transfer, and to compel its cancellation. *Jackman v. Mitchell*, 13 Ves. 581. But it is unnecessary to determine that question in this case. The plaintiff having paid the note, although under the coercion resulting from the transfer, the law leaves him where the transaction has left him.

The judgment should be affirmed.

All concur.

Judgment affirmed.

HANOVER NAT. BANK OF CITY OF NEW YORK v. BLAKE.

(37 N. E. 519, 142 N. Y. 404.)

Court of Appeals of New York. June 5. 1894.

Appeal from supreme court, general term, first department.

Action by the Hanover National Bank of the City of New York against Sarah F. Blake. From a judgment of the general term (20 N. Y. Supp. 780) affirming a judgment for defendant rendered at special term plaintiff appeals. Reversed.

The action is brought by the payee of a promissory note against the indorser. The facts were not in dispute, and were stated by the general term as follows: Frederick D. Blake and Charles Waterman were partners engaged in the dry-goods business under the firm name of F. D. Blake & Co. They were indebted to various creditors, including the plaintiff, and, becoming insolvent, executed a general assignment of all their property to James H. Thorp on the 24th day of April, 1888. On the 4th of June, 1888, the creditors of F. D. Blake & Co. signed a composition agreement by which they agreed to take 40 per cent. of their respective claims, to be paid by four notes, made by the members of the firm, each for 10 per cent. of the claim; two payable in 6 and 12 months, and two in 18 and 24 months,—the latter two indorsed by Sarah F. Blake. The Hanover Bank, desiring to have the security of Mrs. Blake upon all the notes, asked that she indorse the first two as well as the last two, which she did. This was not known to the other creditors, and was a security additional to that provided by the terms of the composition agreement. The note in suit is the third of the series, payable in 18 months, and properly indorsed by Mrs. Blake, in accordance with the composition agreement. At the trial both parties moved for judgment, which the court directed for the defendant. At the general term that judgment was affirmed, and the plaintiff has again appealed to this court.

Thos. S. Moore, for appellant. C. Bainbridge Smith, for respondent.

GRAY, J. (after stating the facts). In the general term opinion the question of law was stated thus: "Did the secret agreement, by which Mrs. Blake indorsed the first two notes, invalidate the whole composition agreement, so that notes given in pursuance of its terms are not enforceable by the plaintiff?" The learned justices, finding no controlling authority in this state, determined the question adversely to the plaintiff, and upon the ground, in substance, that, as the agreement was fraudulent, the fraud permeated and vitiated the whole composition agreement, and disabled the creditor from recovering anything under it. In this view we are not able to agree with

them. It may be true that there was no decision, in the courts of this state, in its features so precisely in point as to compel adherence to its authority, and it is true that the view of the general term has support in decisions of English courts. I think, however, that in our state there are expressions of opinion by eminent judges of this court, and by a former very distinguished judge of the superior court of the city of New York, which rather commit us to a contrary view, and which should commend themselves to us, as furnishing a wise and more politic rule in these cases of composition by an insolvent debtor with his creditors. The general principle has been long settled in England and here that a secret agreement which induces a creditor to agree to a composition by the promise of a preference, or of some undue advantage, over the other creditors, is utterly repugnant to the composition agreement, and, from its fraudulent nature, is avoided by the law. The very essence of a composition agreement is that all creditors come in upon terms of equality, and that equality would be destroyed if the secret agreement were given effect. In *Leicester v. Rose*, 4 East, 372, at page 381, Lord Ellenborough observed that the principle of all the cases was "that where the creditors, in general, have bargained for an equality of benefit and mutuality of security, it shall not be competent for one of them to secure any partial benefit or security to himself." In *Russell v. Rogers*, 10 Wend. 474-479, Justice (afterwards chief justice) Nelson said: "So scrupulous are courts in compelling creditors to the observance of good faith towards one another in cases of this kind, that any security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, if unknown to the other creditors, is void and inoperative." It is in the extent of the operation of the principle, which was thus early asserted, that we will find the divergence of judicial opinions between English judges and those of this state. It is curious to observe that, though *Leicester v. Rose* was relied upon as the basis of authority for their conclusions, the application of the doctrine of that case has been different in each country. *Leicester v. Rose* was decided in 1803. Its facts were that several creditors of the insolvent refused to sign unless collateral security, which was to be given for the first two installments of the composition payment, should also be given for the last two. The defendant agreed to procure this additional security, and, not having done so, the action was brought to enforce his agreement. Lord Ellenborough stated the question to be whether any legal effect could be given to such an agreement, which gave to some creditors a better security than to others; and he held that it could not, as it was a

fraud upon the rest of the creditors. The case of *Howden v. Haigh*, 11 Adol. & E. 1033, was decided in 1840, and was a suit upon composition notes. By a secret agreement between the plaintiff and defendant that the latter should indorse to him a bill accepted by a third party, in order to give him a preference beyond the other creditors, the former had been induced to sign the composition deed. It was held that he could not recover. Lord Denman, relying upon *Leicester v. Rose* and *Knight v. Hunt*, 5 Bing. 432, held that every part of the transaction was avoided by reason of the deceit upon the other creditors. Littledale, J., while agreeing with him that the fraud extended over the whole, remarked, rather significantly, "It is possible that the plaintiff may be entitled to sue for the original debt." The case of *Knight v. Hunt*, 5 Bing. 432, referred to by Lord Denman, if we are to regard the language of the opinion, did not expressly decide that the whole transaction was avoided. In that case the plaintiff had refused to accede to a composition of 10 shillings in the pound until a brother of the debtor agreed to supply him with coals to an amount in value equal to half the debt. The coals were furnished; but the notes remained unpaid, and the plaintiff brought this suit upon them. Best, C. J., stated the principle that the judgment of the creditors is influenced by the supposition that all are to suffer in the same proportion, and briefly concluded with the remark: "Here the plaintiff has had his ten shillings in the pound in coal, and he cannot have it again in money." In *Mallalieu v. Hodgson*, 16 Adol. & E. (N. S.) 689 (decided in 1851), Erle, J., held that "where any creditor, in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void. Not only can he take no advantage from it, but he is also to lose the benefit of the composition." In this ruling he relied upon *Leicester v. Rose* and *Howden v. Haigh*. The plaintiff there was seeking to recover for the balance of his original debt, after allowing for the amount of the composition and the value of a preference. It was his claim that the composition deed had not released the debt to him, because he had been induced to believe that he alone was preferred, whereas some other creditors had also been secretly preferred. It will be observed that, in *Mallalieu v. Hodgson*, it was unnecessary to decide whether the plaintiff had lost the benefit of the composition. The question was whether the plaintiff could defeat the effect of the composition agreement by the plea that he had been deceived into supposing that he was the only creditor secretly preferred. As an expression of judicial opinion, it must, however, be accorded its weight as evidencing the continuance of the authority of *Howden v. Haigh*. That case furnishes the sole basis of authority on which subsequent de-

cisions and text writers have rested the doctrine that the fraud in the secret agreement with the creditors so vitiates the whole transaction of composition as to disable him from recovering even the amount of the composition. Leake, Cont. 768; Chit. Cont. 694; Wald's Pol. Cont. 239. I say the sole authority, because *Leicester v. Rose* did not go so far as that, and *Howden v. Haigh* was an extension of the principle which was supposed to be justified by Lord Ellenborough's decision in the former case. The doctrine of *Howden v. Haigh*, it may be observed, did not go wholly unquestioned in England, as may be inferred from the remarks of Littledale, J., in that case, which I have quoted, and of Baron Alderson in *Davidson v. McGregor*, 8 Mees. & W., at page 763; who said he was "alarmed at the extent to which that decision goes."

In this state, with the case of *Leicester v. Rose* before him, Judge Duer, in *Breck v. Cole*, 4 Sandf. 79, formed quite a different conclusion as to the extent of the effect of a secret agreement which attempts to secure to a creditor an advantage over the other creditors. *Breck v. Cole* was an action upon a promissory note secretly given to the plaintiff, in addition to the composition notes, as an inducement to him to agree to the composition. Judge Duer, in his opinion, comments upon the fraudulent nature of the agreement, in its effect upon the other creditors; observing that "it is, in all cases, the concealment of a fact which it was material for them to know, and the knowledge of which might have prevented them from assenting to the composition. * * * Every composition deed is, in its spirit, if not in its terms, an agreement between the creditors themselves, as well as between them and the debtor. It is an agreement that each shall receive the sum or the security which the deed stipulates to be paid and given, and nothing more, and that upon this consideration the debtor shall be wholly discharged from all the debts then owing to the creditors who sign the deed." The learned judge then adverts to the violation of the equality among creditors worked by secretly giving additional security, and states this conclusion: "Hence, either the composition deed itself, * * * or the private agreement, which seeks to evade—and, if valid, would defeat—it, must be set aside; and sound policy and the principles of good faith require that the latter course should be followed. It is perfectly just that every creditor who signs a composition deed should be estopped from setting up any private agreement repugnant to its terms, or inconsistent with its intention and spirit, and * * * every private agreement * * * is of this character, and consequently * * * every security which is the fruit of such an agreement is illegal and void." He reviews the early decisions in the courts of England and of this state, and concludes that "it is the clear and inevitable result of the decisions

that, where a composition is made with creditors, every security given to a particular creditor, not provided for in the terms of the deed, and not disclosed, is void, as a fraud upon the creditors from whom it is concealed." The importance of this expression of judicial opinion should not, in my judgment, be underestimated. It was delivered by one of the most eminent judges in this state, and was concurred in by his associates, Judges Mason and Campbell. It does not appear from the opinion that *Howden v. Haigh* was before him, although it had been decided 10 years before. But, whether his attention was called to it or not, the learned judge's opinion was formed after considering the same early English cases as were considered by Lord Denman in *Howden v. Haigh* and by Justice Erle in *Mallalieu v. Hodgson*. Judge Duer limited the effect of the fraudulent secret agreement to the nullification of any rights or advantages attempted to be gained under it, and regarded it as something quite separable from the composition agreement itself. From all the early cases in England and in this state, the inference from the decisions is, not that the composition agreement is avoided, but, as Justice Nelson stated it in *Russell v. Rogers*, "the security taken for an amount beyond the composition agreed upon, or even for that sum, better than that which is common to all, * * * is void and inoperative." So in *Fellows v. Stevens*, 24 Wend. 294, Justice Cowen held that the law would set aside "all secret terms made by the creditors with the debtor, more favorable to the former than is allowed to the other creditors." It is the secret agreement itself which is fraudulent and void. *Bliss v. Matteson*, 45 N. Y. 22; *Harloe v. Foster*, 53 N. Y. 385. And that is all that I think *Leicester v. Rose* decided. *White v. Kuntz*, 107 N. Y. 518, 14 N. E. 423, is one of the latest cases in which this court has considered the effect of composition agreements. In that case the plaintiff had signed a composition agreement by which he agreed with other creditors of the debtors to accept one-third of the indebtedness due them in four notes, to be indorsed by the father of the debtors. To induce the plaintiff to sign this agreement, Kuntz, the father of the debtors, secretly agreed to purchase of him the composition notes within a specified time, and to pay \$10,000; the composition notes aggregating only about \$6,000. This secret agreement Kuntz refused to perform, alleging that it was null and void. Thereupon, plaintiff brought an action, alleging these facts in his complaint, and also that several other creditors had been induced to sign by a secret agreement to pay them a larger percentage than the one-third provided for in the composition agreement, and, upon the ground that that agreement was void as to him, demanded its cancellation, and that of the notes delivered under it, and a judgment against the debtors for the amount of the original indebtedness. Demurrer to the complaint was sustained below, and in this

court the judgment was sustained. It was held that the agreement between plaintiff and Kuntz, the debtors' father, was fraudulent, and could not be enforced, and that the composition agreement, as to all the innocent parties, was avoided. As the plaintiff was not an innocent party, but had himself taken a fraudulent advantage, he could not set up the fraud of the creditors. The opinion discusses what were his rights. It was said that he had not forfeited all claims upon his debtors; that "he must have either the composition notes, or his original notes;" that he could not avoid the composition agreement as to himself, and enforce his original notes for their full amount, as that would unjustly result in an advantage over the other creditors, and "he should be held to the composition." "His only remedy," it was said, "against the defendants, is upon the composition notes." Judge Earl, in delivering the opinion in *White v. Kuntz*, cited the English case of *Mallalieu v. Hodgson*, supra, as an authority in point; but that he did not adopt the opinion, in all its expressions, is evident, for he held that there was "no ground upon which he [the creditor in the case before him] can be deprived of all remedy." It is very plain, from the opinion in *White v. Kuntz*, that it is the secret agreement, by which the creditor receives an undue advantage, which is deemed to be avoided. It was so considered, again, by Judge Andrews, in *Meyer v. Blair*, 100 N. Y. 600, 17 N. E. 228, who, referring to *White v. Kuntz* as authority for the statement that a collateral agreement is void in composition cases, which secures to one creditor an advantage over others, said, "The court refuses to enforce the secret bargain, and confines the creditor, who is a party to the fraud, to a remedy to recover the sum which, by the terms of the composition, he agreed to accept." In *Solinger v. Earle*, 82 N. Y. 393, the facts were that a third party had given his note for a portion of the insolvent's debt to the defendants, to induce them to agree to the composition. Having paid the note to a transferee thereof, he brought an action to recover back from the defendants the money so paid. It was held that the action could not be maintained, for, though the transaction was a fraud upon the other creditors, the parties were in *pari delicto*. Judge Andrews, remarking that fair dealing condemned such a transaction, said: "If the defendants here were plaintiffs seeking to enforce the note, it is clear that they could not recover." Inasmuch as the note sued upon was for an additional amount beyond the amount of the composition agreement, the remark of the learned judge was in line with all the authorities. He held the secret agreement was void, and could not have been enforced. The case is in no wise in conflict with *White v. Kuntz* or *Meyer v. Blair*.

If we should say that the fraud of the secret agreement made by the creditor operated to avoid the whole transaction of compo-

sition, the result would be to leave him with the original indebtedness unreleased. If the composition agreement, by which the debt was compromised, is to be deemed nullified by the fraudulent transaction, I do not see why the creditor would not be at liberty to pursue the original debt; a view which Littledale, J., regarded as possible in *Howden v. Haigh*. It would certainly seem to be the logical outcome of the proposition asserted below that, if the composition agreement has been avoided, it has become inoperative as an agreement for any purpose. We assert a wholesome rule, and one which works a just result, if we hold that the secret and fraudulent agreement itself is illegal, and is inoperative to confer any rights or advantages upon the creditor. Perfect equality is to be maintained among the creditors. It was thought below that the secret agreement and the composition agreement constituted but a single and indivisible transaction or agreement. I am not prepared to accede to that proposition, though it has support in some of the English cases referred to. It seems to me the case falls easily within the rule which permits a severance of the illegal from the legal part of the covenant. *Pickering v. Railway Co.*, L. R. 3 C. P. 235, 250; *U. S. v. Bradley*, 10 Pet. 343-360. In *Mallam v. May*, 11 Mees. & W. 653, the plaintiffs, who were surgeon dentists, agreed to take the defendant as an assistant, and to instruct him for a term of years, and he agreed, at the expiration of that term, not to practice his profession "in London, or any of the towns in, or places in, England or Scotland, where the plaintiffs might have been practicing." It was held that the covenant as to not practicing in London was valid, and that not to practice elsewhere was illegal, but that the valid part was not affected by the illegality of the other part. Here, the agreement with other creditors for a composition was lawful and valid, unless they should elect to rescind it upon the discovery of the secret agreement,—an element not present. But the agreement for, and the giving of, additional security, was unlawful and void. Is there any reason why the bad may not be rejected, and the good retained? If the alternative is, as it presents itself to my mind, that the composition agreement shall stand as a release of the plaintiff's original demand, or that it shall fall, and leave the plaintiff at liberty to recover the original debt, I am for upholding it, and I fail to see why the legal part of the transaction had with it cannot be severed from the illegal part. We should be careful, in our desire to punish the harsh and unscrupulous creditor, who presses his debtor, and bargains for an advantage over other creditors, by deprivation of legal rights and remedies, that we do not go too far, and lay down a rule which may result unjustly in other ways. It ought not to be possible that through his fraud he may be reinstated in his original position as a creditor for the

whole sum due. The operation of a secret agreement is such that the other innocent creditors may, because of the fraud of their debtor, elect to refuse to be bound by their agreement of composition with him. If the secret agreement is executory, they may not so elect, and may rely that the creditor secretly seeking to obtain some promise of advantage over them will be prevented from enforcing it, and from gaining anything by his fraud. Its illegality is a perfect defense in the hands of the promisor. The composition agreement is one thing, as an agreement between all the creditors to release some part of the insolvent's indebtedness to them, upon terms equal as to each; and the secret fraudulent agreement with one or more of them is a stipulation which, from its inception, was unlawful, and which the law annuls. *Bliss v. Matteson*, 45 N. Y. 22.

It was also suggested in the opinion below, in support of the rule there asserted, that if it did not obtain there would be an inducement to an unscrupulous creditor to commit a fraud, for his only risk would be to lose his additional security, while assured of the amount of his composition. To a certain extent, that may be true; but, on the other hand, it may be suggested that if it were the rule the insolvent debtor would have the inducement to ensnare his creditors into some secret arrangement, and thus, by trick and device, to leave them wholly remediless,—disabled to recover the amount of the composition, and disabled from pursuing the original debt which the composition agreement released. It seems wiser simply to regard the secret agreement as one which the law avoids for its fraud. The creditor makes it with the risk of its worthlessness, if repudiated, and the debtor makes it with the peril that its discovery will furnish cause for his other creditors to avoid the composition agreement. The conclusion reached is the result of a careful examination of the authorities, and the doctrine they teach, and it is in accord with a wiser policy. It must not be forgotten that the defendant's contract of indorsement is within the terms of the composition agreement with respect to the note in suit. We know nothing of the fate of the earlier notes, the indorsement upon which by defendant was secretly and fraudulently procured to be added. She had a perfect defense to the enforcement of her contract. We are only concerned now with the question of whether the plaintiff shall have the amount of the composition, notwithstanding it may have been agreed secretly that it should have some better security for the payment of some of the composition installments. This question, for the reasons stated, should be answered in the affirmative; and therefore the judgments below should be reversed, and a new trial ordered, with costs to abide the event. All concur, except *ANDREWS, C. J.*, and *PECKHAM, J.*, dissenting. Judgments reversed.

CHANDLER et al. v. HOLLINGSWORTH
et al.

(3 Del. Ch. 99.)

Court of Chancery of Delaware. Sept. Term,
1867.

E. G. Bradford and Mr. Higgins, for com-
plainants. Mr. McCaulley, for defendants.

BATES, Ch. The case presented for relief is this: William Chandler, three days before his marriage with the complainant Elizabeth Chandler, while under an engagement of marriage with her, made a voluntary conveyance of all his estate, real and personal, thereby, if it be allowed to operate, defeating the right of dower which otherwise would have accrued from the marriage, and also withdrawing from his own control the means he then had, whereby provision might be made for his intended wife and the issue of the marriage, either through a will or by law in case of his dying intestate. This conveyance was made without notice to her, and, as we must take it, without her knowledge derived in any way whatever before the marriage. Yet no misrepresentation as to his means appears; nor any positive deception as to what was done beyond simple nondisclosure. Nor are we to consider it as an element in the case that Mrs. Chandler, before the engagement, knew that Chandler had held this property or that she had formed any expectations with regard to it.

We may now take the legal question presented by such a case. Will a court of equity relieve against a voluntary conveyance by the husband of all his estate, made pending an engagement; or, as the English cases term it, pending a treaty of marriage made without any disclosure to the intended wife or knowledge on her part, though without any express misrepresentation or deception practiced by the husband? This is the general question; but it is to be considered in two forms:

(1) Will equity relieve, at least so far as to save to the wife her dower in the real estate, even though the conveyance must stand as it affects the personal estate and also the real estate, except as this may be subject to dower?

(2) Will equity go further, and set aside the deed wholly, thereby admitting to take effect the same consequences which would have followed if no such deed had been executed, so that, as Chandler in fact died intestate, the whole property shall descend or be distributed as in ordinary cases of intestacy?

Either form of relief will give Mrs. Chandler her dower. On the latter depends her claim to a share of the personal estate, and the claim on behalf of the infant complainant as heir at law and distributee.

1. Let us consider the first question. The English court of chancery has from the earliest times protected the marital rights of the husband against a fraudulent settlement by

the wife pending a treaty of marriage. It is considered that he becomes a purchaser of the wife's property, in consideration of the charge he assumes of her maintenance and the payment of her debts; that this is a right upon which fraud may be committed, and which ought to be protected. Lord Thurlow, in *Countess of Strathmore v. Bowes*, 1 Ves. Jr. 27. This view has commanded universal consent from the beginning. But until a recent date the doubt has been as to what circumstances should be held to render the settlement fraudulent,—whether there must have been some misrepresentation or deception practiced upon the husband, such as amounts to actual fraud, or whether mere nondisclosure was sufficient as a fraud in law to invalidate the settlement; especially, whether mere nondisclosure should be fatal where the husband was at the time of the marriage ignorant as well of his wife's having held the property as of its having been disposed of away from him.

The first full examination of this subject was in *Countess of Strathmore v. Bowes* (decided in 1789) *supra*. That was a bill filed by Bowes, the husband, to set aside a settlement made before marriage by his wife, the Countess of Strathmore. There was also a cross bill filed by the wife to set aside a deed revoking the settlement, on the ground of duress by the husband in obtaining it from her. First, upon an issue directed to inquire whether the deed of revocation was obtained by the duress, and, a verdict so finding, that deed was set aside. 2 Brown. Ch. 345. Then the cause came to be heard upon the bill to set aside the settlement, before Justice Buller, sitting for the lord chancellor. He decreed in favor of Lady Strathmore. Upon a rehearing before Lord Chancellor Thurlow, the decree was affirmed; and, finally, it was affirmed again on appeal to the house of lords. The argument before Justice Buller and his opinion are reported in 2 Cox, Ch. 28. The rehearing before the lord chancellor, with his opinion, are reported both in Cox, Ch. and in 1 Ves. Jr. 22. Upon the rehearing the arguments are best reported in Ves. Jr., but the opinion of Lord Thurlow, in Cox, Ch. As a decision the case is of no importance upon the question before us, since the settlement made by Lady Strathmore was not a fraud upon the marital rights of her husband under any—the most liberal—construction of fraud. It was made before she knew Bowes, her future husband, even pending a treaty of marriage with another man, and with his consent; and her marriage to Bowes was itself obtained by a gross fraud on his part. But the case is valuable as containing a full review of all the prior decisions. Justice Buller considered that the decisions had gone only so far as to relieve the husband in cases of some actual fraud practiced upon him, and he so lays down the rule. The result, he says, is "that, if the wife is guilty of any fraud, and holds out to the husband that

there is nothing to interfere with his rights, then any deed executed by her in prejudice of such representation shall be void." Bare concealment he held not to be sufficient. 2 Cox, Ch. 30. Lord Thurlow, though it did not affect the result of that case, seems to have held to the more liberal construction of frauds, which includes concealment as well as positive misrepresentation. In his opinion (1 Ves. Jr. 28) he says: "If a woman, during the course of a treaty of marriage with her, makes, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good *prima facie*, because affected with that fraud." It is true, according to Justice Buller's view, that the early decisions were upon cases of actual misrepresentation or deception, but it is also true that the distinct question whether bare concealment was itself fraud had never before been raised; and therefore the cases prior to that of *Strathmore v. Bowes* are to be considered rather as presenting examples of fraud as they occurred in fact, than as deciding in what fraud on marital rights must consist so as to limit the construction of it. Lord Thurlow must so have regarded them in laying down his view of fraud in terms more comprehensive than Justice Buller had done, embracing in his definition mere concealment, which Justice Buller had expressly excluded. The later decisions in England and America have sanctioned the view of Lord Thurlow.

The first of these is *Goddard v. Snow*, 1 Russ. 485, decided by Lord Gifford, master of the rolls, in 1826. In that case, the wife, ten months before her marriage, settled to her separate use for her life, and subject to her appointment after her death, two sums of money, £900 in all, being not the whole of her estate. Her intended husband was ignorant both of her possession of the funds and of the settlement made of them, and so continued until after her death, when he filed his bill to set aside the settlement as one made in fraud of his marital rights. No actual misrepresentation was alleged, nor deception other than was implied in the concealment. Here the precise question was presented whether bare concealment was in itself a fraud. In the argument and decision of this case, *Countess of Strathmore v. Bowes* was fully reviewed, and the opinions of Justice Buller and Lord Thurlow considered. Concealment alone was held to be a fraud, and the settlement was set aside.

Next is a case in which the subject is considered by Lord Brougham, though the decision went upon other grounds. *St. George v. Wake*, 1 Mylne & K. 610. Lord Brougham raises the question, and upon a review of the cases says that in none, except *Goddard v. Snow*, had there been a positive decision avoiding a settlement by the wife on the mere ground of want of knowledge by the husband. "Yet," he proceeds to say, "it is certain that all the cases in which the subject is approached treat the principle as

one of undoubted acceptance in this court; and it must be held to be the rule of the court, to be gathered from a uniform current of dicta, though resting upon a very slender foundation of actual decision touching the simple point." This was in 1833.

In *England v. Downs* (1840) 2 Beav. 522, in which the question concerned the validity of a settlement made by a widow upon children of a former marriage before a second marriage, the master of the rolls, Lord Langdale, considered it not sufficiently proved that the settlement was made pending a treaty of marriage; or, if so, that it was concealed up to the time of the marriage; and on these grounds he sustained the settlement. But he states the law quite fully on the point before us, and clearly in accordance with *Goddard v. Snow*, that mere concealment is sufficient to avoid an antenuptial settlement by the wife. He adds a qualification, not necessary to be here considered, viz. that the concealment is evidence of fraud, rather than fraud *per se*, and therefore is open to explanation; so that cases may occur in which noncommunication would not be held fraudulent.

Next is *Taylor v. Pugh* (1842) 1 Hare, 608. In this case, a settlement made before marriage, to the exclusion of the husband, was sustained on the special ground that the husband had previously seduced the woman, thus putting her in a situation in which she must submit to a marriage without being able to stipulate for a settlement out of her own property. In his opinion, the vice chancellor, Sir James Wigram, notices, with strong disapproval, the argument, that to avoid such an antenuptial settlement by a wife, without the intended husband's knowledge, actual fraud or deception must be proved; and he cites as the true rule a statement from 2 Ropers, Husb. & Wife, 162, that "deception will be inferred if, after the commencement of the treaty for marriage, the wife should attempt to make any disposition of her property without her intended husband's knowledge or concurrence."

It is true that the cases cited subsequent to that of *Goddard v. Snow* give only the dicta of judges in support of the rule of that case; but they show at least a concurrent judicial opinion, from that case down, in favor of the rule which holds mere concealment to be at least evidence of fraud. The real doubt has been whether the concealment should, in all cases, *per se* avoid the settlement, or whether a settlement not disclosed to the husband might, nevertheless, be sustained upon such equitable considerations as the meritorious character of the objects provided for, such as children of a former marriage (*Hunt v. Matthews*, 1 Vern. 408; *King v. Cotton*, 2 P. Wms. 675); so the poverty of the husband and his inability to make any settlement upon his wife (*King v. Cotton*, *supra*; *St. George v. Wake*, 1 Mylne & K. 610); so the fact that

the settlement is of part only of the wife's property, which was the ground in *De Manneville v. Crompton*, 1 Veas. & B. 354.

The only equitable consideration relied upon in the pending case was that Mrs. Chandler, as we must assume, had no knowledge that William Chandler had held the property in controversy; and hence the expectation of it could not have been an inducement to the marriage. But this circumstance is certainly immaterial. The true ground of relief is not the disappointment of an expectation, but fraud upon a legal right; that is, the right to a marriage without any secret alteration of the circumstances of the parties as they stood at the time of the engagement. The husband's ignorance of the property settled, though urged in *Goddard v. Snow* and *Taylor v. Pugh* as a ground for sustaining the settlement, was expressly overruled and was disapproved in *England v. Downs*. In the latter case Lord Langdale says: "If both the property and the mode of its conveyance pending the marriage treaty were concealed from the intended husband, as was the case in *Goddard v. Snow*, there is still a fraud practiced on the husband. The nonacquisition of property of which he had no notice is no disappointment; but still his legal right to property actually existing is defeated, and the vesting and continuance of a separate power in his wife over property which ought to have been his, and which is, without his consent, made independent of his control, is a surprise upon him, and might, if previously known, have induced him to abstain from the marriage." In *Taylor v. Pugh* the same consideration was rejected by the vice chancellor; and he reasoned with great force that no equitable considerations arising out of the circumstances of the particular case, such as those before referred to, shall excuse a concealment from the husband, or sustain a settlement made without his knowledge.

In this country the ignorance of the husband of a settlement by the wife pending a treaty of marriage has of itself been uniformly held fatal to the settlement, though no actual misrepresentation or deceit might appear. The cases are collected in 1 *White & T. Lead. Cas. Eq.* 317. See, especially, *Linker v. Smith*, 4 Wash. C. C. 224, Fed. Cas. No. 8,373; *Tucker v. Andrews*, 13 Me. 124; *Logan v. Simmons*, 3 Ired. Eq. 487; *Spencer v. Spencer*, 3 Jones, Eq. 404, 409; *Poston v. Gillespie*, 5 Jones, Eq. 238; *Ramsay v. Joyce*, 1 McMul. Eq. 236 (in which latter case an issue was directed to the single question whether the husband had knowledge of the settlement); and *Manes v. Durant*, 2 Rich. Eq. 404. In North and South Carolina the whole subject of fraud on marital rights has been examined in a series of cases contemporaneous with the later English decisions, and without reference to them, but reaching the same conclusion, viz. that no

antenuptial settlement by the wife can be valid if made without the husband's knowledge; it matters not how meritorious may be the objects provided for by the wife, or what may be the circumstances of the husband. He is considered as having rights springing out of the treaty of marriage, not to be controlled by any equitable considerations between the wife and third person. And in North Carolina the result reached by frequent investigations of the subject has been to establish a rule requiring, in order to sustain a settlement by the wife, not only that the husband have general knowledge of her intention to make one, or that she has done so, but requiring his consent to the very act or instrument by which the settlement is made. *Spencer v. Spencer*, 3 Jones, Eq. 409; *Poston v. Gillespie*, 5 Jones, Eq. 262.

We see, then, both in England and in this country, since the decision of *Countess of Strathmore v. Bowes*, and the cases prior to it, the course of judicial opinion has tended more and more to strengthen the protection of marital rights against settlements made to their prejudice (1) by enlarging the ground of invalidity. This originally was only actual fraud, evidenced by positive misrepresentation or deceit, but now it includes also constructive fraud, such as arises from mere nondisclosure; and (2) by excluding all the exceptions founded on equitable considerations in the particular case, which were originally allowed to support such settlement; thus making in all cases the husband's knowledge, at least, and in some courts his positive assent, essential to the validity of a conveyance or settlement made after an engagement to marry.

Now, wishing to lay down a rule only for the case presented, it is enough to say that this court will protect a husband against a voluntary conveyance or settlement by the wife of all her estate, to the exclusion of her husband, made pending an engagement of marriage, without his knowledge, prior to the marriage, even in the absence of express misrepresentation or deceit, and whether the husband knew of the existence of the property or not. The concealment of what it is the right of the husband to know, and what it is the duty of the wife to disclose, is itself fraud in law. It is a doctrine of equity, not so fully developed at the date of *Strathmore v. Bowes* as now, that the concealment, to the prejudice of another party with whom one is dealing, of facts which, if known to him, might affect his decision, and which there is an obligation arising out of the transaction to disclose, is a fraud. It is so treated in equity without respect to the motive of the party in the concealment, being what is termed a "constructive fraud." But whether a conveyance or settlement made under the circumstances I have stated is always void, or whether it may be sustained upon such equitable considerations as were admitted in the

earlier English cases, and in *St. George v. Wade*, 1 Mylne & K. 610. such as the reasonableness of its provisions as being made for children of a former marriage, or its embracing only a part of the wife's estate, or such as the husband's inability to make a settlement upon the wife, I leave as questions open in this state until they arise judicially.

We now reach a question which was discussed with much earnestness and ability on both sides: Will equity extend to the wife the like protection against an antenuptial conveyance by her husband which we have seen it affords to the husband against her?

After a patient examination of the argument and authorities, I find no just ground of discrimination against the wife. First, dower is a right of property, and, as such, a proper subject of protection; indeed, a right above all other rights of property favored. Again, dower is a marital right, as well as is the husband's interest in the wife's property. Protection, maintenance, and dower are the rights inuring to her from the marriage; and, though her dower is inchoate only until the husband's death, it is none the less, in his lifetime, a legal right, vested and indefeasible, except by her own act. This is so far recognized that a release of it by the wife is held a sufficient consideration to support a postnuptial settlement upon her, and to make it available, if bona fide, against the husband's creditors. *Ath. Mar. Sett.* (27 Law Lib.) 162; *Bullard v. Briggs*, 7 Pick. 533. Again, the wife is a purchaser of her marital rights, as much so as is the husband. She takes them for a consideration, rendered by her in the marriage,—a consideration not, indeed, the same in kind as that rendered by the husband for his marital rights, but, considering all the consequences involved in marriage, what the wife surrenders is in value or measure more, certainly not less, than what she receives. She surrenders her person, her services, her self-control, her means of self-support; and, as to property, far more than the interest she acquires. However, it should be said that whether the wife's dower, as well as the husband's interest in her estate, is to be protected against fraud, depends not at all upon such considerations as the comparative value of the consideration rendered by each, or the value of their respective rights, but solely upon the fact that there exists a marital right, which, in common with all legal rights, is a proper subject of legal protection, whether it be itself of more or less value, or whether it spring from a larger or less consideration rendered. If there could be any ground, in addition to the mere existence of a right defrauded, to evoke a swifter interposition for one sex rather than the other, it would be the consideration that the wife, being of the weaker sex, the more needs legal protection.

It was argued by the defendant's counsel that in England dower is not protected as a marital right against a conveyance by the

husband before the marriage, even though made on the eve of marriage and expressly to exclude the wife, that under the English decisions, the husband and wife, in this respect, stand on a different footing. There is no decision upon the precise question, but the weight of opinion is in favor of the position taken. Prior to the statute of uses, estates were largely held in trust; and it was, from the beginning, considered that dower did not attach to a use, even when it was one reserved to the husband under a conveyance made by himself. Whether a conveyance with a use reserved to himself by the husband, made on the eve of marriage, and with the express purpose of barring dower, was, at that period, held to be effectual, does not appear by any decided case. The case *Ex parte Bell*, 1 Glyn & J. 282, cited in 1 *Roper, Husb. & Wife* (32 Law Lib.) 354n, that a voluntary settlement made by the husband, though set aside as fraudulent against creditors, prevents his wife's right of dower, cannot be taken as a decision upon the question, since it does not appear whether the settlement was made pending a marriage treaty. The dicta on this point are conflicting. Lord Chief Baron Gilbert is reported to have said that such a conveyance would be fraudulent as to the wife. 4 *Cruise*, Dig. 416; 1 *Roper, Husb. & Wife* (32 Law Lib.) 354n. In 1 *Crusie*, 411, and in 4 *Cruise*, 416, it is laid down that a secret conveyance by the husband, in trust before marriage, to defeat dower, is void; and the whole doctrine as to antenuptial settlements by the wife is expressly applied to conveyances by the husband made under like circumstances. On the other hand, Lord Hardwicke, in *Swannock v. Lyford, Co. Litt.* 208a, note 1, also reported fully in *Park, Dower*, 382, treats it as admitted "that if a man, before marriage, conveys his estate privately, without the knowledge of his wife, to trustees in trust for himself and his heirs in fee, that will prevent dower." Upon this authority, *Park, Dower*, 236, so lays down the rule. So, also, does 1 *Washb. Real Prop.* 161. After the statute of uses, which converted all uses into legal estates, and so admitted dower to attach to them, another mode of avoiding the inconveniences of dower was resorted to by the practice of settling jointures in lieu of dower. By a statute of Henry VIII., which was passed to remedy the inconvenient effect of the statute of uses as to dower, the husband was authorized to settle upon his intended wife, before the marriage, a jointure, which, if reasonable, was held effectual as an equivalent for dower, and barred it, even though made without the wife's privity, the courts of equity reserving the power to relieve the wife against a jointure unfair or merely illusory. Such, after much controversy was the construction finally given to this statute in *Earl of Buckingham v. Drury*, 3 *Brown, Parl. Cas.* 492, cited in 1 *Roper, Husb. & Wife*, 477. The effect was that dower, under the English system, became a

precarious, and, in the case of large estates, an infrequent mode of provision for the wife; and hence its value as a marital right, and the importance of protecting it, was the less appreciated. Marriage was not presumed to have been contracted in expectation of it, unless upon representations to the wife that she would become entitled to it. This may account for what otherwise must appear as an unjust discrimination made by the English courts of equity in withholding from the wife such protection as is given to the husband against secret antenuptial settlements. Such a reason is suggested in the note to 1 Roper, *Husb. & Wife*, 354. But in this country, clearly the same reasons do not apply. Her dower is the only provision made by law for the wife out of the husband's real estate. Practically it is a most important resource, and the only form of provision out of real estate enjoyed by her, except under wills. It does, in fact, to a large extent, enter into the wife's expectations in contracting marriage, and properly so. It, therefore, ought to receive all the protection accorded to any marital right. To refuse it would, in this country, where jointures are unknown, render the right of dower precarious, if not wholly illusory.

In none of the American cases has this subject been thoroughly examined; but so far as they have gone they treat the wife's marital rights and their claim to protection as being on the same footing with those of the husband. In *Swaine v. Perine*, 5 Johns. Ch. 482, a conveyance was made by a husband before marriage, with a view to defeat the wife's dower. The deed was to his daughter, was kept concealed for many years, and possession did not go with it. After the husband's death the widow filed her bill for dower, and it was decreed to her; the deed being adjudged fraudulent as against her. It is true, that in a previous suit, the deed had been held void as against a mortgagee claiming under a mortgage subsequent in date to the deed; but the widow was admitted to her dower not at all in consequence of the decree previously made, that the deed was void as against the mortgagee. It was expressly declared to be fraudulent as against her also; and she would have been relieved quite as certainly, had there been no previous controversy between the husband's representatives and another party touching the deed. It is also true that this was treated by the chancellor as a case of fraud in fact. It is, then, an authority for the relief of the wife against an antenuptial conveyance by the husband, fraudulent in fact; but whether she should be relieved against a conveyance on the ground of mere nondisclosure is a question not decided in *Swaine v. Perine*.

To the same extent precisely is the ruling of *Petty v. Petty*, 4 B. Mon. 215. In that case a settlement by the husband, on the eve of marriage, of all his property, upon his

children by a former marriage, was declared void so far as it affected the wife's dower in the real estate. It was a case of fraud in fact, very gross in its circumstances, being in violation of express representations made to the wife before marriage, in order to induce her consent. This case, like *Swaine v. Perine*, decides nothing as to the effect of mere concealment. It is, however, in one of its features, a valuable recognition of the meritorious character of dower as a marital right, and of its claim to legal protection; for the wife was relieved upon a bill filed in her husband's lifetime, while her dower was inchoate only, the deed being adjudged void, lest it should, through delay, become an impediment to her right of dower in the event of her surviving the husband.

Now, although, in *Swaine v. Perine* and *Petty v. Petty*, relief was given against fraud in fact, yet in weighing the effect of these decisions upon the case before us this is to be considered. They recognize the wife's dower to be a marital right, and as such a proper subject of protection in equity against a fraudulent antenuptial conveyance, placing it upon an equal footing in this respect with the husband's marital rights. Then, with respect to the sort of fraud against which she should be relieved; whether it must be only what is termed fraud "in fact," or whether she should be protected against "constructive fraud," such as bare concealment, the same rule must apply in her favor which we have already seen has become settled for the husband's protection, viz. that constructive, as well as actual, fraud will invalidate an antenuptial conveyance.

Two cases, at least, have carried the protection of the wife thus far. One is *Cransom v. Cransom*, 4 Mich. 230. A husband, two weeks before his marriage, made a voluntary conveyance of his lands to his sons, with the design to exclude his intended wife. There was no misrepresentation to the wife; no positive deception. It was a case of mere concealment. The deed was held void on two distinct grounds, viz. the absence of a sufficient delivery, and also that, "being executed secretly, for the purpose of cutting off the wife's dower, it was a fraud in law upon her rights accrued directly from the marriage." The other case of this class is *Smith v. Smith*, 6 N. J. Eq. 515. A husband, on the day of the marriage, but before it, without the wife's knowledge, settled property upon himself and a daughter by a former marriage, with intent to defeat dower. Actual misrepresentation was alleged by the bill, but denied by the answer. No proof to that effect appears, and the decision does not rest upon any such feature; but the chancellor assumes the broad ground that "a voluntary conveyance by a man on the eve of marriage, unknown to the intended wife, and made for the purpose of defeating the in-

terest which she would acquire by the marriage in his estate, is fraudulent as against her. I see no sound distinction," he adds, "between this case and the like conveyance by a woman under the like circumstances."

In 1 Scrib. Tower, 561, there are cited, to the same point, *Littleton v. Littleton*, 1 Dev. & B. 327, and *Rowland v. Rowland*, 2 Sneed, 543; but these cases I have not seen. Scribner refers to the American decisions as "not being entirely uniform"; and in 1 Washb. Real Prop. 175, it is said that "the cases are singularly conflicting." On examination of the cases, I find no conflict whatever as to the power of a court of equity to relieve the wife. It is only in courts of law, where a legal seisin is essential to dower, that the claim to it against the husband's conveyance prior to marriage has been denied; as in *Baker v. Chase*, 6 Hill, 482. The other case cited in Washburn as against the doctrine of *Swaine v. Perine* is *Jenny v. Jenny*, 24 Vt. 324. I have examined this case, and think it not relevant to the question, though, not having it by me, I cannot state its circumstances. The rule to be derived from the equity decisions is that the wife's dower will be protected against a voluntary conveyance of the husband, made pending a marriage engagement, under precisely the same circumstances in which the husband is relieved against an antenuptial settlement by the wife.

I am therefore of opinion that Mrs. Chandler is entitled to dower out of the real estate described in the deed of trust, notwithstanding the execution of the deed before her marriage, together with one-third of the rents and profits accrued since her husband's death. It appears from the answer that part of the real estate—a lot in Wilmington—has been sold by the trustees for \$400, its value. Assuming, as it is proper to do, that the purchaser was a bona fide purchaser, without notice, the court will not follow this lot into his hands; but the widow is nevertheless entitled, as against the defendants, to an assignment of such a share of the remaining real estate as she would have taken if the lot had remained in their hands; and therefore, in assigning the dower, although it will be assigned only out of the remaining real estate, yet in estimating her share of that, the whole real estate, including the lot sold, will be considered.

2. It now remains to consider briefly the claim of the complainants to relief beyond the allowance of dower to the widow. The prayer is that the trust deed be declared wholly void, so that the real estate may descend under the intestate law, and the personal estate be distributed precisely as if no deed had been executed. This relief the court cannot decree.

A court of equity will not interfere to set aside a voluntary conveyance, because the conveyance disappoints hopes or expecta-

tions, however just and reasonable; not even because it violates obligations, if they are only natural or moral ones. Courts of equity, as well as of law, protect only legal rights, and enforce legal obligations; legal, I mean, as distinguished from such as are merely natural or moral. For example, a promise, however solemnly made and binding in morals, if without a consideration, is not enforced in equity any more than at law; nor is the obligation of a parent to provide for children after his death. So a conveyance will be set aside on the ground of fraud only when it is in fraud of some legal right, and one existing at the time it is made. Now, in this case, we may waive the fact that, as to the infant complainant, he was not in esse at the execution of the trust deed. It is a consideration decisive of the whole of this branch of the case that, even had William Chandler not conveyed his estate, his marriage would have vested no rights in it, nor have restricted his absolute control of it beyond the wife's dower in the real estate. He could, after marriage, have effectually disposed of his whole personal estate and of the inheritance of his real estate by just such a trust deed as this. It follows that his control of the property could not be less absolute before the marriage than after it; for, otherwise, an engagement to marry would be of more force than marriage itself. Besides, as any disposal of property before marriage, which he could as freely have made after marriage, defeated no right, but removed only a bare chance that the complainants might succeed to it if Chandler should continue to hold it and die intestate, the loss of such a chance cannot be treated as the disappointment of a just and reasonable expectation in marriage, nor as so altering the circumstances of the husband as to have influenced the decision of the intended wife. Again, it is clear that this deed would have stood against any attempt by Chandler to dispose of the personal estate and the inheritance of the real estate by another deed or by will. That he made no such attempt, but died intestate, so that, as it happened, these complainants would have succeeded to the whole property but for this deed, cannot affect the deed. A conveyance can be set aside only for causes affecting it when it is made, as for fraud then committed, or for the protection of rights then existing. Its validity cannot be held in suspense, to be determined by future contingencies. This would subject titles to a distressing uncertainty.

But it was argued for the complainants that the deed, being fraudulent in respect to dower, is, therefore, wholly void, passing no title whatever; so that the heir at law may succeed to the real estate, and the distributees to the personal estate, as a consequence of the fraud on the right of dower, though they themselves might have no equi-

ty to set the deed aside. Such would be the effect if the deed were illegal; as where it violates the provisions of a statute which avoids the deed itself. It is then a nullity, and stands in the way of no claim which otherwise would be valid. And so, where a conveyance is tainted with fraud in fact, in which the parties claiming under it are implicated, such a conveyance is wholly void; for no effect whatever can be given to an instrument actually fraudulent; and therefore it is that, although a conveyance which is merely voluntary, and not fraudulent in fact, is invalid only against existing creditors, and not against subsequent creditors. Yet, if the conveyance is tainted with actual fraud, it is void altogether, and subsequent creditors are let in. But such is not the effect of constructive fraud. The object of the doctrine of constructive fraud is to protect some right or interest which, in equity, ought to be preserved, against the effect of a conveyance which is in other respects valid; and therefore equity does not avoid the deed altogether, but saves against it the rights or interests which are to be protected. A deed containing some provisions or hav-

ing some operation forbidden by statute or public policy, or contrary, as in this case, to some equity, is held invalid only so far as the statute or policy or equity requires, upon the principle "*ut res magis valeat quam pereat*." *Bredon's Case*, 1 Coke, 76; *Shep. Touch.* 68; *Doe v. Pitcher*, 6 Taunt. 359; *Darling v. Rogers*, 22 Wend. 483. Thus a voluntary conveyance, if not fraudulent in fact, passes the title to the grantor, but subject to the rights of existing creditors, which are preserved by raising an implied trust in the grantor. See 1 Story, Eq. Jur. § 371. So in this case the trust deed is effectual between the parties, but equity preserves the right of dower against the real estate in the hands of the grantees. Precisely as at law, dower follows real estate conveyed by the husband after the marriage, though the conveyance is otherwise good. It does not seem accurate to say that a deed is void for constructive fraud. The deed is valid; title under it passes, but subject in equity to those rights which are affected by the fraud.

Decree for complainant, Mrs. Chandler, in accordance with the foregoing opinion.

HUTCHINS v. VAN VECHTEN.

(35 N. E. 446, 140 N. Y. 115.)

Court of Appeals of New York. Nov. 28, 1893.

Appeal from supreme court, general term, first department.

Action by Elizabeth E. Hutchins, as executrix, etc., against Abraham Van Vechten, to have adjudged that defendant held certain real property, and the proceeds arising from the possession thereof, in trust for the joint and equal benefit of himself and plaintiff's testator. From a judgment of the general term (20 N. Y. Supp. 751) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Matthew Hale, for appellant. Augustus S. Hutchins and Charles N. Morgan, for respondent.

O'BRIEN, J. The judgment in favor of the plaintiff in the courts below adjudges that the defendant, under a deed of conveyance to him by Reuben E. Fenton on the 23d day of December, 1870, of certain lands in the county of Chautauqua, then became and was, and ever since has been, seised and possessed thereof, and of the proceeds, rents, issues, and profits, in trust for Waldo Hutchins, the plaintiff's testator, to the extent of an equal undivided one-half part thereof, as tenants in common. It appearing that the defendant, before the commencement of the action, had sold the land, the title to which he held in his own name, an accounting concerning the proceeds and the rents and profits was directed before a referee designated in the judgment. There is little, if any, dispute with reference to the facts, and practically the only question presented by the appeal is whether the trust impressed by force of the judgment upon the defendant's title was sufficiently or legally established. The defendant relies upon the provisions of the statute of frauds concerning trusts of this character, and it therefore becomes necessary to determine whether the plaintiff's proofs are such as that statute requires. The English statute on this subject, (29 Car. II. c. 3,) in its essential features, was enacted in this state by the act of February 26, 1787, the twelfth section of which provides that "all declarations or creations of trusts of any lands shall be manifested and proved by some writing signed by the party entitled by law to declare the trust." Thus the law stood for about 40 years, until the general revision of the statutes, when it was changed, and made to read as follows: "No estate or interest in lands, other than leases for a term not to exceed one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing subscribed by

the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." 2 Rev. St. p. 135, § 6. After the revision a trust of the character claimed by the plaintiff in this case could not be created or established except by a deed or conveyance in writing. But by chapter 322 of the Laws of 1860 the legislature restored the law to its original condition by an amendment to the seventh section substantially providing that a declaration of trust in lands might be proved by any writing subscribed by the party declaring the same. It is not necessary now to produce a deed or a formal writing intended for the purpose in order to prove the trust, but letters or informal memoranda signed by the party, and even admissions in a pleading in another action between other parties, if signed by the party with knowledge of its contents, will satisfy the requirements of the statute, if they contain enough to show the nature, character, and extent of the trust interest. *Forster v. Hale*, 3 Ves. 696; *Fisher v. Fields*, 10 Johns. 494; *Wright v. Douglass*, 7 N. Y. 564; *Cook v. Barr*, 44 N. Y. 156; *Loring v. Palmer*, 118 U. S. 321, 6 Sup. Ct. 1073; 2 Story, Eq. Jur. § 972; *McArthur v. Gordon*, 126 N. Y. 597, 27 N. E. 1033; *Urann v. Coates*, 109 Mass. 581.

The evidence produced in behalf of the plaintiff was sufficient, within this rule, to establish an interest in the lands by her testator at the time of his death, which occurred on the 9th day of February, 1891. The conveyance to the defendant was shown by the production of the deed, which appeared to have been recorded in the proper clerk's office December 3, 1875. The plaintiff produced and put in evidence three papers found in an envelope in the safe of Mr. Hutchins after his death, and which were shown to have been in his possession during his life: (1) A power of attorney under the hand and seal of the defendant to John H. Platt, who was at the time of its execution the law partner of the deceased, bearing date June 5, 1873, acknowledged before a notary public in the city of New York, who also became a subscribing witness thereto. This instrument authorized and conferred full power upon Platt to sell the land for \$8,000, payment to be made in the manner and as specified therein. (2) A letter in the defendant's handwriting, and bearing his signature, of the same date as the power of attorney, addressed to Platt, in which, after referring to the power of attorney, and giving instructions permitting him to take certain notes for the purchase price of the land, the defendant says: "Whatever is realized, you will understand that it belongs to Waldo Hutchins and myself, jointly and equally; and any further instructions Mr. Hutchins may give you, you may comply with." (3) Another paper, unsigned, but wholly in the defendant's handwriting, describing the land

conveyed to him by Fenton. It begins with the statement that the "deed from Fenton to me is a warranty deed, with full covenants," and, after the description, ends with the statement that "the above is the description of the property as contained in a deed to me; nothing about our being entitled to 600 inches." The plaintiff also produced several letters written by the defendant to the deceased and one of his sons, after the execution of the power of attorney, in regard to taxes on the land; also, a letter written by the defendant to E. H. Fenton, then a tenant of a portion of the land, bearing date February 14, 1887, in which the defendant states that, "although the title of the whole property is in me, there is another party who has an interest. I expect to go to New York some time next week, when I will see him, and let you know what it is decided to do." It is not necessary to the plaintiff's case to show that the trust was created by, or originated in, a writing. The statute enacts a rule of evidence, and is satisfied if the trust is manifested or proved by a writing, however it originated, whether by parol arrangement or otherwise. *Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911. The defendant's letter to Platt refers to the power of attorney, and that refers to the deed under which the title was held; giving its date, and the parties to it. Both are signed by the defendant, and reading them together, as they should be, the subject-matter and extent of the trust is sufficiently defined and specified, even without the unsigned paper and other letters. This proof is sufficient to sustain the findings of the learned trial judge, to the effect that the defendant took and held the title to the land in his own name, but in trust for the benefit of himself and the plaintiff's testator, in equal shares, as tenants in common. It was not, of course, one of the express trusts authorized by statute, but one arising under the forty-seventh section, which, in equity, entitled the deceased to a beneficial interest, and vested in him an estate of the same quality and duration as such interest. *Ellwood v. Northrup*, 106 N. Y. 172-179, 12 N. E. 590.

We agree with the learned counsel for the defendant that a trust cannot be impressed upon what appears by the deed alone to be an absolute title in the defendant, without clear proof showing a beneficial interest in another, as well as its nature, character, and extent, and that a failure to execute or deliver the necessary legal evidence to qualify the title is fatal to such a claim. *Wadd v. Hazelton*, 137 N. Y. 215, 33 N. E. 143; *Van Cott v. Prentice*, 104 N. Y. 45, 10 N. E. 257. With this point clearly in view, we have carefully

considered the very able argument of counsel in behalf of the defendant, mainly devoted to the proposition that the proof in this case does not come up to the standard which the law demands in such cases. But we think that the written evidence produced at the trial is not fairly open to any construction except that given to it by the learned trial judge, and is consistent only with the theory that the deceased had in fact a beneficial interest in the lands. The defendant stated under his own signature, when authorizing his attorney in fact to sell the property, that he was entitled to one-half the price, and directed the attorney to consult with him in regard to the execution of the agency. There is nothing in the case to warrant the belief that this division of the proceeds of the sales, when made, referred to compensation as a broker, or to anything else, save an interest in the property to be sold. That is the natural conclusion which the judicial mind must reach upon reading the letters and papers in the light of all the circumstances. The trust, it is true, must be established wholly by a writing sufficient within the statute; but, when the writing is produced, it must be interpreted, like all other contracts and written instruments, according to the intention of the parties, ascertained from the language used, and all the surrounding circumstances. The fact that no proof was given by the plaintiff of payment by the testator of any part of the consideration is not material. It is not always possible, after the death of the party interested, to give such proof, and it is not essential to the process of establishing the trust. A writing without any consideration whatever affords sufficient proof that the title conveyed by the deed is for the benefit of another. The unsigned paper and the letters of the defendant bearing date subsequent to the power of attorney, and the letter which accompanied it, relating to the taxes on the land, and the nature of the defendant's interest therein, were properly admitted in evidence. They were all in the defendant's handwriting, presumptively sent or delivered by him to the deceased; and they explained, and tended to confirm, what the defendant had stated in the first letter in regard to the interests of the parties in the land.

There are some other exceptions in the record, but it is not necessary to refer to them in detail. It is sufficient to say that we have examined them all, and have found nothing in them that would warrant us in disturbing the judgment, and it should therefore be affirmed, with costs. All concur, except PECKHAM, J., not sitting.

URANN v. COATES et al.

(109 Mass. 581.)

Supreme Judicial Court of Massachusetts.
March, 1872.

A. conveyed to B. certain land by an absolute conveyance, B. agreeing orally to hold in trust for A. after satisfying claims he held against A. At B.'s death the following writing was found among his papers.

"Boston, July 21, 1865. I, Benjamin Rand, having purchased the estate of Isaac P. Rand, of Roxbury, said estate being situated partly in Roxbury and partly in Dorchester, in the state of Massachusetts, for his deed delivered to me on July 21, 1865, do hereby agree and bind myself and my heirs to pay over to the said Isaac P. Rand whatever balance shall remain over and above the amount necessary to discharge my original claims against Isaac P. Rand, and the charges against the said estate, which by my purchase of the same have become vested in me, the said payment to be made when all such claims and charges shall have been fully liquidated and discharged. * * * And also in all charges and expenses which have been or shall be incurred by me or my heirs in discharging the above claims and charges and in carrying on the estate. Benjamin Rand."

This was followed by the memorandum which is given in the opinion. The plaintiff, who is the assignee of A., brings this action against the heir and administrator of B. to recover the balance remaining after the satisfaction of the claims of B.

H. F. French & J. E. Maynadier, for plaintiff. E. D. Sohler & C. A. Welch, for defendants.

COLT, J. The bill charges that Benjamin Rand held the land conveyed to him by the absolute deed of Isaac P. Rand, upon trust to apply the avails of it to the payment of certain incumbrances and debts due him, and to account for any surplus to Isaac P. Rand, the grantor, to whose right the plaintiff, as assignee, has succeeded. The writings by which it is claimed that this trust is declared are fully set forth, and it is alleged that under the trust sales have been made of more than enough to pay all demands and charges, leaving a surplus, to which the plaintiff is entitled.

The defendants file a plea denying that Benjamin in his lifetime held the land upon any such trust, or that any trust was devolved upon them, as his representatives, by his death. The purpose, no doubt, is to obtain first the decision of the court upon the question whether, upon the facts disclosed, any trust is raised which can be enforced; for, if no trust shall be found to exist, then the investigation of long and detailed accounts will be avoided. This is the point which was argued at the bar, and we proceed to its consideration without regard to supposed irregularities in the pleadings.

The land in question was conveyed by an absolute quitclaim deed, dated on the 15th, but delivered on the 21st day of July, 1865, to Benjamin, who then held large demands against Isaac P. Rand, secured by mortgage on the same premises. The evidence sufficiently proves that Benjamin orally agreed, at and before the time of the delivery of the deed of the equity, and as part of the transaction, that any surplus over and above his claim that might remain of the estate or its proceeds should belong to Isaac P. No written memorandum of the agreement was made before the delivery of the deed, but it was suggested at the time that Benjamin should put it in the shape of a memorandum, safely deposited, in case anything should happen to him. And Benjamin afterwards informed Isaac P. that soon after the transaction he made a memorandum of the agreement. No such paper was ever delivered to, or came into the possession of, Isaac P., but after the death of Benjamin a writing of that description was found safely deposited in his bank trunk. By the terms of this writing, he agreed to pay over any balance of the estate remaining, substantially in accordance with the oral agreement. It was signed by Benjamin, and dated July 21, 1865; and underneath the first signature was an additional statement, also signed, in these words: "This memorandum is made by me for the use of my executor or administrator only. Neither Isaac P. Rand, nor those claiming under him, have any legal or equitable claim against me or my estate; but upon the payment of my debt, interest, and all charges, as above mentioned, any balance shall enure to the benefit of Isaac P. Rand and those claiming under him."

We are of opinion that this writing is sufficient as a declaration of trust, within the meaning of our statute. It is much more formal and particular in its statement than declarations of this description by letter, by answer in chancery, affidavit, recital in bond or deed, or in pamphlet, which have all been held sufficient, and with reference to which it is held to be no objection that they were drawn up for another purpose and not addressed to, nor intended for the use of, the cestui que trust. See cases cited in Browne, St. Frauds, §§ 98, 99.

It is not essential that the memorandum relied on should have been delivered to any one as a declaration of trust. It is a question of fact, in all cases, whether the trust had been perfectly created; and upon that question the delivery or nondelivery of the instrument is a significant fact, of greater or less weight according to the circumstances. If the alleged trust arises from mere gift, delivery of the writing by which it is declared is not always required as proof that the gift was perfected, for the court will consider all the facts bearing upon the question of intention, and it has been held that if a party execute a voluntary settlement, and the deed

recites that it is sealed and delivered, it will be binding on the settlor, even if he never parts with it and keeps it in his possession until his death. *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Perry, Trusts*, § 103, and cases cited. It must always, however, appear that the fiduciary relation is completely established, and not left as a matter of executory agreement only, regard being had to the situation of the property, the relations of the parties, and the purposes and objects had in view. In this case the verbal agreement in which the trust originated was made in consideration of the conveyance by Isaac P. of his interest in the real estate, and the trust is founded on a good consideration. The fact is of weight in aiding the court to carry out the intentions of the parties; and the want of a delivery of the memorandum becomes of less significance.

The law as thus laid down is to be found mainly in decisions under the words of the English statute, which requires that all declarations and creations of trust shall be manifested or proved in writing. These were the words of our earlier law (*St. 1783, c. 37, § 3*), and they remained until the first general revision of the statutes; the requirement of the present statute being that the trust shall be created or declared in writing. *Gen. St. c. 100, § 19*. The same change has been made in other states; and in those in which the question has been incidentally before the courts the tendency is to rule that this abbreviation in the words does not change the law, and that "created or declared" are equivalent to "manifested or proved." Trusts may be created in the first instance in writing. They more commonly originate in the

oral agreements and transactions of the parties, and are subsequently declared in writing. Our statute embraces both descriptions. It had been settled by repeated decisions under the old statute, when this change was made, that an express trust was sufficiently declared if shown by any proper written evidence disclosing facts which created a fiduciary relation. Under this construction, the additional words of the old statute seemed immaterial, and are omitted. And we are of opinion that no change in the meaning or effect of it was intended or made. *Perry, Trusts*, § 81, and cases cited.

In view of the law thus stated, the fact that there was no delivery of the memorandum in this case is not of controlling importance. It is impossible to account for its existence and safe preservation, unless there was an intention that it should be used, if necessary, to prove a trust. The statement that it is made for the use of the executor or administrator of the trustee implies this. The cestui que trust was informed of its existence; and by its terms a perfect trust is declared. It is, indeed, declared that neither Isaac P., nor those claiming under him, have any legal or equitable claim against the maker or his estate. But this statement, if such was its intention, cannot control the effect of the memorandum in establishing the trust. That results, as matter of law, from the proof. We are inclined to think that its intention was not to defeat an equitable claim to the proceeds of the estate conveyed, but only to protect the maker against personal responsibility beyond the actual receipts in administering the trusts.

Decree for the plaintiff.

BATES et al. v. HURD.

(65 Me. 180.)

Supreme Judicial Court of Maine. Franklin.
May 2, 1876.

Bill in equity to declare a trust and for an account.

P. H. Stubbs, for plaintiff. H. L. Whitcomb, for defendants.

BARROWS, J. In 1847 one Kennedy gave to Nicholas Bates and his brother Thomas, the plaintiff, a bond conditioned for the conveyance of certain parcels of land (estimated at about two hundred and fifty acres) upon payment of the obligee's notes. In 1851, before the maturity of all the notes, an adjustment was made, by which, in satisfaction of the bond, he made conveyances of the bonded land in two separate parcels,—one to Wm. W. Bates, a third brother, and the other to Nicholas, who (with Wm. W. and the plaintiff) subscribed and delivered to Kennedy a receipt indorsed upon the bond, setting forth that he had received the deed of his portion, "for himself and in trust for his brother Thomas Bates, according to what the said Thomas has or may pay towards the same real estate, which amounts at present to seventy-five dollars." The price of the parcel thus conveyed to Nicholas was \$450, and Nicholas seems to have admitted a resulting trust in favor of the plaintiff to the amount of one-sixth of the purchase, which was binding upon him and all claiming under him with notice.

Indeed the writing subscribed by Nicholas Bates seems to be tantamount to a declaration of an express trust, so as to satisfy Rev. St. c. 73, § 11.

The words "created and declared" in that statute seem to be construed by the courts to be synonymous with "manifested and proved" as they stood in the original seventh section of the statute of frauds,—29 Car. II. c. 3. *Forster v. Hale*, 3 Ves. 707, 5 Ves. 308; *Unitarian Society v. Woodbury*, 14 Me. 281; *Barrell v. Joy*, 16 Mass. 221; *Pinnock v. Clough*, 17 Vt. 508.

From the cases just cited and numerous others we see that a letter, memorandum, or recital subscribed by the trustee, whether addressed to or deposited with the cestui que trust or not, or whether intended, when made, to be evidence of the trust or not, will be sufficient to establish the trust when the subject, object, and nature of the trust, and the parties and their relations to it and each other, appear with reasonable certainty.

The existence of a trust in favor of the plaintiff, which he may enforce against Nicholas Bates and his representatives, and all claiming under him with notice of the trust, may be regarded as established.

Nicholas Bates mortgaged the property to Kennedy to secure a balance of the purchase

money, and subsequently made two other mortgages thereon to Philip M. Stubbs, the scrivener who drew the conveyances from Kennedy and wrote the indorsement upon the bond containing the declaration of the trust. Both of these last-named mortgages were assigned to Prince Thompson, who had no knowledge of the trust, and has given notice of foreclosure, but has never been in possession of the property.

Nicholas Bates died in January, 1866, leaving a widow, Keziah M. Bates, now Keziah M. Hurd, who is one of the respondents, and who took out letters of administration on his estate, inventoried the land as subject to the mortgage to Prince Thompson, "and being also held as a trust estate for Thomas Bates to the amount of about \$140." This sum is apparently the amount of the \$75 originally paid in by the plaintiff towards the purchase money, with interest up to the time of the making of the inventory. The widow continued in possession of the land, receiving the rents and profits until November, 1868, when she made sale thereof by license from the probate court, without making mention of the trust, to Daniel Day, who mortgaged it back to her for part of the purchase money, and took possession. The widow married George Hurd, the other respondent, and on September 9, 1870, took a quitclaim deed from Day, and since then the two defendants have occupied or had the exclusive use, income, and profit of the premises.

The plaintiff does not claim any rights against the mortgagees. The heirs of Nicholas Bates are no longer interested, as the sale by the administratrix devested them of all right and title in the premises.

The administratrix, in her inventory, admitted the plaintiff's rights, and is fully chargeable with notice of them. The other respondent, her husband, seems to have occupied only under her. But a joint reception by them of the rents and profits is admitted in the agreed statement. He is therefore responsible to the plaintiff on this score with her. The testimony establishes the fact that the plaintiff made a claim upon the administratrix for his interest, and that there was more or less negotiation between them looking to an adjustment. It is unfortunate for both that an equitable adjustment could not be reached without litigation.

In the hands of these respondents it is obvious that the property is subject to the trust which the plaintiff seeks to enforce.

They object that he might have had an adequate remedy at law by a suit for his share of the income. But cases of trust are, under our statute, specially made the subject of remedies in equity, and, moreover, it might be desirable for him to have the decree to which he is entitled in equity as against them, in view of the possibility of a redemption.

Unless the parties can agree as to the

proper sum to be allowed for the past rents and profits, a master must be appointed to ascertain them.

Bill sustained. Estate declared subject, in the hands of these respondents, to the trust

asserted. Costs for the complainant. Master to be appointed at nisi prius, if required.

APPLETON, C. J., and WALTON, DANFORTH, and PETERS, JJ., concurred.

McVAY v. McVAY.

(10 Atl. 178, 43 N. J. Eq. 47.)

Court of Chancery of New Jersey. July 12, 1887.

On final hearing on bill, answer, and proofs taken before a master.

C. F. Axtell and E. A. Quayle, for complainant. Theodore Little, for defendant.

VAN FLEET, V. C. This suit is brought to enforce an express trust. Prior to April 2, 1879, the complainant was the owner of a lot of land in Morristown. On that day he conveyed it to his son John, who on the same day conveyed it to the complainant's wife. Both deeds were voluntary. The complainant's wife continued to hold the title until November 26, 1883, when she and complainant conveyed it to their daughter Celia, the defendant in this suit. Celia, on the same day, and as part of the transaction by which she became invested with title, made a deed to the complainant. The object of the two conveyances was to change the title from the wife to the husband. No consideration was paid for either. Celia, at the time of this transaction, was a minor, being only 19 years of age. Her deed, therefore, while not void, was voidable. No acts, in confirmation of her deed, performed since she attained full age, are either alleged or proved. Since attaining full age, she has refused to execute a deed in confirmation of the one she made while a minor, but now insists that that deed, by reason of her minority, is of no effect, and that the title to the land still remains in her, and that she is under no duty to convey it to the complainant. The complainant, on the contrary, insists that the defendant took title subject to a trust, the trust being that she should convey the land to him, and having thus far failed to execute it effectually, and now refusing to do so, the court should compel her to execute it.

There can be no doubt about the fact. The circumstances attending the transfer of the title to the defendant render it conspicuously clear that the purpose of all persons concerned in the transaction was to change the title from the wife to the husband. It is obvious that the transaction had no other object. It is clear, therefore, that the defendant took title subject to a trust, and that the trust was an express one. The only question which the case presents is, is the trust manifested in such manner that equity can take cognizance of it and enforce it? The existence of such a trust can be proved by nothing short of written evidence. The direction of the statute of frauds upon this subject is imperative. It declares that all declarations and creations of trust of lands shall be manifested and proved by some writing signed by the party enabled to declare the trust, or else they shall be utterly void and of no effect. Revision, 445, § 3. This statute mere-

ly prescribes a rule of evidence. It declares that the existence of an express trust of lands shall be proved by nothing but written evidence and rigorously excludes all other evidence as a means of establishing the fact of the existence of such a trust, but it does not inhibit the creation of a trust of this kind by parol. It has accordingly been held that a valid express trust of land may be created by parol, provided it is subsequently declared and manifested in the manner directed by the statute.

In *Smith v. Howell*, 11 N. J. Eq. 349, the trust sought to be enforced was not declared by writing until more than 16 years after its creation, and yet the court decreed its execution. Chancellor Williamson in that case said the statute does not require that the trust shall be created by writing, but that it shall be manifested and proved by writing. And he also held that where the integrity of a trust not put in writing at the time of its creation, but subsequently declared by writing, was assailed, parol evidence was competent to show whether or not it had in fact been created at the time the conveyance was made. On this point he said: "A question of fraud—that is, whether the trust was really created at the time of the execution of the instrument or deed to which the manifestation of the trust refers—is always an open question. Suppose a judgment or some other lien has attached to the property in the interval between the execution of the deed and the declaration of the trust, it would be necessary, in order to defeat such lien, to show that the trust was bona fide created at the time of the execution of the deed. This may, however, be done by parol evidence, because the statute does not require that the trust shall be created, but only manifested by writing." The doctrine of this case was fully approved by the court of errors and appeals in *Jamison v. Miller*, 27 N. J. Eq. 586. Parol evidence was admitted in this case to establish the fact that a trust had been created by parol contemporaneously with the execution of the deed by which the title was made to the trustee. The trust was declared, some time subsequent to its creation, by several writings, one of which was the defendant's answer. The court said: "The writings [meaning the declaration of trust] are but evidence; the trust is anterior and independent; and the rights which the court regards are those that spring from the creation, not the mere proof of the trust." The rule must be considered settled that a valid parol trust of land may be created by parol, but the existence of the trust cannot be proved except by written evidence. The written evidence, however, may be made long subsequent to the creation of the trust.

The only written evidence or manifestation of the trust which the complainant has offered in this case is that which is contained in the pleadings. The bill alleges that the land in question was conveyed by the complain-

ant and his wife to the defendant for the sole purpose and with the express understanding that the defendant should, immediately after acquiring title, convey it to the complainant. The defendant was required to answer under oath, and has done so. By her answer she says that she has no reason to doubt the truth of the above allegation of the bill. Does this constitute such evidence of the trust as to render it proper for the court to decree its execution? The proof of the trust, in my judgment, is complete. The declaration is in writing; it is signed by the trustee; it was made after she became competent to declare a trust; it is verified by her oath; and its terms are plainly stated. The principle is settled that an answer to a bill in equity may be sufficient, as a declaration of a trust, to justify the court in decreeing its execution. Chancellor Vroom, in *Hutchinson v. Tindall*, 3 N. J. Eq. 357, held that, where a complainant files a bill, alleging that a deed made to the defendant is subject to a trust in his favor, and praying that it may be so decreed, and the defendant answers, admitting the trust, the defendant's answer will constitute sufficient evidence of the trust to warrant the court in decreeing its execution. And the same efficacy was given by the court of errors and appeals to an answer in chancery, even in case where the declaration was volunteered, or rather was not made in response to the bill. *Jamison v. Miller*, 27 N. J. Eq. 586. It is wholly unimportant on what part of the declaration of trust the trustee signs his name. He may sign it at the bottom, at the top, at the side, or in the middle. He may sign by simply making his initials. Wherever or in whatever form his signature may be made, it will be sufficient within the meaning of the statute, if what he does is done for the purpose of giving authenticity to the instrument. *Smith v. Howell*, 11 N. J. Eq. 349.

The defendant in this case signed the affidavit to her answer, not only for the purpose of authenticating the answer, but also for the purpose of verifying its contents. It must therefore be held that a valid trust in the land in question in favor of the complainant has been proved by evidence of the kind required by the statute. This being so, the complainant now stands invested with a full and complete estate in equity in the land in question. The land, in equity, belongs to the complainant, and the defendant simply holds the dry, naked legal title in trust for the complainant. In this condition of affairs, the defendant cannot defeat the complainant's right to a conveyance by showing that the land was conveyed to her, or to her grantor, in fraud of creditors. *Ownes v. Ownes*, 23 N. J. Eq. 60, is decisive against the validity of such a defense. Chancellor Zabriskie in that case said: "I know of no case in which a court of equity has refused to enforce a trust, actually declared and vested, on account of fraud in the conveyance to the trustee who declared the trust." The fraud here charged is against the conveyance by which title was put in the wife. The defendant says that the complainant put the title to the land in controversy in his wife to defraud his creditors. The proof in support of this charge is of the most meager character. But suppose it be admitted that that conveyance was fraudulent as to the complainant's creditors, there can be no doubt that it was good against him, nor that it gave to his wife as full and complete dominion over the land, against everybody except his creditors, as an honest conveyance would have given. As against everybody except creditors her title was unimpeachable, and she consequently might, as against all the world except the creditors of her husband, make a valid conveyance of it in trust or otherwise.

The complainant is entitled to a decree.

DANSER v. WARWICK.

(33 N. J. Eq. 133.)

Court of Chancery of New Jersey. Oct. Term, 1880.

George C. Beekman, for complainant. Joel Parker, for defendant.

VAN FLEET, V. C. The complainant is the widow of David C. Danser. She seeks to have a parol trust established and enforced against the defendant. She alleges that her husband, some months before his death, assigned the bond and mortgage in controversy to the defendant, upon a parol trust or understanding that he would forthwith, or by a short day, transfer them to her. The transfer to the defendant was intended to be merely a step in vesting her with title. The assignment to the defendant bears date February 1, 1875, and Danser died on the 13th day of the following September. The bond and mortgage were in Danser's possession at the time of his death, and have since then been constantly in the possession of the complainant. The defendant has never asked for them, nor attempted to get possession of them. A month or six weeks prior to Danser's death, the defendant directed an assignment to be drawn to the complainant, stating to the person to whom he gave the direction that he must draw it for Danser, who would pay him. He, at the same time, said it was right that the old lady—referring to the complainant—should have the bond and mortgage. Danser, at this time, was prostrated by the disease which shortly afterwards caused his death. The defendant did not remain to execute the assignment, but said he would return soon and do so. He did not return that day. He was subsequently informed, on two or three different occasions, while Danser was living, that the assignment had been drawn and was ready for execution. On each occasion he said he had forgotten or neglected to execute it, but would call soon and do so. He never fulfilled his promise. Two or three weeks after Danser's death, he called for the assignment Danser had made to him, and which he had left when he gave direction for the draft of the one to the complainant, and stated that he meant to do what was right about the matter, but he would not execute the assignment to the complainant until things were fixed up; Danser owed him. He took both papers, and has never executed the assignment to the complainant.

This narrative comprises only those facts which are not disputed by either party.

The defendant denies that the mortgage was transferred to him subject to a trust, but says, on the contrary, that the assignment was made to satisfy a promissory note he held against Danser, upon which there was due \$2,000 of principal and a year and six or seven months' interest. His explana-

tion of the preparation, by his direction, of an assignment to the complainant, is this: He says, some time after the execution of the assignment to him, he ascertained that the person who made the mortgage had no title on record for the mortgaged premises; that he went at once to Danser, and told him he had swindled him, and that if he did not take the mortgage back he would make him. He says that Danser replied that the mortgagor's title was all right, but if he was dissatisfied he would pay him his debt, or give him another security, and he could then reassign the mortgage. He further says that it was ultimately arranged that Danser should have two mortgages, which were then liens on his lands, canceled, and execute a mortgage thereon to him, and he was then to assign the mortgage in controversy to the complainant. He says it was after this scheme had been agreed upon that he ordered the assignment to the complainant to be drawn.

These statements present the question of fact to be decided. The counsel of the defendant, however, insists that, as a matter of law, the bill in this case must be dismissed, regardless of what the evidence demonstrates the truth to be in respect to the trust alleged, his contention being that the trust set up by the complainant is one which cannot be established except by written evidence. The trust, it will be observed, affects personal property, and not lands. The subject of it is a debt. That part of the statute of frauds which enacts that all declarations and creations of trust shall be manifested by writing, and signed by the party creating the same, or else shall be void and of no effect, applies only to trusts of lands, and has no application to trusts of personal property. A valid trust of personality may be created verbally, and proved by parol evidence. A trust of personal property, almost precisely like the one under consideration, and which had been created by mere spoken words, and was supported by only parol evidence, was upheld by Chancellor Williamson in *Hooper v. Holmes*, 11 N. J. Eq. 122; also *Kimball v. Morton*, 5 N. J. Eq. 26; *Sayre v. Fredericks*, 16 N. J. Eq. 205; *Eaton v. Cook*, 25 N. J. Eq. 55; 2 Story, Eq. Jur. § 972; 1 Perry, Trusts, § 86. A valid trust of a mortgage debt may be created by parol; for, though a trust thus created cannot embrace the land held in pledge, yet it is good as to the debt, and will entitle the cestui que trust to sufficient of the proceeds of sale, when the land is converted into money, to pay the debt. *Sayre v. Fredericks*, supra; *Benbow v. Townsend*, 1 Mylne & K. 506; *Childs v. Jordan*, 106 Mass. 321.

It must be held, then, that the trust alleged in this case is valid, and if it has been sufficiently proved, the complainant is entitled to have it established and enforced. The question then is, has it been proved? A high degree of evidence should be required.

Before the court ingrafts a trust upon a written instrument, absolute on its face, it should require the most cogent proof. Such proof, I think, has been furnished in this case. The undisputed facts make a strong case against the defendant. He attempts to explain and moderate the force of the one having the greatest weight. I refer, of course, to the fact that he had an assignment drawn to the complainant, and that when he gave the order he said it was right that she should have the bond and mortgage. His attempted explanation has, however, resulted in a series of contradictions which utterly destroy his testimony.

By his answer, which is under oath, he says that after he sent his assignment to Ocean county for record, he was informed that the mortgagor had no title on record for the mortgaged premises, and that he went at once to see Danser, and that an arrangement was then made by which Danser was either to pay his debt or substitute another security, and he was then to reassign the mortgage. His assignment was not lodged for record until October 23, 1875. Danser had then been dead more than a month, so that the arrangement, at the time stated, was unquestionably a fabrication. When the defendant came to testify, he swore that, before he lodged his assignment for record, he had heard, from one George P. Conover, that the mortgagor had no title, and he went at once to see Danser. But it is perfectly clear, from the evidence, that Conover could not have given this information until long after Danser's death; for he did not have it himself. Conover obtained his information from the mortgages, and the mortgagor swears that he first obtained it from a search made in December, 1876. The defendant was subsequently recalled and re-examined, against the complainant's objection, and without an order for that purpose, and then swore that one Edward P. Jacobus first informed him that the mortgagor had no title, and that this information was given to him very soon after the assignment was made to him. But, upon the examination of Jacobus, it was shown that the search from which he obtained his information was not made until after Danser had been dead more than a month. So it is perfectly clear that the information which the defendant says led to his interview with Danser did not come to him until after Danser was dead, and the conclusion is therefore unavoidable that no such inter-

view as he describes took place. The tergiversation of the defendant upon this point renders his testimony unworthy of credit. I find it impossible to believe him.

It must also be remarked that the defendant's conduct in relation to the custody of the bond and mortgage, as portrayed by himself, shows very clearly that he did not believe they were his property. He says the bond and mortgage were delivered to him, with the assignment, on the day of the date of the assignment, and that he took them to a hotel, in which he and Danser were jointly interested, and which was under the management of Danser, and threw them in a desk in the bar-room. He retained the assignment. He gave them no further care or attention, but carried the assignment to his house, and placed it in his safe. He does not know when or how Danser got possession of the bond and mortgage. So far as appears, he has never tried to find out. Danser did not live in the hotel, but occupied a dwelling in the village where the hotel was located. The defendant says, that while Danser was sick, on the occasion of his last visit to him, Danser told the complainant to get the bond and mortgage and give them to him, but that she refused to do so, and, to repeat his own words, "she was just as cross to me as she could be." He did not ask Danser why he had taken them from the desk, nor did he insist upon their being at once surrendered. He never asked for them after Danser's death, nor did he make any attempt to obtain possession of them. Every phase of his conduct evinces a consciousness that he had no right to them, and that any attempt to take them from the possession of the complainant would be met by a resistance which he knew was grounded in right and truth. The evidence, in my opinion, fully establishes the trust alleged.

The defendant also insists that the trust upon which the complainant's action is founded should not be enforced, because it was concocted to cheat and defraud Danser's creditors. It is enough to say of this contention that no such defence is presented by the answer, and that the complainant's right to a decree cannot be defeated by a defence she has had no opportunity to meet and disprove.

There must be a decree establishing the trust, and requiring the defendant to execute it. The defendant must pay costs.

TOBIAS v. KETCHUM.

(32 N. Y. 319.)

Court of Appeals of New York. March, 1865.

Action to recover dower and mesne profits. Defendant pleaded a provision by will in lieu of dower, and failure of the widow to elect. There was a judgment for plaintiff, from which defendant appealed.

T. W. Dwight, for appellant. Charles Tracy, for respondent.

DAVIS, J. The testator not having declared in express terms that the provisions made by his will for his widow are given in lieu of dower, she is not put to her election unless the devise of the will "be so repugnant to the claim of dower, that they cannot stand together." *Lewis v. Smith*, 9 N. Y. 502; *Church v. Bull*, 2 Denio, 430; *Jackson v. Churchill*, 7 Cow. 287; *Savage v. Burnham*, 17 N. Y. 562. This rule is a familiar one, and needs no further citation of authority.

In this case the provisions made by the will and codicil for the widow are as follows: 1. The will gives her all the household furniture and jewelry of every kind in use by her and the testator, or either of them. 2. One-third of the net income of all the real estate belonging to the testator, after payment of all taxes, assessments and interest due thereon, to commence to be paid to her six months after the testator's decease, and to be paid to her every six months thereafter, during her life. The codicil adds, "a suitable provision in money," "to be paid to her during the first six months, till the payment of her provisions under the will shall commence," and the use during her natural life of the apartments in the house No. 615 Fourth street, New York, as occupied by her and her husband, as a residence at the date of the codicil, with the election to have such other suitable residence in any other house belonging to him at the time of his decease that she might prefer.

After making these provisions the will disposes of all the "rest, residue and remainder of the estate," by directing in substance that it be divided equally among his surviving children and the children of his deceased children, if any there should be, six months after the death of his widow.

The will then nominates executors, and clothes them "with full power and authority to carry out all the provisions of the will," and if they deem it necessary or proper to a fair division of the property among the parties entitled thereto, to sell either at public or private sale the personal and real estate, or any portion thereof, and execute deeds thereof, and to divide the proceeds as thereinbefore directed; but no sale to be made till six months subsequent to the death of the testator and his wife. It also clothes the executors, "the survivor or survivors of

them, with full power and authority to rent, lease, repair and insure any portion of the estate during any period of time the same may remain unsold or undivided."

In *Savage v. Burnham*, 17 N. Y. 561, the testator devised and bequeathed all of his estate, real and personal, to trustees; the real estate upon trust to sell after the death of his wife. The will provided that during her life, the widow should "receive and take to her own use one-third part of the clear yearly rents and profits of the real estate, and that the residue of the clear yearly rents and profits should be deemed a part of the personal estate, and subject to the dispositions of the will concerning the personal estate."

The entire estate, with all its income, except the one-third of the rents and profits of the land, was given (through the trusts) to the testator's children and the children of his daughters. It was held that a claim of dower could not stand consistently with these provisions, and that the widow was put to her election.

Upon the authority of that case, if the will in question creates a trust and vests the entire legal estate in the trustees, the provision made for the widow is inconsistent with the right of dower, and she was bound to elect. In that case her claim of dower, if allowed, would inevitably defeat the scheme of the will, for it would prevent the trustees from holding the legal title of the whole estate, and receiving the entire rents and profits for the purpose of paying taxes, assessments, interest, repairs and insurance, and ascertaining the net income, of which one-third is to be paid to the widow, and the residue ultimately to the other beneficiaries.

The first question then is, are the executors, under this will, made trustees of an express trust? The word "trust" or "trustee" is not used in the will, but that is only a circumstance to be noted in considering the question. "It is by no means necessary that the donee should be expressly directed to hold the property to certain uses or in trust, or as a trustee. * * * It is one of the fixed rules of equitable construction, that there is no magic in particular words; and any expressions that show unequivocally the intention of the parties to create a trust will have that effect. It was said by Lord Eldon, that the word 'trust' not being made use of, is a circumstance to be alluded to, but nothing more; and if the whole frame of the will creates a trust, the law is the same though the word 'trust' is not used." *Hill, Trustees* (3d Am. Ed.) 99; (Orig. Ed. 65) and cases there cited.

We are in this case to determine the question by the authority conferred and the duties imposed. The executors are clothed "with full power and authority to rent, lease, repair and insure" the estate "during any period of the time it shall remain unsold and undivided." That period is, at all

events, to last until six months after the decease of the widow. They are also in general language clothed "with full power and authority to carry out all the provisions of this will." It is apparent that the "net income of all the real estate" is to be ascertained by some person or persons once in six months during the life of the widow, "after all taxes, assessments and interest due thereon are paid." One-third of this net income is to be paid to the widow. By whom is this duty to be performed? It is clearly impracticable for the various tenants of the estate to perform it; neither collectively nor individually have they the means of determining the facts upon which the net income is ascertained, and it would be extremely embarrassing so to frame leases that each tenant should be subject to pay to the widow an amount of his rent that should discharge the proportion his rent bore to the net income of the whole estate, after payment of all taxes, assessments and interest due on the whole. Collating the power to rent, lease, repair, and insure, with the duty that rests somewhere to pay all taxes, assessments and interest, and then to pay to the widow one-third of the net income after such payment, there seems to be no embarrassment in determining where the duty rests. To my mind it is apparent that the scheme of this will requires that the whole income, rents and profits of the real estate shall be received by the executors until the sale and division provided for; and that they are the persons on whom the duty to pay one-third of the net income to the widow is imposed. They are to make the ultimate division, and consequently to retain for that purpose the income not paid semi-annually to the widow. The rents and profits of all the real estate are given to them for several purposes: 1. To keep down taxes, assessments and interest by paying them; 2. To ascertain the "net income" by deducting from the gross receipts the amount paid for those purposes; 3. To pay one-third of the net income thus ascertained to the widow every six months; 4. To repair and insure the premises out of the residue; and 5. To retain the balance for division, and finally divide it among the daughters or their children after the decease of the widow. The imposition of these various duties by the will make the acting executors trustees for their performance to the same extent as though declared to be so by the most explicit language. The authority to sell the real estate and execute deeds thereof, as given by the will, standing by itself, would confer nothing but a power; but coupled as it is with the various provisions for leasing, repairing and insuring, with the obligation to give to the widow a residence as she may elect in any of the houses of the testator, it goes far to show that it was the testator's intention to vest the fee of the estate in the trustees. But however that may be, it is well settled that

trustees take the legal estate whenever they are clothed with the authority which the foregoing construction of the will gives to the executors in this case.

"If land be devised to three persons and their heirs in trust to permit A. to receive the net profits for her life for her own use, and after her death to permit B. to receive the net profits for her life, etc., it has been held that the legal estate is in the trustees, for that they are to receive the rents and thereout pay the land tax and other charges on the estate, and hand over the net rents only to the tenant for life." *Lewin, Trusts*, 248; *Baker v. Greenwood*, 4 Mees. & W. 421; *White v. Parker*, 1 Bing. N. C. 573.

In *White v. Parker*, the trustees were to permit the testator's wife and daughters to receive the clear rents of three parts and his son the clear rent of one part—the trustees to pay all outgoing, to repair and let the premises. It was held that the legal estate vested in the trustees. In the note to 2 Wms. Saund. 11, the rule is thus laid down: "Where something is to be done by the trustees which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes, and keep the premises in repair, the legal estate is vested in them, and the grantee has only a trust estate."

In *Birmingham v. Kerivan*, 2 Schoales & L. 444, Lord Redesdale said that a direction to keep a house in repair applied to the whole house, and could not be considered an obligation on a person claiming dower. When therefore the testator authorized his executors to repair, he did not expect that they would control two-thirds of the estate and the widow one-third, but that they would manage the entire property.

The authority to rent and lease, to repair and to insure, by necessary implication vests the trustees with the legal title. They must not only execute leases, but enforce them, put in tenants and dispossess them, the proper performance of which requires the title of the estate. So to repair there must be such a right of entry and control in the trustees as gives them complete dominion; and to insure involves the necessity of ownership, for the policy must be taken in the name of the trustees. But to repair and to insure necessarily involve expenses chargeable upon the rents and profits; and an executor who is authorized to lease, repair and insure by necessary implication may so lease that rents will come to his hands out of which to pay repairs and insurance, and if a net income is to be paid out of such rents, the executor becomes the party whose duty it is to ascertain and pay it. In *Leggett v. Perkins*, 2 N. Y. 297, the testator constituted his executors trustees of the estate devised to his daughters for life, and authorized them to take charge of, manage and improve the same, and pay over to them from time to

time the rents, interest and income thereof. It was held to be "very obvious that the legal estate in the premises was necessary to enable the trustees to discharge their duties," and that the trust was a valid one under the third subdivision of section 55 of the statutes of uses and trusts (1 Rev. St. 729), and that by section 60 of the same statute, the whole estate in law and equity vested in the trustees.

In *Brewster v. Striker*, 2 N. Y. 19, the testator devised his real estate to his grandchildren, and then provided that the lands should not be sold or alienated, but that his executors should lease or rent the same and pay the rents, issues and profits to his said grandchildren, etc.; it was held that the executors were trustees for the purposes of the will, and took, by implication, the legal estate during the lives of the grandchildren.

These authorities are conceived to be abundant to establish the proposition that the authority to lease, rent, repair, insure, pay taxes, assessments and interest, and pay net income to devisees, carried the legal title to the executors in this case, and created a trust in them valid under the statute.

It follows therefore from the decision of this court in *Savage v. Burnham*, that a claim of dower is totally inconsistent with the provisions of the will, and the plaintiff was not at liberty to take both the provisions of the will and dower.

In the language of Comstock, J., in the case cited: "During her life she was to have one-third of the clear rent and profits, and the other two-thirds were to go into a general fund for distribution. The entire es-

tate, with all its income, except the one-third, is given in the clearest possible terms, to the testator's children and the children of his daughters. It is therefore impossible for her to receive any part of it, except what is expressly given to her, without subverting the will to that extent."

The circuit judge erred in directing a verdict for plaintiff.

I have considered the question as to the effect of the alleged release of dower. In my opinion, the instrument was not designed for any such purpose as a release of dower, and ought not to be so construed. Its objects are apparent on its face; to-wit, to dispose of the vexed question as to her rights under the provision of the will directing moneys to be paid to her for her suitable support the first six months, and protecting the executors on paying her a sum which might prove larger than was designed by the surrogate's decree, and the instrument ought to be construed accordingly.

I am not embarrassed by the question of parties, nor the form of the judgment. The Code authorizes all persons having conflicting claims to be made parties. Code, § 118. The defendants who appeared and answered, admitted the receipt of the rents and profits as alleged in the complaint, putting nothing but the amount in issue. They are the heirs at law, and the statute authorizes the verdict for rents and profits against them.

The judgment below should be reversed, and new trial ordered, costs to abide event.

All the judges concurring, the judgment was reversed and a new trial ordered.

Judgment reversed.

WARNER v. BATES.¹

(98 Mass. 274.)

Supreme Judicial Court of Massachusetts.
Nov., 1867.

Bill in equity filed September 4, 1865, by a son of Sarah I. Bates, deceased, seeking for a decree to enforce performance by the respondent, his stepfather, of a trust created by her will.

The bill alleged that on December 12, 1833, the deceased, being a widow, having a daughter and two sons, of whom the complainant was one, and owning property to the amount of more than \$100,000, was married to the respondent, and her property secured by a settlement from any marital right or claim which otherwise he might have thereto; that thereafter, until her death on May 17, 1859, she and the respondent, with these children, and with another daughter, the issue of this marriage, lived together as one family in her house, where she and her children had formerly resided; that the expenses of maintaining the family in a liberal style suitable to their circumstances were defrayed chiefly from the income of her property, the respondent having but little property of his own, but acting as the head of the family, having the general care thereof, and managing the funds for its maintenance; and that she left a will of which she named the respondent sole executor, and an estate of which there was a large residue after paying her debts.

This will was set forth in the bill; bore date of December 30 1857; was indorsed with the approval of the respondent under date of October 1, 1858; was amended by a codicil dated April 14, 1859, in particulars not needful to be recited; and disposed of the estate during the respondent's life as follows:

"I give and bequeath unto my husband, George Bates aforesaid, the use, income and improvement of all the estate, real, personal and mixed, of which I shall die seised and possessed, for and during the term of his natural life, in the full confidence that upon my decease he will, as he has heretofore done, continue to give and afford my children" (enumerating them) "such protection, comfort and support as they or either of them may stand in need of."

Upon the death of the respondent, it gave one half of the estate to the complainant and his brother; and the other half to three persons designated by name, "and to the survivors or survivor of them, their or his executors, administrators or assigns, to have and to hold the same upon and for the uses, trusts and purposes mentioned and expressed of and concerning the same," and then set forth minutely certain trusts for the benefit of the two daughters.

The bill further alleged that, after the

death of the testatrix, the respondent, under the clause of the will first above quoted, took possession of the estate remaining after payment of the debts; that the complainant with his brother and unmarried sister continued to reside in the house as before, and to receive from the respondent, without payment or charge therefor, the benefits and privileges which children of their condition usually receive in their own families, until, on or about April 1, 1863, the respondent, in the complainant's absence, removed the complainant's effects from the house, and ever since forbade and prevented him from coming into it, and neglected and refused to give him the said benefits and privileges which he had before enjoyed, or make him any reasonable compensation instead thereof; that in 1850 the complainant became and ever afterwards was a clerk in a counting room in Boston; that up to the time of his mother's death his salary had never exceeded \$100 per annum, which fact she well knew; that in 1858, 1859 and 1860, it was at that rate, but from 1860 to 1864 did not in any year exceed \$200; that from 1864 until the filing of this bill it was at the rate of \$600 per annum; that at the time of his exclusion from the house in 1863 he had saved from his salary of previous years only \$250; that afterwards, during that year, in order to obtain means for his support, he sold for \$700 his reversion of some land belonging to his mother's estate; that these two sums, together with his salary, included all his means of support, except such provision as was made for him in the will, and were and are wholly inadequate thereto; that he stood in need of such support as he had been accustomed to receive in his mother's lifetime; and that the respondent, though well aware thereof, and often requested therefor, refused to give it.

The respondent filed a general demurrer; and the case was reserved by Chapman, J., for the consideration of the full court.

G. O. Shattuck and J. B. Thayer, for complainant. E. D. Sohier and C. A. Welch, for respondent.

BIGELOW, C. J. We see no sufficient ground for calling in question the wisdom or policy of the rule of construction uniformly applied to wills in the courts in England and in most of the United States, that words of entreaty, recommendation or wish, addressed by a testator to a devisee or legatee, will make him a trustee for the person or persons in whose favor such expressions are used, provided the testator has pointed out with clearness and certainty the objects of the trust, and the subject-matter on which it is to attach or from which it is to arise and be administered. The criticisms which have been sometimes applied to this rule by textwriters and in judicial opinions will be found to rest mainly on its applications in particular cases, and not to involve a doubt

¹ Argued November, 1866.

of the correctness of the rule itself as a sound principle of construction. Indeed, we cannot understand the force or validity of the objections urged against it, if care is taken to keep it in subordination to the primary and cardinal rule that the intent of the testator is to govern, and to apply it only where the creation of a trust will clearly subserve that intent. It may sometimes be difficult to gather that intent, and there is always a tendency to construe words as obligatory in furtherance of a result which accords with a plain moral duty on the part of a devisee or legatee, and with what it may be supposed the testator would do if he could control his action. But difficulties of this nature, which are inherent in the subject-matter, can always be readily overcome by bearing in mind and rigidly applying in all such cases the test, that to create a trust it must clearly appear that the testator intended to govern and control the conduct of the party to whom the language of the will is addressed, and did not design it as an expression or indication of that which the testator thought would be a reasonable exercise of a discretion which he intended to repose in the legatee or devisee. If the objects of the supposed trust are certain and definite; if the property to which it is to attach is clearly pointed out; if the relations and situation of the testator and the supposed cestuis que trustent are such as to indicate a strong interest and motive on the part of the testator in making them partakers of his bounty; and above all if the recommendatory or precatory clause is so expressed as to warrant the inference that was designed to be peremptory on the donee,—the just and reasonable interpretation is, that a trust is created, which is obligatory and can be enforced in equity as against the trustee by those in whose behalf the beneficial use of the gift was intended. 1 Jarm. Wills, 333; 1 Redf. Wills, § 17, cls. 11-13; Id. § 43; 2 Story, Eq. Jur. §§ 1068-1070; Malim v. Keighley, 2 Ves. Jr. 333, 529; Bernard v. Minshull, Johns. Eng. Ch. 287; Williams v. Williams, 1 Sim. (N. S.) 358; Bonser v. Kinnear, 2 Giff. 195; Knight v. Boughton, 11 Clark & F. 513, 551; Harrison v. Harrison's Adm'x, 2 Grat. 1; Coate's Appeal, 2 Pa. 129; McKonkey's Appeal, 13 Pa. 253; Erickson v. Willard, 1 N. H. 217; Van Amee v. Jackson, 35 Vt. 173. The doctrine was recognized as an established rule of construction by this court in Whipple v. Adams, 1 Metc. 444, and Homer v. Shelton, 2 Metc. 194, 206.

Turning now to the clause of the will which is the subject of the present controversy, it seems to us that it does not leave the support of the children of the testatrix to the discretion of the respondent, to be afforded or withheld at his pleasure, but that the devise to him was made on the trust that he should furnish such support so long as he lived and received the income of her property. The objects of the trust are distinctly named.

The nature and extent of the trust is clearly stated and defined. It was such a sum of money as might be necessary to the comfort and support of each one of the children of the testatrix. Nor is the amount of the beneficial interest left indefinite or without a standard by which it can be measured. It is to be such comfort and support "as they or either of them may stand in need of." The extent of such a beneficial interest can be ascertained and enforced by suitable proceedings either at law or in equity. Thorp v. Owen, 2 Hare, 607, 610; Sanderson's Trust, 3 Kay & J. 497-507; Farwell v. Jacobs, 4 Mass. 634. In the last case, it was held by this court that an action at law would lie against an executor who was directed by the testator to furnish support to a person in whose behalf the suit was brought. But in the present case the phrase "comfort and support" is made more definite and certain by an express reference in the terms of the gift to the continuance of a previously existing state of things in the family of the testatrix and her husband, in which the children of the former had resided and received support during her life. Nor is it to be overlooked that the language addressed to the respondent in the clause of the will under consideration is not confined to words expressive of a wish or recommendation only, but the property is given to the respondent "in the full confidence" that he will afford to the children of the testatrix adequate support. Although these words would not necessarily create a trust in a case where a different intent is clearly indicated, they are nevertheless strong and significant to show that such was the purpose of the testatrix, when taken in connection with other facts and circumstances which have a like tendency. Wright v. Atkins, 17 Ves. 255, 258, 261; Meredith v. Heneage, 1 Sim. 542, 556.

We think it also worthy of remark in that connection that it is not left to the respondent to determine the amount or extent of the support which he was to afford to the children. The gift to him is not in the confidence that he will give them such support as he may think proper, or as in his judgment they may need, but to such an extent as they shall in fact "stand in need of." It was to be measured, not by the exercise of his discretion in the matter, but by the actual wants of the children.

The view which we have taken of the construction of the clause of the will by which the property of the testatrix is given to the respondent for his life is greatly strengthened when we take into consideration the relations of all the parties toward each other, the nature and condition of the property which was the subject of the gift, and the ultimate disposition which was made of it by the will after the death of the respondent. The objects for whose comfort and support the testatrix was aiming to provide were her own children, three of them by a former husband,

and one by the respondent. They had always lived in the family of the testatrix and her husband, and received all needful support as members thereof. They had no property of their own; and, if they were deprived after her death during the life of the respondent of all benefit of the estate of their mother, from which the support of the family had been chiefly drawn during her life, they would not only lose the support which they had previously enjoyed, but would be in danger of being left without adequate means of support, and without habits or abilities which would enable them to obtain a livelihood. To these children she gives the entire beneficial interest in her whole estate after the death of her husband. Is it reasonable to suppose that under such circumstances she intended that these children, who were so clearly the chief objects of her bounty, should be left during the lifetime of her husband without any such right or interest in her estate as would enable them to enforce a claim for support in the event that, from alienation of feeling, imbecility of mind, or any other like cause, the respondent should be unwilling or unable to comply with her wish or to exercise a discretion in their behalf?

It is suggested that in other clauses of the will, in which she creates a trust in favor of

her daughters for their respective shares of her estate, of which they are to have the entire income after the death of her husband, she does not use words of entreaty, request and recommendation, but apt and technical words by which to establish a trust in their behalf. But we think this suggestion is not entitled to much weight. She might well express herself in a different language when addressing her husband from that which she would use toward strangers, and at the same time intend a similar result. Words of confidence, entreaty and recommendation were natural and appropriate when used to express the will of a testatrix who intended to direct and control the conduct of her husband in a matter in which the right to give directions and to control belonged to her. In such a case, the words used by Lord Loughborough are applicable: "Where a person recommends to another who is independent of him, there is nothing imperative; but if he recommends that to be done by a person whom he has a right to order to do it, the mode is only civility." *Malim v. Keighley*, *ubi supra*.

After a careful consideration of the case, we are of opinion that the will creates a trust in favor of the complainant, which it is our duty, sitting as a court of equity, to enforce.

Decree accordingly.

HESS et al. v. SINGLER et al.

(114 Mass. 56.)

Supreme Judicial Court of Massachusetts.
Nov., 1873.

Bill in equity by Charles Hess and August Eller, executors of the will of George A. Kramer, to which all the persons interested in the estate were made parties defendant, to obtain the directions of the court.

The bill alleged that Matthias Kramer, the father of George A., died having devised his property by a will, the material parts of which were as follows:

"All the rest, residue and remainder of all my estate and property, real, personal and mixed; including all of which I may be seised, and to which I may be entitled at the time of my decease, I give to my son George A. Kramer: To have and to hold the same to him, his heirs and assigns forever, to his and their own use, but subject however to the following charges: namely: To pay to and for the use, support and maintenance of my wife, Polly Kramer, for and during her natural life, at the rate of fifteen dollars a week: and to pay to or for the use of my sister Genevieve Singler, for and during her natural life, at the rate of twelve dollars and a half a month.

"I hereby authorize the executor or executors acting under this will, or my said son, to purchase annuities for the abovementioned payments at the Massachusetts Hospital Life Insurance Company, or at some other secure office, in favor of my said wife and my said sister, at any time or times, and by and upon such purchases the said charges upon the estate and property given to my said son shall cease and be discharged.

"It is my will, and I hereby direct the executor or executors acting under this will to expend, in addition to the above provision for my wife, any and all sums of money which may be necessarily incurred in or about the proper nursing and taking care of my wife in any sickness or sicknesses with which she may be visited or afflicted, whether for medical attendance, medicines, nursing or other necessary or proper attentions to her or for her comfort in sickness; it being my intention to provide for the suitable and comfortable support, care and maintenance of my wife (who is subject to mental derangement) during her natural life; and the provision which I have thus made for her is intended by me to be in lieu of and in full and in the stead of any dower or right to dower or thirds or interests in my estate or property.

"I hereby signify to my said son my desire and hope that he will so provide, by will or otherwise, that in case he shall die leaving no lawful issue living, the property which he will take under this will shall go in equal shares,—to the children of my late brother Melchior Kramer, one share; to the children of my said sister Genevieve Singler, including any she may have after the date of this

will, one share; to my cousin John Kramer, of Liverpool, in the state of Ohio, one share; to my cousin Matthias Kramer, of said Liverpool, one share; and to my cousin Crescenz Kramer, of said Boston, one share."

The bill then alleged that the greater portion of the estate devised by George A. Kramer, of whose will they were executors (a copy of the will being set forth), was that devised to him as the residuary devisee under the will of his father, and that the children of Genevieve Singler, the surviving children of Melchior Kramer, and John Kramer, Matthias Kramer and Crescenz Kramer, mentioned in the will of Matthias Kramer, contended that by the true construction of that will they were entitled to a greater proportion of the estate than had been devised to them by the will of George A. Kramer, and denied the plaintiffs' authority to sell the real estate according to the authority given by the will of George A. Kramer.

The answer of those claiming under the will of Matthias Kramer alleged that George A. Kramer died leaving no lawful issue living, and alleged that they were entitled to the residue and remainder of the estate of Matthias Kramer, the son George A. Kramer having taken it subject to the trust that in the event of his dying without lawful issue it should go to them respectively in the shares provided in the will.

The other defendants admitted the allegations of the bill.

The case was heard and reserved by Ames, J., on the bill and answers.

E. H. Abbot & L. A. Jones, for those claiming under the will of Matthias Kramer. D. Foster and G. W. Baldwin & J. F. Colby, for those claiming under the will of George A. Kramer.

GRAY, C. J. It is a settled doctrine of courts of chancery that a devise or bequest to one person, accompanied by words expressing a wish, entreaty or recommendation that he will apply it to the benefit of others, may be held to create a trust, if the subject and the objects are sufficiently certain. Some of the earlier English decisions had a tendency to give to this doctrine the weight of an arbitrary rule of construction. But by the later cases, in this, as in all other questions of the interpretation of wills, the intention of the testator, as gathered from the whole will, controls the court; in order to create a trust, it must appear that the words were intended by the testator to be imperative; and when property is given absolutely and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation and confidence. *Warner v. Bates*, 98 Mass. 274, 277; *Spooner v. Lovejoy*, 108 Mass. 529; *In re Pennock's Estate*, 20 Pa. 268; *Van Duyne v. Van Duyne*, 14 N. J. Eq. 397; *Knight v. Knight*, 3 Beav. 148, 172, s. c. nom. *Knight v. Boughton*, 11 Clark & F. 513; *Lambe v.*

Eames, L. R. 10 Eq. 267, s. c. L. R. 6 Ch. 597; 1 Spence, Eq. Jur. 439, 499; 2 Spence, Eq. Jur. 64-70.

In the case at bar, the testator devises and bequeaths the residue of his estate to his son, "to have and to hold the same to him, his heirs and assigns forever, to his and their own use, but subject however to the following charges:" These charges are first, the payment of specified sums yearly to the testator's wife and sister for their respective lives, unless discharged by the purchase of annuities in their favor by the executors (of whom the son is one) under the authority given them by the will; second, the further payment, which the testator expressly "directs" the executors to make, of all the wife's expenses in case of sickness, in lieu of her right to dower or thirds in his estate. Subject to these charges during the lives of the testator's wife and sister, the son is given, by the fullest, clearest and most formal words, an absolute estate in fee.

By the further clause of the will, the testator merely signifies to his son his "desire and hope that he will so provide, by will or otherwise, that in case he shall die leaving no lawful issue living, the property which he will take under this will shall go in equal shares" to certain nephews, nieces, and cousins of the testator. This clause, if construed as creating a trust, leaves nothing to the discretion of the son, but amounts to an executory devise over, in case of his death leaving no issue, to the persons named, in definite amounts. To give it that construction would be inconsistent with the principal intention of the testator, as previously manifested, to give the son an absolute title, as well as with the description of the estate in this very clause as "the property which he will take under this will."

It follows that the son had full power to dispose of the estate by will, unfettered by the supposed trust, and that there must be a decree for the son's devisees.

CLAY et al. v. WOOD et al.

(47 N. E. 274, 153 N. Y. 134.)

Court of Appeals of New York. June 8, 1897.

Appeal from supreme court, general term, First department.

Action by George S. Clay and others against Lucretia M. Wood and others for partition, and incidentally to construe the will of William W. Clay, deceased. A judgment dismissing the complaint on the merits was affirmed by the general term (36 N. Y. Supp. 317), and plaintiffs appeal. Affirmed.

This action was brought for the partition of real property, and it involves the construction of the will of William W. Clay, deceased. By that will the testator, after directing the payment of his debts and funeral expenses, and particularly an indebtedness secured by mortgage upon his house and lot, in the second clause gave to his wife, Lucretia, "and to her heirs and assigns, forever," the house and lot mentioned, and also his household goods and personal effects in said house, "to have and to hold the said house and lot to her, my said wife, Lucretia M. Clay, and to her heirs and assigns, forever, and to have and to hold the said household goods, etc., unto her, my said wife, Lucretia M. Clay, and to her heirs, executors, administrators, and assigns, forever." He also gave to her the sum of \$20,000. In the third and fourth clauses he gave legacies to his brothers, to a sister, to nephews, and to an adopted daughter, providing at the same time that none of those legacies should be a charge upon the house and lot and household goods, etc., which he had given to his wife. By the fifth clause he gave all the residue of his estate to his wife, and "to her heirs, executors, administrators, and assigns, forever," and then stated as follows: "And it is my desire and request that my said wife do sustain, provide for, and educate Lucretia M. Wood, the daughter of my said adopted daughter, Josephine M. Wood. And it is my further desire and request that my wife do make the said Lucretia M. Wood, Josephine M. Wood, and my nephews and nieces, the children of my brothers, Caleb S. Clay and George Clay, joint heirs after her death in the said estate which by this will I have bequeathed to my said wife." The question in this case arises upon the effect to be given to that concluding sentence of the fifth paragraph. The plaintiffs, who are the nephews and nieces referred to therein, claim in their complaint that a trust was thereby created in favor of the persons named, and that Lucretia M. Clay, the widow of the testator, having died, those persons had become tenants in common of the property, or entitled thereto under the trust alleged. It appears that Mrs. Clay died, leaving a will whereby she gave the property equally to Josephine M. Wood and Lucretia M. Wood.

John F. Dillon, for appellants. James L. Bishop, for respondents.

GRAY, J. (after stating the facts). Upon reading this will, we can infer some conflict in the mind of the testator with respect to the ultimate disposition which he should make of his property. It was as to how he might benefit the persons named in the fifth clause, after his widow's death. He could have created, in terms, a life estate in his wife, with a remainder over in their favor, in which case there would be a certainty with respect to their interest; or he could have created a power of appointment in their favor, with a like certainty; or he could take the course which he did, namely, of desiring that his wife should make them "her heirs." The mental conflict was not serious respecting the superior claims of his wife, as we seem clearly to see from the careful and elaborate provisions of his will; but it appears when we read his expressions of desire and of request, addressed to his wife, respecting a disposition of the estate which he had given to her, and which she might well have heeded. What was the dominant intention of Mr. Clay in making his will as he did? To discover that, we must take into consideration the whole scheme of the will, and weigh the expressions which he has made use of when defining the interest of his wife. Whether the will in question was drawn with the aid of a lawyer, or by a lay hand, we are not informed. The language is somewhat inartificial, and yet it is so plain and emphatic as to leave little room for doubt in the mind as to what was the principal purpose of the testator. His general scheme was to give everything to his wife upon his death, except the legacies which he gave by the third and fourth clauses. That was the simple plan which he evidently had in mind, and the question is whether the disposition which he made resulted in vesting in her the full beneficial interest in, and in absolute right of disposal of, the property, or whether, as the appellants claim, a trust was created with respect to that property, or a power of trust imperative in its nature. It is very earnestly and ably argued in behalf of the appellants that by force of the last clause in the fifth paragraph of the will, while the widow took a legal estate in fee, it was subject, as to the real and personal property, to a trust, or to a power in trust, in favor of the persons and the classes of persons named therein; and they base the argument upon the proposition, substantially, that the provision is couched in such precatory words as to fulfill all the conditions named by the authorities as requisite to create a trust, in that the words used exclude any option or discretion in the wife, and the subject of the request and the objects of the bounty are definitely pointed out. They argue, too, that the relations sustained by the persons named to the testator are such, and are shown by other parts of the will to be such, as to indicate a strong interest on his part to make the gift. If, however, the conclusion must be reached that the testator intended an absolute gift to his wife of his real and per-

sonal property, carrying with it an absolute right of disposal, then it will become unnecessary for us to consider questions of trust or of power in trust; for the existence of an absolute and beneficial estate in fee in the widow would be equally destructive of the claim of a trust, or of the claim of an imperative trust power.

The testator, it must be admitted, was very emphatic in the use of language when defining the nature of the holding by his wife of the estate devised and bequeathed. When he gave to her the house and lot where he resided, he added the words, "and to her heirs and assigns, forever." In the same paragraph where he had so given her the house and lot, and also all of his household goods and effects, he repeats that she was "to have and to hold the said house and lot to her, * * * and to her heirs and assigns, forever"; and he states with reference to the personal effects that she was to have and to hold them "unto her, * * * and to her heirs, executors, administrators, and assigns, forever." This repetition of language, indicating completeness and perpetuity of ownership, arrests the attention. It will be observed, too, that there was discrimination in the employment of language defining her holding, in the use of words which would be appropriate in speaking of the succession to either class of property. He had been particular, in the first clause, to direct that in the payment of his debts the mortgage upon the house and lot should be discharged, and he was equally particular, in the promotion of the interests of his wife, in directing, in the fourth clause, that the legacies given should not be a charge upon either the house and lot, or the personal effects mentioned. When he disposes of his residuary estate, in the fifth clause, he is again emphatic in defining the estate which his wife shall take therein, by giving it to her, "and to her heirs, executors, administrators, and assigns, forever." Again, in expressing his desire and request as to the disposition to be made by his wife in that clause, he refers to "the said estate which by this will I have bequeathed to my said wife." It is hardly conceivable that the intention of a testator that his wife should have the absolute title to, and the completest right of disposal of, the estate given could be stated in more forcible language. The words which have been sometimes used, and which the counsel for the appellants think would be more appropriate to express the intention to make an absolute gift to the wife, such as "with full power of disposal," or "for her sole use and benefit," would not be any stronger, and, indeed, would seem to be more appropriately used when providing for the case of a married woman, and to protect her against her husband's acts. Where there is an absolute gift of real or personal property, in order to qualify it, or to cut it down, the latter part of the will should show an equally clear intention to do so, by the use of words definite in their meaning,

and by expressions which must be regarded as imperative. That is a general rule, and can it be said of the concluding clause of this fifth paragraph that it stands the test? We cannot think so. It undoubtedly contains the desire and request of the testator that his wife should make the persons named her "joint heirs" after death; but, in view of the very emphatic and precise language which he had seen fit to employ in defining the estate which his wife should take in his property, it would be going too far in the effort to give effect to the testator's desire to hold that it dominated his previous expressions of intention, and affected their legal force and significance. In *Phillips v. Phillips*, 112 N. Y. 197, 19 N. E. 411,—a case upon which much reliance is placed by the appellants,—Judge Finch observed of the testator's will, in the course of his opinion, "that in the gift to his wife he does not add words that could seem inconsistent with a subsequent charge upon it, as for her own use and benefit, or to her and her heirs, forever, but leaves the path to a trust or a charge unobstructed so far as possible." That case differed from the present one in that the testator "wished" his wife, who was his executrix, "if she finds it always convenient," to pay to his sister and brother during their lives the interest on \$10,000. In that case there was no cutting down of his wife's fee to a life estate; but, it being seen that a gift was made, dependent only upon the fact of ability to do so, a precatory trust was deemed to have been created with respect to the annuities. The very words of distinction pointed out by Judge Finch are present here. In *Re Gardner*, 140 N. Y. 122, 35 N. E. 439, the testator gave the residue of his estate to his wife, to have and to hold the same, to her and her assigns, forever, providing that what should remain unexpended or undisposed of at her death he gave to his son and his heirs. The testator added this clause: "And I expect and desire that my said wife will not dispose of my said estate by will in such a way that the whole that might remain at her death shall go out of my own family and blood relation." It was held that "the estate of the wife was not qualified by the precatory words mentioned," and that they were "merely the expression of an expectation or desire." The construction of a trust was refused by us upon the ground that the words of the will in the first instance clearly indicated a disposition in the testator to give the entire interest, use, and benefit to the donee. In *Re Hamilton* [1895] 2 Ch. 370, which is relied upon in the prevailing opinion at the general term, the following language is used: "I give, bequeath, and appoint to my dear nieces * * * the sum of £2,000 apiece, for their sole and separate use, and to be independent of their husbands, and I wish them to bequeath the same equally between the families of my nephew Silver Oliver and my dear niece Mrs. Packenham in such mode as they shall consider right." It was held that the

niece, took absolutely, and a construction of the words was refused which should imply that the ladies took for life only, instead of absolutely.

We are referred to many cases on the one side and on the other, but precedents in will cases are not very satisfactory aids in reaching a conclusion in the work of interpretation; for each will will differ in its scheme, as in its forms of expression. At most, they furnish illustrations of the application of those general rules of construction which have been laid down in the decisions of the courts. Whether the precatory words in a will shall be accorded such force as to deprive the donee of the absolute right of disposal, and thereby qualify the beneficial interest in the gift, must be determined in connection with what may be gathered from the rest of the will as an intention which would be reconcilable with the idea of a trust imposed upon the legal estate. Where to impose such a trust would be to nullify previous expressions in the will, and to create a repugnancy between its different parts, then the rules of construction forbid the attempt, and this is not disputed by the appellants' counsel. Their contention in that respect is that that principle of construction has no application to the present case, because of the absence of words showing that the wife was to have the whole beneficial interest. Thus we see that the pivotal point of construction is as to the significance of the expressions used by the testator when giving his estate to his wife, and the inferences to be drawn therefrom. In our view, they are unmistakable, and create an atmosphere about the instrument of an entire subjection of the claims of others upon his bounty to the paramount claim of his wife, and to her ultimate testamentary disposition. In the present case we can only read the lan-

guage, in which the testator expresses his desire and request, in the light of the emphatic language previously used in the will, and, as so read, award to it the force of a suggestion and of an expectation, which, however strongly phrased, were only morally binding upon the widow. Within the case of *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, where the testator gave to his wife all of the real and personal estate of which he should die seised, possessed, or entitled to, with a recommendation to her as to the care and protection of his mother and sister, and with a request to her to make such gift and provision for them as in her judgment would be best, the present case might be said to be within the exception there recognized. It was there held that the language of the bequest was sufficient to convey to the testator's wife the whole estate absolutely, if it stood alone, but that nevertheless, as it did not stand alone, and did not "contain any expressions which necessarily anticipate or limit any subsequent provisions affecting it," the bequest was affected by the request. Precisely that did occur in the will under consideration, as we view it, and the language of the devise and bequest to the wife did contain such expressions as to anticipate and limit the possible effect of the subsequent provision. The cases of *Dominick v. Sayre*, 3 Sandf. 555, and *Smith v. Floyd*, 140 N. Y. 337, 35 N. E. 606, related to devises for life, with a power, in the one case, and with a "right and privilege," in the other case, of disposal by will in favor of certain persons, and we do not perceive how they affect the conclusions we have reached. We have sufficiently expressed our views upon the questions presented by this appeal, and they lead to an affirmance of the judgment. The judgment should be affirmed, with costs. All concur. Judgment affirmed.

RICHARDS v. DELBRIDGE.

(L. R. 18 Eq. 11.)

Chancery Division. April 16, 1874.

Demurrer. The bill filed by Edward Benetto Richards, an infant, by his next friend, stated: That John Delbridge, deceased, was possessed of a mill, with the plant, machinery, and stock-in-trade thereto belonging, in which he carried on the business of a bone manure merchant, and which was held under a lease dated the 24th of June, 1863. That on the 7th of March, 1873, John Delbridge indorsed upon the lease and signed the following memorandum: "7th March, 1873. This deed and all thereto belonging I give to Edward Benetto Richards from this time forth with all the stock-in-trade. John Delbridge." That the plaintiff was the person named in the memorandum, and the grandson of John Delbridge, and had then for some time assisted him in the business. That John Delbridge, shortly after signing the memorandum, delivered the lease on his behalf to Elizabeth Ann Richards, the plaintiff's mother, who was still in possession thereof. That John Delbridge died in April, 1873, having executed several testamentary instruments which did not refer specifically to the said mill and premises, but he gave his furniture and effects, after his wife's death, to be divided among his family. That the testator's widow, Elizabeth Richards, took out administration to his estate, with the testamentary papers annexed. The bill, which was filed against the defendants Elizabeth Delbridge, Elizabeth Ann Richards, and the testator's two sons, who claimed under the said testamentary instruments, prayed a declaration that the indorsement upon the lease by John Delbridge and the delivery of the lease to Elizabeth Ann Richards created a valid trust in favor of the plaintiff of the lease and of the estate and interest of John Delbridge in the property therein comprised, and in the good will of the business carried on there, and in the implements and stock-in-trade belonging to the business. The defendants demurred to the bill for want of equity.

Fry, Q. C., and Mr. Phear, in support of the demurrer. W. R. Fisher (Mr. Southgate, Q. C., with him), and T. D. Bolton, for plaintiff. Gregory, Rowcliffes & Rawle, for defendants.

JESSEL, M. R. This bill is warranted by the decisions in *Richardson v. Richardson*, L. R. 3 Eq. 686, and *Morgan v. Malleeson*, L. R. 10 Eq. 475, but, on the other hand, we have the case of *Milroy v. Lord*, 4 De Gex, F. & J. 264, before the court of appeals, and the more recent case of *Warriner v. Rogers*, L. R. 16 Eq. 340, 348, in which Vice Chancellor Bacon said: "The rule of law

upon this subject I take to be very clear, and, with the exception of two cases which have been referred to (*Richardson v. Richardson* and *Morgan v. Malleeson*), the decisions are all perfectly consistent with that rule. The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take to be, that the donor, or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect, and put the property out of his power, at least in the way of interest."

The two first mentioned cases are wholly opposed to the two last. That being so, I am not at liberty to decide the case otherwise than in accordance with the decision of the court of appeal. It is true the judges appear to have taken different views of the construction of certain expressions, but I am not bound by another judge's view of the construction of particular words; and there is no case in which a different principle is stated from that laid down by the court of appeal. Moreover, if it were my duty to decide the matter for the first time, I should lay down the law in the same way.

The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning.

The cases in which the question has arisen are nearly all cases in which a man, by documents insufficient to pass a legal interest, has said: "I give or grant certain property to A. B." Thus, in *Morgan v. Malleeson*, L. R. 10 Eq. 475, the words were: "I hereby give and make over to Dr. Morris an India bond"; and in *Richardson v. Richardson*, L. R. 3 Eq. 686, the words were, "grant convey, and assign." In both cases the judges held that the words were effectual

declarations of trust. In the former case, Lord Romilly considered that the words were the same as these: "I undertake to hold the bond for you," which would undoubtedly have amounted to a declaration of trust.

The true distinction appears to me to be plain, and beyond dispute; for man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise.

In *Milroy v. Lord*, 4 De Gex, F. & J. 264, 274, Lord Justice Turner, after referring to the two modes of making a voluntary settlement valid and effectual, adds these words: "The cases, I think, go further, to this extent: That if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be

made effectual by being converted into a perfect trust."

It appears to me that that sentence contains the whole law on the subject. If the decisions of Lord Romilly and of Vice-Chancellor Wood were right, there never could be a case where an expression of a present gift would not amount to an effectual declaration of trust, which would be carrying the doctrine on that subject too far. It appears to me that these cases of voluntary gifts should not be confounded with another class of cases in which words of present transfer for valuable consideration are held to be evidence of a contract which the court will enforce. Applying that reasoning to cases of this kind, you only make the imperfect instrument evidence of a contract of a voluntary nature which this court will not enforce; so that, following out the principle even of those cases, you come to the same conclusion.

I must, therefore, allow the demurrer; and, though I feel some hesitation, owing to the conflict of the authorities, I think the costs must follow the result.

YOUNG v. YOUNG.

(80 N. Y. 422.)

Court of Appeals of New York. 1880.

Appeal from judgment of the general term of the supreme court, in the Third judicial department, reversing a decree of the surrogate of the county of Sullivan upon the accounting of plaintiff, as administrator of the estate of Joseph Young, deceased.

Upon such accounting the administrator claimed that certain United States and town coupon bonds belonged to himself and to his brother, John N. Young. The surrogate disallowed the claim, and charged him with said bonds.

These bonds, upon the death of the intestate, were found in two packages inclosed in envelopes, upon which were indorsed memoranda signed by him, one dated March 14, the other March 14, 1874, each of which described the bonds inclosed by numbers, and stated that certain of them belonged to William H. Young, that the others belonged to John N. Young. Then followed a statement of the indorsements, of which the following is a copy: "But the inst. to become due thereon is owned and reserved by me for so long as I shall live; at my death they belong absolutely and entirely to them and their heirs." The other was similar.

The circumstances under which the memoranda were made, and the further material facts, are set forth in the opinion.

Hezekiah Watson, for appellant. Homer A. Nelson, for respondent.

RAPALLO, J. The intention of Joseph Young, deceased, to give the bonds in controversy on this appeal to his son, William H. Young, reserving to himself only the interest during his life-time, was so clearly manifested, that we have examined the case with a strong disposition to effectuate that intention and sustain the gift, if possible.

The transaction is sought to be sustained in two aspects: First, as an actual executed gift, and secondly, as a declaration of trust. These positions are antagonistic to each other, for if a trust was created, the possession of the bonds, and the legal title thereto, remained in the trustee. In that case there was no delivery to the donee, and consequently no valid executed gift; while if there was a valid gift, the possession and legal title must have been transferred to the donee, and no trust was created. As each of these theories thus necessarily excludes the other, they must be separately considered.

To establish a valid gift, a delivery of the subject of the gift to the donee or to some person for him, so as to divest the possession and title of the donor, must be shown, and the first question which arises under the peculiar circumstances of this case is, whether it is practicable to make a valid

gift in present of an instrument securing the payment of money, reserving to the donor the accruing interest, and if so, by what means this can be done. The purpose of such a gift may undoubtedly be accomplished by a proper transfer to a trustee and perhaps by a written transfer delivered to the donee, but the question now is, can it be done in the form of a gift, without any written transfer delivered to the donee, and without creating any trust? I can conceive of but one way in which this is possible, and that is by an absolute delivery of the security which is the subject of the gift, to the donee, vesting the entire legal title and possession in him, on his undertaking to account to the donor for the interest which he may collect thereon. But if the donor retains the instrument under his own control, though he do so merely for the purpose of collecting the interest, there is an absence of the complete delivery which is absolutely essential to the validity of a gift. A gift cannot be made by creating a joint possession of donor and donee, even though the intention be that each shall have an interest in the chattel, especially where, as in this case, the line of division between these interests is not ascertainable. The reservation of the interest on the bonds to the donor was for an uncertain period; that is, during his life-time, and until his death it was impossible to determine the precise proportion of the money secured by the bonds, to which the donee was entitled.

If therefore the donor retained the custody of the bonds for the purpose of collecting the accruing interest, or even if they were placed in the joint custody or possession of himself and the donee, there was no sufficient delivery to constitute a gift. But if an absolute delivery of the bonds to the donee, with intent to pass the title, was made out, the donor reserving only the right to look to the donee for the interest, the transaction may be sustained as an executed gift. *Doty v. Willson*, 47 N. Y. 580.

This brings us to an examination of the evidence. The written memoranda attached by the donor to the envelopes containing the bonds, evinced his intention to make a present gift to the respondent of an interest in the bonds, and shows that the disposition was not intended to be of a testamentary character. He declares that the bonds are owned by William H. Young, but the interest to become due on the same is owned and reserved by the donor for so long as he shall live, and that at his death the bonds are owned by the donee "absolutely and entirely" in one case, and "wholly and entirely" in the other. There are some verbal differences in the two memoranda, but the purport of both is the same. They both express in the same words that the interest to become due on the bonds is "owned and reserved" by the donor for so long as he shall live, and that the bonds are not to be

long "wholly" or "absolutely" to the donees till after his death.

The exhibition of these memoranda to the wife of the donee, and the declarations of the donor, show that what he had thus done was in pursuance of a settled purpose, and that he believed that he had made a valid disposition of the bonds according to the memoranda, but they do not satisfy the requirement of an actual delivery.

The evidence touching the point of delivery is that the deceased for several years before his death resided at the house of his son, William H. Young, where there was a safe which had formerly belonged to the deceased, but which he is said to have presented to his grandson, James C. Young, a son of William H., reserving to himself the right to use the safe, and in fact using it as a place of deposit for his valuable papers. That William H. Young also kept papers in the same safe, but rarely went to it himself, the deceased being in the habit of depositing therein for him such things as he desired, and removing them for him at his request.

The upper part of this safe was divided into pigeon-holes, where the deceased usually kept his papers and was in the habit, up to the time of the transaction now in question, of keeping the bonds in controversy. The lower part of the safe was divided into larger open compartments, one of which had been appropriated as the receptacle of the papers of William H. Young.

After affixing to the two envelopes in which the bonds were contained, the memoranda showing the dispositions in favor of his sons William H. Young and John N. Young, and after exhibiting these memoranda to the respective wives of the donees, the deceased replaced the two packages of bonds in this safe, and after his death they were found, not in the pigeon-hole where they had formerly been kept, but in the compartment where William H. Young's papers were kept. After the memoranda had been made, the bonds were generally kept in that compartment, but the deceased had been seen by William H. to put them in the pigeon-holes and take them out with the indorsements on.

On the occasion of exhibiting the packages of bonds and the indorsements to Mrs. William H. Young, the deceased asked her to take them in her hands and see what he had written on them. But this was not intended as a delivery to her, for she asked him whether he wanted her to take them and put them up, and he said, "No." After having thus exhibited them he took them back and placed them in the safe. The memoranda were made on the 14th March, 1874. The testator died November 12, 1875. In the meantime installments of interest on the bonds became due. The deceased cut off the coupons, and on some occasions William H. Young assisted him in so doing, but William H. testified that he never asserted any

ownership over the bonds as against his father. And the testimony shows that they were at all times under the control of the deceased, although William H. Young and his son, James C. Young, also had access to the safe. Those three however were the only persons having access to the safe, and it does not appear that John N. Young, the other donee named in the memoranda, ever had any control over the bonds or access thereto. It was also shown that after the alleged gift, when solicited for a loan, the deceased said that he supposed he might with the boys' consent take some of their bonds. Also that he called the attention of his grandson, James C. Young, to the memoranda and said, "you see what I have done with them." That he declared to a witness, Benjamin Grant, that what he had left he had given to William and Newton. That in September, 1875, he took from one of the envelopes a bond of \$1,000, being one of those stated in the memorandum indorsed to belong to John N. Young, and gave it to a third party, but it also appeared that he had, before making the memorandum, presented John N. Young with \$1,000.

This is the substance of all the testimony by which a delivery to the donee is sought to be established. It shows that the deceased at no time parted with the possession or control of the bonds, but merely confirms the intention expressed in the memoranda. The change of the position of the bonds in the safe where they were kept, from the pigeon-hole to the compartment, might have been significant had William H. been the only donee, and had the intended gift been unaccompanied by any reservation. But under the existing circumstances it cannot be construed into a delivery of the bonds. In the first place, part of the bonds were stated in the memoranda to be given to William H., and part to John N. Young. The intention of the donor toward each of his sons was the same. Yet no attempt appears to have been made to effect any sort of delivery to John N. Moreover, the form of the intended gift shows that no immediate delivery could have been contemplated by the deceased. The memorandum on each envelope says that the interest to become due on the bonds is "owned and reserved" by the donor. This interest, up to the dates of the maturity of the bonds respectively, was represented by coupons attached to the bonds. It clearly could not have been intended to deliver them, for so many of them as might become due during the life of the donor were reserved from the gift, as the interest was expressly declared to be "owned" by the donor, and not parted with. The possession of these coupons was necessary to enable him to collect the interest, and he availed himself of it for that purpose from time to time. No intention was manifested to deliver up these vouchers and look to the donees for the interest. No divi-

sion of the coupons could be made, for the period of the donor's life was uncertain; and further, if all the coupons were retained by the donor, they might not represent the entire interest reserved by him. The bonds matured in 1887 and 1888, and some were redeemable earlier; and if he had lived until the maturity of the bonds, or until the United States bonds were called in by the government, as they were liable to be, the donees would not then have been entitled to the possession of the bonds or their proceeds. The reservation accompanying the gift would entitle the donor to possession of the fund. The intention of the donor, as deducible from the memoranda and the evidence, was, not to part with his title to the accruing interest, but to keep the bonds and collect the interest for his own use till he should die; and that then, and not before, his sons should have possession of them and own them absolutely. That although he meant that their right to this interest in remainder should be vested and irrevocable from the time of the supposed gift, yet that at no time during his life did the donees have exclusive possession of the bonds or the legal right to such possession.

The declarations of the donor that he had given the bonds to his sons must be understood as referring to the qualified gift which he intended to make. There is nothing to indicate that he ever relinquished his right to the interest, and all the circumstances of the case show that he could not have intended to admit that he had made an absolute gift, free from the qualification expressed in the memoranda. The cases of *Grangiac v. Arden*, 10 Johns. 295; *Davis v. Davis*, 8 Nott & McC. 226, and kindred cases, consequently have no application. The principle of those cases was applied in the late case of *Trow v. Shannon*, 78 N. Y. 446, but in that case the gift was intended to be absolute. No qualification was attached to it, and the bonds were placed where they were accessible to the donee, and he had himself collected the interest for his own use. There was nothing inconsistent with a full delivery, but there was no direct evidence of such delivery, and the admissions of the donor that she had given the bonds and they belonged to the donee, were received, and weight given to them, as some evidence from which the jury might infer that the gift had been completed by an absolute delivery.

It is impossible to sustain this as an executed gift, without abrogating the rule that delivery is essential to gifts of chattels *inter vivos*. It is an elementary rule that such a gift cannot be made to take effect in possession in futuro. Such a transaction amounts only to a promise to make a gift, which is *nudum pactum*. *Pitts v. Mangum*, 2 Bailey, 588. There must be a delivery of possession with a view to pass a present right of property. "Any gift of chattels which expressly reserves the use of the property to the donor

for a certain period, or (as commonly appears in the cases which the courts have had occasion to pass upon) as long as the donor shall live, is ineffectual." 2 Schouler, Pers. Prop. p. 118, and cases cited; *Vass v. Hicks*, 3 Murph. (N. C.) 494. This rule has been applied even where the gift was made by a written instrument or deed purporting to transfer the title, but containing the reservation. *Sutton's Ex'r v. Hallowell*, 2 Dev. 186; *Lance v. Lance*, 5 Jones Law, 413.

The only question remaining therefore is whether a valid declaration of trust is made out.

The trust contended for, if put into words, would be that the donor should hold the bonds and their proceeds for his own benefit during his life and to the use of the donees from the time of his own death.

Of course no trust was created of the interest for the donor's own life, for he was the legal owner of the income of the bonds, and never parted with this right—nor could he be at the same time trustee and *cestui que trust*. The trust then would be to hold to the use of the donees an estate in remainder in the bonds, which should vest in possession in the donees, at the time of his death.

The difficulty in establishing such a trust is that the donor did not undertake or attempt to create it, but to vest the remainder directly in the donees. Assuming, for the purposes of the argument, that he might have created such a trust in himself, for the benefit of his sons, and, further, that he might have done so by simply signing a paper to that effect and retaining it in his own possession, without ever having delivered it to the donees, or any one for them, yet he did not do so. He simply signed a paper certifying that the bonds belonged to his sons. He did not declare that he held them in trust for the donees, but that they owned them subject to the reservation, and were at his death to have them absolutely. If this instrument had been founded upon a valuable consideration, equity might have interfered and effectuated its intent by compelling the execution of a declaration of trust, or by charging the bonds, while in his hands, with a trust in favor of the equitable owner. *Day v. Roth*, 18 N. Y. 448. But it is well settled that equity will not interpose to perfect a defective gift or voluntary settlement made without consideration. If legally made, it will be upheld, but it must stand as made or not at all. When therefore it is found that the gift which the deceased attempted to make failed to take effect for want of delivery, or a sufficient transfer, and it is sought to supply this defect and carry out the intent of the donor by declaring a trust which he did not himself declare, we are encountered by the rule above referred to. *Story, Eq. Jur.* 706, 787, 793b-793d; *Antrobus v. Smith*, 12 Ves. 39, 43; *Edwards v. Jones*, 1 Mylne & C. 226; 7 Sim. 325; *Price v. Price*, 8 Eng. Law & Eq. 281; *Hughes v. Stubbs*, 1 Hare, 476. It

is established as unquestionable law that a court of equity cannot by its authority render that gift perfect which the donor has left imperfect, and cannot convert an imperfect gift into a declaration of trust, merely on account of that imperfection. *Heartley v. Nicholson*, 44 L. J. Ch. 279. It has in some cases been attempted to establish an exception in favor of a wife and children on the ground that the moral obligation of the donor to provide for them constituted what was called a meritorious consideration for the gift, but Judge Story (2 Eq. Jur. § 987, and 1 Eq. Jur. § 433) says that that doctrine seems now to be overthrown, and that the general principle is established that in no case whatever will courts of equity interfere in favor of mere volunteers, whether it be upon a voluntary contract, or a covenant, or a settlement, however meritorious may be the consideration, and although the beneficiaries stand in the relation of a wife or child. *Holloway v. Headington*, 8 Sim. 325; *Jeffreys v. Jeffreys*, 1 Craig & P. 138, 141.

These positions are sustained by many authorities. To create a trust, the acts or words relied upon must be unequivocal, implying that the person holds the property as trustee for another. *Martin v. Funk*, 75 N. Y. 134, per Church, C. J. Though it is not necessary that the declaration of trust be in terms explicit, the donor must have evinced by acts which admit of no other interpretation, that such legal right as he retains is held by him as trustee for the donee. *Heartley v. Nicholson*, 44 L. J. Ch. 277, per Bacon, V. C. The settlor must transfer the property to a trustee, or declare that he holds it himself in trust. *Milroy v. Lord*, 4 De Gex, F. & J. 264, per Lord Knight Bruce. In cases of voluntary settlements or gifts, the court will not impute a trust where a trust was not in fact the thing contemplated. The distinction between words importing a gift and words creating a trust is pointed out by Sir Geo. Jessel in *Richards v. Delbridge*, L. R. 18 Eq. Cas. 11, as follows: "The making a man trustee involves an intention to become a trustee, whereas words of gift show an intention to give over property to another, and not to retain it in the donor's hands for any purpose, fiduciary or otherwise."

The words of the donor in the present case are that the bonds are owned by the donees, but that the interest to accrue thereon is owned and reserved by the donor for so long as he shall live, and at his death they belong absolutely to the donees. No intention is here expressed to hold any legal title to the bonds in trust for the donees. Whatever interest was intended to be vested in them was transferred to them directly, subject to the reservation in favor of the donor during his life, and free from that reservation at his death. Nothing was reserved to the donor, to be held in trust or otherwise, except his right to the accruing interest which should become payable during his life. It could only be by re-

forming or supplementing the language used, that a trust could be created, and this, as has been shown, will not be done in case of a voluntary settlement without consideration. There are two English cases where indeed the circumstances were much stronger in favor of the donees than in the present case, which tend to sustain the position that a settlement of this description may be enforced in equity by constituting the donor trustee for the donee. They are *Morgan v. Malleson*, L. R. 10 Eq. Cas. 475, and *Richardson v. Richardson*, L. R. 3 Eq. Cas. 686. In the first of these cases, *Morgan v. Malleson*, L. R. 10 Eq. Cas. 475, the intestate signed and delivered to Dr. Morris a memorandum in writing: "I hereby give and make over to Dr. Morris one India bond," but did not deliver the bond. Sir John Romilly sustained this gift as a declaration of trust. The case is referred to by Church, C. J., in *Martin v. Funk* as an extreme case. In *Richardson v. Richardson*, an instrument purporting to be an assignment, unsupported by a valuable consideration, was upheld as a declaration of trust. In speaking of these cases in *Richards v. Delbridge*, L. R. 18 Eq. Cas. 11, Sir Geo. Jessel, M. R., says: "If the decisions of Lord Romilly (in *Morgan v. Malleson*), and of Wood, V. C. (in *Richardson v. Richardson*) were right, there never could be a case where the expression of a present gift would not amount to an effectual declaration of trust." And it may be added that there never could be a case where an intended gift, defective for want of delivery, could not, if expressed in writing, be sustained as a declaration of trust. Both of the cases cited are now placed among overruled cases. *Fisher*, Ann. Dig. (1873 and 1874) 24, 25. In *Moore v. Moore*, 43 L. J. Ch. 623, Hall, V. C., says: "I think it very important indeed to keep a clear and definite distinction between these cases of imperfect gifts and cases of declarations of trust; and that we should not extend beyond what the authorities have already established, the doctrine of declarations of trust, so as to supplement what would otherwise be mere imperfect gifts." If the settlement is intended to be effectuated by gift, the court will not give effect to it by construing it as a trust. If it is intended to take effect by transfer the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. *Milroy v. Lord*, 4 De Gex, F. & J. 264.

The case of *Martin v. Funk* and kindred cases cannot aid the respondent. In all those cases there was an express declaration of trust. In the one named the donor delivered the money to the bank, taking back its obligation to herself in the character of trustee for the donee; thus parting with all beneficial interest in the fund, and having the legal title vested in her in the character of trustee only. No interposition on the part of the

court was necessary to confer that character upon her; nor was it necessary, by construction or otherwise, to change or supplement the actual transaction. None of the difficulties encountered in the present case stood in the way of carrying out her intention. It was capable of being executed in the form in which it was expressed.

The question whether a remainder in a chattel may be created and given by a donor by carving out a life estate for himself and transferring the remainder, without the intervention of a trustee, is learnedly discussed in the appellant's brief; but the views we have

expressed render it unnecessary to pursue that inquiry. We are satisfied that it is impossible to hold that the facts as they appear establish a valid transfer of any interest in the bonds in question to the donee, and that the attempted gift cannot be sustained as a declaration of trust. It follows that the judgment of the general term must be reversed and the decree of the surrogate affirmed. Costs of all the parties in this court and in the supreme court to be paid out of the estate.

All concur.

Judgment reversed.

In re WEBB'S ESTATE.

(49 Cal. 541.)

Supreme Court of California. Jan., 1875.

Appeal from probate court, city and county of San Francisco.

Lloyd Baldwin, for appellant. George W. Tyler, for respondent.

CROCKETT, J. The claim of the father and sisters of the deceased to the fund in controversy can be sustained, if at all, on no other ground than that, by the two letters of the deceased to his sisters, he created and declared a present trust, to the effect that he held the policy of insurance in trust for his father and sisters. The transaction cannot be upheld merely as a donation *inter vivos*. There was no assignment or delivery of the policy to the father and sisters, and treated simply as a donation, it would fail for that reason. But a person intending to make a donation to another, and who clearly declares his purpose and transfers the title, need not necessarily part with the possession, provided he declares himself, in proper form, to be a trustee, holding possession for the donee. In such a case, he would thenceforth hold the property as a trustee and not in his own right. That such a trust, when properly declared, even in favor of a volunteer, is valid, and will be enforced, is established by numerous authorities. "Where there is no valuable consideration, yet, if the settler, by a clear and explicit declaration, duly executed, and intended to be final and binding upon him, makes himself a trustee, courts of equity will enforce the trust." *Perry, Trusts*, § 96. "If the trust is perfectly created, so that the donor or settler has nothing more to do, and the person seeking to enforce it has need of no further conveyances from the settler, and nothing is required of the court but to give effect to the trust as an executed trust, it will be carried into effect, although it was without consideration, and the possession of the property was not changed. Whether the trust is perfectly created or not is a question of fact in each case, and the court, in determining the fact, will give effect to the situation and

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relation of the parties, the nature and situation of the property, and the purposes or objects which the settler had in view making the disposition." *Id.* §§ 98, 99.

In such cases the point to be determined is, whether the trust has been "perfectly created;" that is to say, whether the title has passed and the trust been declared, and the trust being executed nothing remains for the court but to enforce it. In discussing this question the court say, in *Stone v. Hackett*, 12 Gray, 227: "It is certainly true that a court of equity will lend no assistance toward perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and cestui que trust is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery." The same proposition is announced, and the authorities fully collated and examined, in *Kederick v. Manning*, 1 De Gex, M. & G. 176. To the same effect are *Jones v. Lock*, L. R. 1 Ch. 25, and *Wason v. Colburn*, 99 Mass. 342.

We think these cases announce the correct rule, and are decisive of the present controversy. The letters from the deceased to his sisters did not purport and were not intended to be an assignment of the policy, the title to which remained in the deceased. It was not an executed trust, but at most nothing more than a voluntary executory agreement to create a trust in futuro, and such agreements cannot be enforced in equity. This view of the case renders it unnecessary for us to decide whether the probate court had jurisdiction to enforce the trust, if it had been established.

Judgment reversed and cause remanded for a new trial.

McKINSTRY, J., did not express an opinion.

MARTIN v. FUNK.

(75 N. Y. 134.)

Court of Appeals of New York. Nov. 12, 1878.

Nehemiah Millard, for appellants. M. W. Divine, for respondent.

CHURCH, C. J. The facts in this case are substantially undisputed, as found by the judge before whom the case was tried. The intestate Mrs. Boone, in 1866, deposited in the Citizens' Savings Bank \$500, declaring at the time that she wanted the account to be in trust for Lillie Willard, who is the plaintiff. The account was so entered, and a pass-book delivered to the intestate, which contained these entries: "The Citizens' Savings Bank in account with Susan Boone, in trust for Lillie Willard. 1866, March 23, \$500."

A deposit of the same amount and in the same manner was made in trust for Kate Willard, now Mrs. Brown. This money belonged to the intestate at the time of the deposits. The plaintiff and Mrs. Brown are sisters, and were at the time of the age respectively of eighteen and twenty, and were distant relatives of the intestate, their mother being a second cousin. The intestate retained possession of the pass-books until her death in 1875, and the plaintiff and her sister were ignorant of the deposits until after that event. The money remained in the bank with its accumulated interest until the death of the intestate, except that she drew out one year's interest. Mrs. Brown assigned to the plaintiff her interest in the deposit purporting to have been made for her benefit, and the action is brought against the administrator of the intestate and the bank for the delivery of the pass-books and the recovery of the money. The question involved has been very much litigated, and many refinements may be found in the books in respect to it. Many cases have been found difficult of solution, not so much on account of the general principles which should govern, as in applying those principles to a particular state of facts. It is clear that a person *sui juris*, acting freely and with full knowledge, has the power to make a voluntary gift of the whole or any part of his property, while it is well settled that a mere intention, whether expressed or not, is not sufficient, and a voluntary promise to make a gift is *nudum pactum*, and of no binding force. *Kekewich v. Manning*, 50 Eng. Ch. 175, and cases cited. The act constituting the transfer must be consummated, and not remain incomplete, or rest in mere intention, and this is the rule whether the gift is by delivery only, or by the creation of a trust in a third person, or in creating the donor himself a trustee. Enough must be done to pass the title, although when a trust is declared, whether in a third person or the donor, it is not essential that the property should be actually possessed by the ces-

tul que trust, nor is it even essential that the latter should be informed of the trust. In *Milroy v. Lord*, 4 De Gex, F. & J. 264, Lord Chief Justice Turner, who adopted the most rigid construction of trusts, in delivering an opinion against the validity of the trust in that case, laid down the general principles as accurately perhaps as is practicable. He said: "I take the law of this court to be well settled, that in order to render a voluntary settlement valid and effectual the settler must have done every thing which according to the nature of the property comprised in the settlement was necessary to be done in order to transfer the property, and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intended to provide, and the provision will then be effectual, and it will be equally effectual if he transfer the property to a trustee for the purpose of the settlement, or declare that he himself holds it in trust for those purposes, and if the property be personal, the trust may I apprehend be declared either in writing or by parol."

The contention of the defendant is that the transaction did not transfer the property, and that there was no sufficient declaration of trust and that by retaining the pass-books the intestate never parted with the control of the property. If what she did was sufficient to constitute herself a trustee, it must follow that whatever control she retained would be exercised as trustee, and the right to exercise it would not be necessarily inconsistent with the completeness of the trust. The question involving substantially the same facts has been several times before different courts of the state, and in every instance the transaction has been sustained as a good gift.

The Case of *Wetzel* before Surrogate Bradford, and *Millspaugh v. Putnam*, 16 Abb. Prac. 380, were deposits in the same form, and in the former the *cestui que trust* had no notice of the deposit, and in both cases the gift was held effectual. In *Smith v. Lee*, 2 Thomp. & C. 591, money was deposited with the defendant, and a note taken payable to the depositor for another person, and it was held that the depositor constituted himself a trustee. The case of *Kelly v. Manhattan Inst. for Savings* (not reported) was a special term decision of the New York common pleas before Robinson, J., where precisely such a deposit was made as in this, and it was upheld as an absolute gift. These decisions although not controlling upon this court are entitled to respect, and they show the tendency of the judicial mind to give these transactions the effect which on their face they import. So in *Minor v. Rogers*, 40 Conn. 512, a similar deposit was upheld as a declaration of trust. Park, J., noticed the point urged there as here of the retention of the pass-book, and said: "She retained possession therefore be-

cause the deposit was made in her name as trustee, and not because she had not given the beneficial interest of the deposit to the plaintiff," and in that case the depositor had drawn out the deposit, and the action was sustained against her administrator. So in *Ray v. Simmons*, 11 R. I. 266; the facts were precisely like the case at bar, except that the cestui que trust was informed of the gift, and the court held the trust valid.

But the supreme court of Massachusetts in two cases (*Brabrook v. Boston Five Cent Sav. Bank*, 104 Mass. 228, and *Clark v. Clark*, 108 Mass. 522) seem to hold a different doctrine. In the first case the circumstances were deemed controlling, adverse to an intent to create a trust, and in the last, which was similar in its facts to this, the court express the opinion that the trust was not complete, but without giving any reasons for the opinion. The last decision, although entitled to great respect, is exceptional to the general current of authority in this country.

In the English courts I do not find any case where these precise facts appeared, but the cases are numerous where the general principles have been elaborately discussed and applied to particular facts. It is only deemed necessary to refer to a few of them. In *Richardson v. Richardson*, L. R. 3 Eq. Cas. 684, it was held that an instrument executed as a present and complete assignment (not being a mere contract to assign at a future day) is equivalent to a declaration of trust. *Morgan v. Malleeson*, L. R. 10 Eq. Cas. 475, was decided upon this principle, and is an extreme case in support of a declaration trust. It appeared that the testator gave to his medical attendant the following memorandum: "I hereby give and make over to Dr. Morris, an Indian bond No. D 506, value £1,000, as some token for all his very kind attention to me during my illness." This was held to constitute the testator a trustee for Dr. Morris of the bond which was retained by him. These cases are commented upon, and the latter somewhat criticised in *Warriner v. Rogers*, L. R. 16 Eq. 340, but Sir James Bacon, in delivering the opinion, substantially adheres to the general rule before stated. He requires only "that the donor or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration—should have effectually changed his right in that respect, and put the property out of his power, at least in the way of interest." This case was decided against the validity of the trust, mainly upon the ground that the memoranda produced were upon their face testamentary in character. In *Pye's Case*, 18 Ves. 140, money was transmitted to an agent in France to purchase an annuity for a lady. Owing to circumstances which the agent supposed prevented its purchase in her name, he purchased it in the name of

the principal. When the latter learned this fact, he executed and transmitted to the agent a power of attorney to transfer the annuity, but before its arrival the principal died. Lord Eldon held that a declaration of trust was established.

Wheatley v. Purr, 1 Keen, 551, is quite analogous to the case at bar. A testatrix directed her brokers to place £2,000, in the joint name of the plaintiffs, and herself as a trustee for the plaintiffs. The sum was placed to the account of the testatrix alone, as trustee of the plaintiffs, and a promissory note was given by them to her as such trustee. The note remained in her possession until her death, when her executor received the money. It was held that the transaction amounted to a complete declaration of trust.

Mr. Hill, in his work on Trustees, after saying "that it is extremely difficult, in the present state of authorities, to define with accuracy the law affecting this very intricate subject," lays down the following as the result: "When the author of the voluntary trust is possessed of the legal interest in the property, a clear declaration of trust contained in or accompanying a deed or act which passes the legal estate will create a perfect executed trust, and so a declaration or direction by a party that the property shall be held in trust for the object of his bounty, though unaccompanied by a deed or other act divesting himself of the legal estate, is an executed trust." Hill, Trustees, 130.

If there is a valid declaration of trust, that is sufficient of itself, I apprehend, to transfer the title, but the difficulty is in determining what constitutes such a declaration, and whether a mere formal transfer of the property, as in the case of the medical attendant, is sufficient, is a question upon which there is some difference of opinion. No particular form of words is necessary to constitute a trust, while the act or words relied upon must be unequivocal, implying that the person holds the property as trustee for another.

Let us now consider the case in hand. In form at least the title to the money was changed from the intestate individually to her as trustee. She stated to the bank that she desired the money to be thus deposited. It was so done by her direction, and she took a voucher to herself in trust for the plaintiff. Upon these facts what other intent can be imputed to the intestate than such as her acts and declarations imported, and did they not import a trust? There was no contingency or uncertainty in the circumstances, and I am unable to see wherein it was incomplete. The money was deposited unqualifiedly and absolutely in trust, and the intestate was the trustee. It would scarcely have been stronger if she had written in the pass-book: "I hereby declare that I have deposited this money for the benefit of the

plaintiff and I hold the same as trustee for her."

This would have been a plain declaration of trust, and accompanied as it was with a formal transfer to herself in the capacity of trustee, would have been deemed sufficient under the most rigid rules to be found in any of the authorities. It seems to me that this was the necessary legal intentment of the transaction, and that it was sufficient to pass the title. The retention of the pass-book was not necessarily inconsistent with this construction. She must be deemed to have retained it as trustee. The book was not the property, but only the voucher for the property, which after the deposit consisted of the debt against the bank.

There are many cases where the instrument creating the trust has been retained by the author of it until his death, especially when he made himself the trustee, and yet the trust sustained. *Exton v. Scott*, 6 Sim. 31; *Fletcher v. Fletcher*, 4 Hare, 67; *Souvery v. Arden*, 1 Johns. Ch. 240; *Bunn v. Winthrop*, Id., 329. This circumstance, among others, has been considered upon the question of intent, but is never deemed decisive against the validity of the trust. *Id. See, Hill, Trustees*, supra. Some confusion has been created by judicial expression, that the author of such a trust must do all in his power to carry out his intention, that the nature of the property will admit of. This general proposition requires some qualification. In this case the intestate might have notified the objects of her bounty, but this is not regarded as indispensable by any of the authorities, and she might have made the deposits in their name, and delivered to them the books, or delivered to them the money. The rule does not require that the gift shall be made in any particular way, it only requires that enough shall be done to transfer the title to the property, and one of the modes of doing this is by an unequivocal declaration of trust. In *Richardson v. Richardson*, supra, the court, in noticing this point, said: "Reliance is often placed on the circumstance that the assignor has done all he can, and that there is nothing remaining for him to do, and it is contended that he must in that case only be taken to have made a complete and effectual assignment. But that is not the sound doctrine on which the case rests; for if there be an actual declara-

tion of trust, although the assignor has not done all that he could do, for example, although he has not given notice to the assignee, yet the interest is held to have effectually passed as between the donor and donee. The difference must be rested simply on this: aye or no, has he constituted himself a trustee."

As notice to the cestui que trust was not necessary, and as the retention of the pass-books was not inconsistent with the completeness of the act, the case is peculiarly one to be determined by this test: did the intestate constitute herself a trustee? After a careful consideration of the case in connection with the established rules applicable to the subject, and the authorities, I think this question must be answered in the affirmative. It was not done in express formal terms, but such is the fair legal import of the transaction. I have considered the case thus far upon what appears from the face of the transaction, without evidence allunde, bearing upon the intent. It is not necessary to decide that surrounding circumstances may not be shown to vary or explain the apparent character of the acts, and the intent with which they were done. The facts developed may not be so unequivocal as to be regarded as conclusive. It is sufficient to say that there is no finding of an intent contrary to the creation of a trust, and the facts found do not establish such an adverse intent. But looking at the evidence it is fairly inferable that the intestate designed that the plaintiff and her sister should have the benefit of these deposits, and there are some circumstances from which an inference may be drawn that she regarded the gifts as fixed and complete. The circumstance that she did not intend that the objects of her bounty should know of her gift until after her death is not inconsistent with it, and the most that can be said is that she may have believed that the deposits might be withdrawn during her life, and the money converted to her own use. It is not clear that she entertained such a belief, but if she did, it would not change the legal effect of her acts.

The judgment must be affirmed.

All concur except MILLER and EARL, JJ., absent at argument.

Judgment affirmed.

BEAVER v. BEAVER et al.¹

(22 N. E. 940, 117 N. Y. 421.)

Court of Appeals of New York. Nov. 26, 1889.

Appeal from supreme court, general term, third department.

The action was commenced by the plaintiff, as executrix of Asiel G. Beaver, against the Ulster County Savings Institution, to recover certain deposits amounting to the sum of \$2,800 or thereabouts, standing to his credit on the books of the bank. The administrators of John O. Beaver claiming the money as part of his estate, they were substituted as defendants in place of the bank, the money having been brought into court. The question litigated was whether the money represented by the deposits and the accumulations had been vested in Asiel G. Beaver, as a gift from John O. Beaver. The account with the bank consisted of two deposits,—one July 5, 1866, of \$854.04, and one of October 5, 1866, of \$145.96,—making in the aggregate \$1,000, and the accumulations thereon. It is undisputed that the deposit of \$854.04 was made in person by John O. Beaver, and that the money deposited belonged to him. The only evidence to sustain the claim that it was given by him to Asiel G. Beaver is found in the relations between them and the circumstances attending the deposit. Asiel G. Beaver was the son of John O. Beaver, and in 1866 was 17 years of age, and resided with his father, as one of a family of 13 children. John O. Beaver made the deposit of July 5, 1866, in the name of Asiel. The rules of the bank required that on making the first deposit the depositor should subscribe a declaration of his assent to the by-laws of the institution, and his promise to abide by them. John O. Beaver, at the date of the first deposit, signed in his own name a declaration presented to him by the treasurer of the bank, commencing with the words: "I, Asiel G. Beaver, of Esopus, Ulster county, hereby request the officers of the Ulster County Savings Institution to receive from me \$854, and open an account with me," etc. At the same time the savings bank entered on its books an account beginning, "Dr., Ulster County Savings Bank, in account with Asiel Beaver," and crediting said Asiel with the deposit of \$854. Under the name of Asiel Beaver were originally written the words, "Payable to John O. Beaver." The bank also at the same time issued and delivered to John O. Beaver a pass-book, with a similar entry as in the account on the books of the bank, containing also, as originally written, the words, "Payable to John O. Beaver." These words in the account and in the pass-book were in the handwriting of the treasurer of the bank, and were written at the same time and by the same hand as the other part of the entries. But before the delivery of the pass-book the words "Payable to John O. Beaver" were erased therefrom, and the same erasure was

made in the account on the bank-books. How the interlineation came to be made in the first instance does not appear, nor does it appear at whose suggestion or under what circumstances the erasures were made. Subsequently, on October 5, 1866, another deposit of \$145.96 was made to the account, and credited on the pass-book.

There are no facts, except as above stated, tending to show a gift of the money deposited to Asiel. On the other hand, many circumstances were shown which are claimed to be inconsistent with a gift by the father to the son of the money deposited. The son married a few years after the deposit was made, and died in 1886, 20 years after the date of the deposits, being then of the age of 37 years, leaving a wife, but no children, surviving. John O. Beaver, the father, died in 1888. The father retained possession of the pass-book at all times until his death. In April, 1867, he drew \$27.29 from the account, and signed a receipt therefor in the pass-book in his own name. No other sum was ever drawn from the account. From time to time John O. Beaver presented the pass-book to the bank to have the interest credited, and the bank officers had no dealings with any other person in respect to the account. There is no evidence that Asiel G. Beaver ever had the pass-book in his possession, or knew of the deposits. In May, 1870, Asiel opened an individual account at the bank in his own name, which continued until March, 1886, when he drew out \$1,818.56, in full of the account. It appears that John O. Beaver had eight or nine pass-books in the bank, representing deposits made in the names of other persons. He left at his death real estate of the value of \$12,000 to \$15,000, and more than \$20,000 in personal property. One of the rules of the bank provides that "drafts may be made personally, or by the order in writing of the depositor, (if the institution have the signature of the party,) or by letters of attorney, duly authenticated, but no person shall have the right to demand any part of his principal or interest without producing the original book, that such payment may be entered thereon," and another declares that, "although the institution will endeavor to prevent fraud or impositions, yet all payments to persons presenting the pass-books issued by it shall be valid payments to discharge the institution." The rules were printed on the pass-books of the bank.

A. T. Clearwater, for appellants. *F. L. Westbrook*, for respondent.

ANDREWS, J., (*after stating the facts as above.*) It is found that the money with which John O. Beaver made the deposit of \$854.04, July 5, 1866, belonged to him. The inference that the deposit of \$145.96, made October 5, 1866, was also made by him, from his own means, does not admit of reasonable question. The pass-book was at all times in his possession. Concurrently with the last deposit the amount was entered therein. It

¹ Reversing 6 N. Y. Supp. 586.

is affirmatively shown that Asiel, who was then a minor, lived with his father, and had no money of his own, and the circumstances are quite satisfactory to show that he never at any time during his life knew of the bank account. The question in the case turns upon the legal effect of the deposit, made in connection with the attendant and subsequent circumstances. If they established either a trust in favor of Asiel as to the \$854.04, deposited July 5, 1866, or a gift of the fund deposited, then, clearly, the subsequent deposit would, in the absence of explanation, be impressed with the same character, and be governed by the same rules. On the other hand, if the first deposit was not affected with any trust, and was not a gift, neither is the last one. Both were the property of John O. Beaver, or both the property of the son, either by a beneficial or legal title. The trial court seem to have sustained the transaction as a gift, but at the same time refused to find that there was no trust.

There is no warrant, under the decisions of this court, to uphold the deposit of July 5, 1866, as a trust. The case of *Martin v. Funk*, 75 N. Y. 134, established a trust in favor of the claimant in that case, in respect to a fund deposited by another in a savings bank to his own credit, in trust for the former; the latter taking from the bank at the time a pass-book in which the account was entered in the same way. The court applied the doctrine that the owner of a fund may, by an unequivocal declaration of trust, impress it with a trust character, and thereby convert his absolute legal title into a title as trustee for the person in whose favor the trust is declared. There was no declaration of trust in this case, in terms, when the deposit of July 5, 1866, was made, nor at any time afterwards, and none can be implied from a mere deposit by one person in the name of another. To constitute a trust there must be either an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created. It would introduce a dangerous instability of titles if anything less was required, or if a voluntary trust *inter vivos* could be established in the absence of express words, by circumstances capable of another construction, or consistent with a different intention. See *Young v. Young*, 80 N. Y. 438, and cases cited.

The plaintiff's title to the fund must depend, therefore, upon the question of gift. The elements necessary to constitute a valid gift are well understood, and are not the subject of dispute. There must be on the part of the donor an intent to give, and a delivery of the thing given, to or for the donee, in pursuance of such intent, and on the part of the donee acceptance. The subject of the gift may be chattels, choses in action, or any form of personal property, and what constitutes a delivery may depend on the nature and situation of the thing given. The delivery may be symbolical or actual, by act-

ually transferring the manual custody of the chattel to the donee, or giving to him the symbol which represents possession. In case of bonds, notes, or choses in action, the delivery of the instrument which represents the debt is a gift of the debt, if that is the intention; and so, also, where the debt is that of the donee, it may be given, as has been held, by the delivery of a receipt acknowledging payment. *Westerlo v. De Witt*, 36 N. Y. 340; *Gray v. Barton*, 55 N. Y. 72; 2 Schouler, Pers. Prop. § 66 et seq. The acceptance also may be implied where the gift, otherwise complete, is beneficial to the donee. But delivery by the donor, either actual or constructive, operating to divest the donor of possession of and dominion over the thing, is a constant and essential factor in every transaction which takes effect as a complete gift. Anything short of this strips it of the quality of completeness which distinguishes an intention to give, which alone amounts to nothing, from the consummated act, which changes the title. The intention to give is often established by most satisfactory evidence, although the gift fails. Instruments may be even so formally executed by the donor, purporting to transfer title to the donee, or there may be the most explicit declaration of an intention to give, or of an actual present gift, yet, unless there is delivery, the intention is defeated. Several cases of this kind have been recently considered by this court. *Young v. Young*, supra; *Jackson v. Railway Co.*, 88 N. Y. 520; *In re Crawford*, 113 N. Y. 560, 21 N. E. Rep. 692.

We are of opinion that there is lacking in this case two of the essential elements to constitute a gift by John O. Beaver to his son of the money deposited July 5, 1866, viz., an intent to give, and a delivery of the subject of the alleged gift. The only evidence relied upon to establish an intent on the part of the father to make a gift to his son is the transaction at the bank on the day the deposit was made, in connection with the relation between the parties. There is no proof of any oral statement made by the father on that occasion disclosing an intention to make a gift, and not a *scintilla* of evidence that afterwards, during the 20 years which elapsed before the son's death, the father made any declaration or in any way recognized that the money belonged to the son, or had been given to him. Evidence offered on the part of the defendant of declarations of John O. Beaver, made on the day of the deposit and afterwards, inconsistent with the theory of an intent to give the money to Asiel, were excluded, on the objection of the plaintiff. The acts of John O. Beaver after the account was opened tend strongly to negative the claim that the money was deposited with intent to give it to the son. The drawing out of the interest by John O. Beaver on one occasion; his retention of the pass-book for 22 years, and procuring it to be written up from time to time; the fact that the son, so far as appears, never was informed of the existence

of the account,—are strong indications that John O. Beaver did not make the deposit in the son's name, with intent to make a present gift of the money. The father dealt with the account as his own, and, if the control he exercised over it during the minority of Asiel could be reasonably explained on the theory that he acted as the natural guardian of the son, no such explanation is possible as to the 16 years of the life of the son after he reached his majority.

The trial court having found that there was a consummated gift, which, of course, includes a finding of an intent to give, this court is concluded from reviewing the finding, if there was any competent and sufficient evidence to support it. The form of the account is the essential fact upon which the plaintiff relies. It may be justly said that a deposit in a savings bank by one person, of his own money to the credit of another, is consistent with an intent on the part of the depositor to give the money to the other. But it does not, we think, of itself, without more, authorize an affirmative finding that the deposit was made with that intent, when the deposit was to a new account, unaccompanied by any declaration of intention, and the depositor received at the time a pass-book, the possession and presentation of which, by the rules of the bank, known to the depositor, is made the evidence of the right to draw the deposit. We cannot close our eyes to the well-known practice of persons depositing in savings banks money to the credit of real or fictitious persons, with no intention of divesting themselves of ownership. It is attributable to various reasons,—reasons connected with taxation, rules of the bank limiting the amount which any one individual may keep on deposit, the desire to obtain high rates of interest where there is a discrimination based on the amount of deposits, and the desire on the part of many persons to veil or conceal from others knowledge of their pecuniary condition. In most cases where a deposit of this character is made as a gift, there are contemporaneous facts or subsequent declarations by which the intention can be established, independently of the form of the deposit. We are inclined to think that to infer a gift from the form of the deposit alone would, in the great majority of cases, and especially where the deposit was of any considerable amount, impute an intention which never existed, and defeat the real purpose of the depositor. The relation of father and son does not in this case, we think, strengthen the plaintiff's case. It may be true that, as between parent and child, a presumption of a gift may be raised from circumstances where it would not be implied between strangers. *Ridgway v. English*, 22 N. J. Law, 409. But where a deposit is made in the name of another, without any intention on the part of the depositor to part with his title, he would be quite likely to select a member of his own family to represent the account, and in this case this

is the natural explanation of the transaction.

The circumstances of the erasure in the declaration signed by John O. Beaver, and also in the account on the books of the bank, of the words, "Payable to John O. Beaver," throw no light upon the actual intention. If they were originally inserted at the suggestion of John O. Beaver, it would seem to imply that when he came to make the deposit he did not intend to part with the control of the money, and it is scarcely presumable that he changed his intention at the very time of making the deposit. If the words were inserted by the treasurer without authority, he may have erased them so as to leave no evidence of an intent to evade the law or the rules of the bank in respect to deposits, or he may have done it for some other unexplained reason. Again, it is possible that John O. Beaver desired that the fund should be placed so that it could be drawn on presentation of the pass-book, without the necessity of a written order, and the erasure was made for this reason. In short, the reason for the insertion of the words, and the subsequent erasure, is matter of speculation merely, and does not aid in the interpretation of the main transaction. There was not only a failure to prove an intent on the part of John O. Beaver to make a gift, but the case is, we think, equally defective on the proof of delivery. The declaration and request drawn by the treasurer ran in the name of Asiel, as did the promise recited to abide by the rules of the bank. But it was signed by John O. Beaver in his own name, and not as agent for Asiel, and in law was his request and his promise. John O. Beaver took and retained possession of the pass-book on which the rules were printed. The rules prescribed the undertaking of the bank, and the conditions to be observed by depositors in requiring payment. Under these rules, John O. Beaver had the exclusive dominion over the account, and the exclusive right to draw upon it so long as he retained the pass-book. It was his signature that the bank had, and not that of Asiel, and the rule authorizing drafts by the depositor only applies when the bank has his signature. But the rule also prescribed that "no person shall have the right to demand any part of his principal or interest without producing the original book, that such payments may be entered thereon," and also that "all payments to persons producing the pass-books shall be valid payments to discharge the institution." Under these rules, Asiel was never in a situation to control the account, while John O. Beaver had complete authority over the fund at all times. If John O. Beaver had delivered the pass-book to Asiel with intent to give him the deposit, there would have been a constructive delivery of the subject of the gift. In *re Crawford*, supra. But he never did this, or any equivalent act.

We think, for the reasons stated, that the plaintiff failed to establish a gift, or to justify

a finding of a gift. The question of gifts, in connection with deposits in savings banks, has of late years been frequently considered by the courts in various states. The preponderance of authority seems to be in favor of the views we have expressed. See *Robinson v. Ring*, 72 Me. 140; *Burton v. Bank*, 52 Conn. 398; *Marcy v. Amazeen*, 61 N. H. 131; *Schick v. Grote*, 42 N. J. Eq. 352, 7 Atl. Rep. 852; *Scott v. Bank*, 140 Mass. 157, 2 N. E. Rep. 925; 8 Amer. & Eng. Cyclop. Law, tit. "Gifts," and notes. The cases of *Howard v.*

Bank, 40 Vt. 597; *Blasdel v. Locke*, 52 N. H. 238; *Gardner v. Merritt*, 32 Md. 78,—go the furthest towards sustaining transactions, similar to the one in question, as gifts, of any we have noticed, but they are distinguishable in material respects from this. Our conclusion is that the cause of action in this case was not made out, and the judgment should therefore be reversed, and a new trial ordered. All concur, except *DANFORTH, J.*, dissenting, and *FINCH, J.*, not voting.

BATH SAV. INST. v. HATHORN et al.
(33 A. 836, 88 Me. 122.)

Supreme Judicial Court of Maine. June 7, 1895.

Report from supreme judicial court, Sagadahoc county.

This was a bill of interpleader brought by the Bath Savings Institution against the defendant Hathorn, as administrator of the estate of Henry Walker, deceased, and against Alice B. Files, to determine the title to a certain deposit in that institution.

The course of procedure adopted by agreement between all parties was this: Each defendant filed an answer, and then, by agreement, a decree of interpleader was filed, and by further agreement it was stipulated that the answers should be taken as the pleadings in the case, and the cause set down for hearing on bill, answers, and proof, and that Miss Files be regarded as plaintiff in the continuance of the suit. It thus became, practically, a suit in equity by Alice B. Files against the administrator of Henry Walker's estate. The facts in the case were practically undisputed.

It appears that Henry Walker died October 2, 1891, leaving neither wife nor children, his wife having died nearly six years before. Their home was in Woolwich, opposite Bath, and Miss Files, who was a second cousin of Mrs. Walker, frequently visited there, and Mr. and Mrs. Walker often visited the Files family in Winslow, the two families being in close and intimate relations. On July 1, 1882, Mr. Walker deposited the sum of \$700 in the Bath Savings Institution in his own name, but "in trust for Alice B. Files," and took out a depositor's book in that form. At the time of making the deposit he had a conversation with the treasurer of the bank as to its form, and the treasurer told him that if he put the book in any one's name, in trust for any one, it would go to that person at his decease; and Mr. Walker said he wished it to, that he wished it to go to Miss Files. In accordance with his direction, the signature book, which all depositors are required to sign, was signed by Mrs. Potter, then a clerk in the bank, in the same form, "Henry Walker, in trust for Alice B. Files, of Woolwich." Mr. Walker retained the bank book in his possession ever after, but never drew any part of the principal or interest therefrom, but took the book to the bank occasionally to have the accrued dividends added. On one occasion, very soon after the deposit was made, Miss Files' sister, now Mrs. White, was visiting at his house, and saw the book, among some other papers that he happened to be examining. She took it up, and looked at it, saw the form of entry, and he told her then, "Yes, that is for Alice at my decease, and the next will be for you," and Mrs. White communicated this information to Alice, her sister, immediately on her return home from the

visit, who expressed her satisfaction thereat.

Mrs. Trott, who was in the family as housekeeper for about six years, going there before Mrs. Walker's death, saw the book on three different occasions, and Mr. Walker explained to her, also, when she spoke of its being in trust, that the book was for Alice; and again, just a few months before his death, after he had the July dividend added, he was examining the book, spoke of it as Alice's bank book, and asked Mrs. Trott to guess how much it had gained. She told him she supposed it was between ten hundred and eleven hundred dollars, and his reply was: "You are pretty good for guessing. You guessed pretty nearly right; and that will be a great help to Alice, won't it, Mrs. Trott?" Decree against estate.

Orville D. Baker and Leslie C. Cornish, for Alice B. Files. Charles W. Larrabee, for defendant Hathorn.

HASKELL, J. Henry Walker, of Woolwich, died, solvent and intestate, October 2, 1891, leaving brothers and sisters and nephews and nieces, but neither wife nor children. His wife died January 1, 1886. She was a cousin to the father of plaintiff, Alice B. Files, of Winslow, who knew the old people as uncle and aunt, and seems to have been always welcome at their house and a favorite with them.

On July 1, 1882, Mr. Walker deposited in the Bath Savings Institution \$700 "in trust for Alice B. Files," saying, in substance, that he wished it to go to her at his decease. That deposit remained intact during Mr. Walker's life, and at his death amounted to something over \$1,000. He always retained the book, and it was found among his papers by his administrator, the defendant, who now claims the deposit as a part of his estate. The evidence shows that Mr. Walker intended the deposit for Alice at his decease, but never communicated his intention to her.

The authorities all say that a gift inter vivos must be complete. The donor must divest himself of all dominion over the thing given, and the title to it must pass absolutely and irrevocably to the donee. *Northrop v. Hale*, 73 Me. 66; *Dale v. Lincoln*, 31 Me. 420; *Robinson v. Ring*, 72 Me. 140; *Bank v. Fogg*, 82 Me. 538, 20 Atl. 92.

A voluntary trust is an equitable gift, and, like a legal gift inter vivos, must be complete. A declaration of trust as effectually passes the equitable title of the fund to the cestui as a gift inter vivos passes the legal title to the donee. The distinction between them is of a technical nature. In a trust, the real title vests in the donee, but the legal title, perhaps, carrying control of the property, may be placed elsewhere; while in a gift both the real and legal title instantly fall to the donee. It is not necessary, therefore, that he who declares a trust should divest himself of the legal title, if, perchance,

he so does it as to transfer the real or equitable title to the cestui; for then he creates an estate really no longer his own. He may retain the legal title, giving him the control, but for the benefit of the cestui, according to the terms of the trust. His control becomes subject to the direction of courts of equity, that always supervise the administration of trusts. They are the children of equity. They spring from it, and cannot survive without its aid and control. The trustee is merely an agent to administer them, and nothing more.

An express trust of lands can only be created by some writing signed by the party or his attorney (Rev. St. c. 73, § 11), but a trust of personal property may be created or declared by parol. It is necessary, however, to clearly establish the terms of it, and show an executed gift, so that the equitable title shall have passed to the donee as effectually as a gift *inter vivos*. *Gerrish v. Institution*, 128 Mass. 159; *Dresser v. Dresser*, 46 Me. 48.

Says Lord Cranworth: "If a man chooses to give away anything which passes by delivery, he may do so, and there is no doubt that, in the absence of fraud, a parol declaration of trust may be perfectly good, even though it be voluntary. If I give any chattel, that of course passes by delivery; and if I expressly or impliedly say I constitute myself trustee of such and such personal property for a person, that is a trust executed, and this court will enforce it, in the absence of fraud, even in favor of a volunteer. * * * The authorities all turn upon the question whether what took place was a declaration of trust, or merely an imperfect attempt to make a legal transfer of the property. In the latter case, the court will afford no assistance to volunteers; but when the court considers that there has been a declaration of trust, it is a trust executed, and the court will enforce it, whether with or without consideration." *Jones v. Lock*, 1 Ch. App. 25.

In this case, the deposit is in the name of the donor, "in trust for the donee." Standing alone, this entry does not work an absolute, indisputable gift in the form of a dry trust,—that is, a trust without limitation or condition, that may be terminated at the will of the cestui; but extrinsic evidence is competent to control its effect. *Brabrook v. Bank*, 104 Mass. 228; *Clark v. Clark*, 108 Mass. 522; *Powers v. Institution*, 124 Mass. 377; *Stone v. Bishop*, 4 Cliff. 593, Fed. Cas. No. 13,482; *Northrop v. Hale*, 72 Me. 275.

The evidence discloses that, at the time the donor made the deposit, he expressed a desire that the donee should have the money at his death. That certainly shows no intent to part with the legal title at an earlier day. He is said to have subsequently made talk of the same purport; but he neither informed the donee of the deposit, nor made any effort or did any act to apprise her of it, or of his intention concerning it. The deposit on his part was both voluntary and secret. Information

of it may have been communicated to her by others, but never at his request or with his knowledge. What evidence, then, operates to pass the equitable title in the deposit to her? He had consummated no contract with her. His intentions were kept in his own breast. He could have withdrawn the money at any time, and have made a new disposition of it, and she may not have been the wiser, so far as he knew. It is just as essential, to establish the trust sought to be set up here, to prove some act on the part of the donor that shall operate to pass the equitable title to the donee, as it is to prove delivery in a gift *inter vivos*. Both require the same essentials. In both, some title must pass from the donor, differing only in degree. A gift must be executed by delivery; a trust, by declaration.

In *Bank v. Fogg*, 82 Me. 538, 20 Atl. 92, the donor deposited a sum of money in the name of the donee, subject to his own order, with intent that, at his death, it should go to the donee. No trust was claimed or shown. It was an unexecuted purpose, an ineffectual attempt at testamentary disposition.

In *Parcher v. Institution*, 78 Me. 470, 7 Atl. 266, a depositor caused to be entered upon the bank ledger words, in substance, "Payable also to Mrs. Leavitt in case of my death," and it was held no gift.

In *Curtis v. Bank*, 77 Me. 151, the entry of "Subject also to" the donee was held to constitute no gift, but that a subsequent delivery of the bank book completed the gift.

In *Barker v. Frye*, 75 Me. 29, a deposit in the name of the donee, subject to the order of the donor during life, afterwards changed by erasing words giving the donor any control of the fund, and after notice to the donee of the change and that the bank book would be delivered to him the first time they met, and after his reply requesting that the book be sent to him, which the court says "was an acceptance of the gift," it was held that the gift was complete.

The same doctrine is held in *Northrop v. Hale*, 73 Me. 66; *Robinson v. Ring*, 72 Me. 140; *Drew v. Hagerty*, 81 Me. 231, 17 Atl. 63; *Parkman v. Bank*, 151 Mass. 218, 24 N. E. 43.

All of our cases require something more than a mere intention to give, a promise to give, or an expectation to give. Benevolence alone will not do. There must be beneficence also. The mystery sometimes supposed to exist about a trust cannot change the nature of a transaction. A voluntary trust is a gift, and requires all the essentials of a plain gift to sustain it.

In *Dresser v. Dresser*, *supra*, a writing specifying the terms of a voluntary trust, and a delivery of the trust property so that the dominion of the donor over it was thereafter lost, is a good example of a trust of this sort.

In *Alger v. Bank*, 146 Mass. 418, 15 N. E. 916, the donor made a deposit similar to the

one under consideration. It was in his own name, as trustee for the donee, his house-keeper, who claimed the deposit as a payment for her services. It was shown that, shortly before his death, he told her, "I put it in for you;" "that money is yours;" and the court held that the judge, who tried the case, was authorized to find a perfected gift, if he chose to do so.

Some of the cases are in conflict concerning the question now under consideration, more in the application of the law to the ever-varying facts in the numerous cases than otherwise; but our own cases are all consistent, and squarely hold to the doctrine that a trust in personal property may be created by parol, and that a deposit in bank in the name of another may be explained or controlled by evidence outside the written terms of the deposit. In this case, the terms of the deposit clearly show an intended trust in favor of the donee, but may be controlled or limited by extrinsic evidence. This evidence confirms the trust, showing that it should cease at the death of the donor, and that the legal title should then pass to the cestui. When the deposit was made, the treasurer of the bank told the donor that, at his decease, the money would go to the donee, and the donor replied that was his wish. All the subsequent acts and declarations of the donor show the same intent. The gift cannot be upheld as an absolute gift *inter vivos*, nor as a gift *causa mortis*, for these gifts require a delivery of the res, a complete transfer of title. They differ from a gift in trust in that they purport to, and must, pass the whole title, so that the donor can have no dominion or control over them. But a gift in trust withholds the legal title from the donee. It may be transmitted to a third person, or it may be retained by the donor, but in either case the equitable title has gone from him, and unless the declaration of trust contains the power of revocation, or the wide discretion of chancery attaches (*Coutts v. Acworth*, L. R. 8 Eq. 558; *Wollaston v. Tribe*, L. R. 9 Eq. 44; *Everitt v. Everitt*, L. R. 10 Eq. 405; 7 Ch. App. 244; 15 Ch. Div. 570; *Lister v. Hodgson*, L. R. 4 Eq. 30; *Sharp v. Leach*, 31 Beav. 491; *Anderson v. Elsworth*, 3 Giff. 154; *Toker v. Toker*, 31 Beav. 629; *Phillips v. Mullings*, 7 Ch. App. 247; *Smith v. Iliffe*, L. R. 20 Eq. 666; *Welman v. Welman*, 15 Ch. Div. 570, 578, 579; *Prideaux v. Lonsdale*, 1 De Gex, J. & S. 433), it leaves him powerless to extinguish the trust. Of course, the trust must be established by proof, and the fact that no evidence of a voluntary trust once created remains, or can be shown, does not alter the principle. Many rights fail of enjoyment from the lack of evidence that might once be adduced. So, a secret trust may be valid when it can be proved; but if the donor conceals the evidence of it, and later appropriates the fund to his own use, it is simply a wrong on his part, that prevails because of his perfidy, and goes unpunished and un-

noticed because unknown. The cestui's rights are the same, although his remedy may have been destroyed.

In the case of *In re Smith's Estate*, 144 Pa. St. 428, 22 Atl. 916, a lad of 3 years went to live with his uncle. When the lad was 12 the uncle placed \$13,000 in bonds in an envelope, on which he had written and signed a declaration that he held them for his nephew. The bonds remained in the uncle's possession until his death, and the court held a completed gift in trust for the nephew.

In *Bank v. Albee*, 64 Vt. 571, 25 Atl. 487, the court says: "A completed trust, although voluntary, may be enforced in equity. It is not essential that the beneficiary should have had notice of its creation or have assented to it. The owner or donor of personal property may create a perfect or complete trust by his unequivocal declaration in writing, or by parol, that he himself holds such property in trust for the purposes named. The trust is equally valid whether he constitutes himself or another person the trustee."

In that case a father deposited money in a savings bank in the name of his son, naming himself trustee. It appeared that one motive of the father was to avoid taxation; but, said the court, "that fact does not negative the idea that he also intended to create a trust for the benefit of his son. It is perfectly consistent with it, and the retention of the pass book is not inconsistent with such a purpose. He must have retained it as trustee."

Ray v. Simmons, 11 R. I. 266, is in point. One Bosworth deposited money in a savings bank in his own name as trustee for a step-daughter. He did not tell her what he had done, nor show her the pass book. He kept that himself. After his death, the court held that the stepdaughter was entitled to the money,—that the transaction constituted a trust in her favor.

So is *Martin v. Funk*, 75 N. Y. 134. Susan Boone deposited \$500 in a savings bank "in trust for Lillie Willard." Susan kept the pass book, and Lillie had no knowledge of it until after Susan's death. Want of notice to Lillie, and the retention of the pass book by Susan, were urged in defense; but the court held a gift in trust complete. This is an exhaustive case, and contains a review of authorities by Chief Justice Church prior to 1878.

So is *Minor v. Rogers*, 40 Conn. 512. A widow deposited \$250 in her own name, "as trustee of William A. Minor," the child of a neighbor. The child knew nothing of the deposit until after the depositor's death, and meantime did not have possession of the pass book; and the court held the trust complete, and allowed a recovery of the money from the depositor's executor.

So is *Re Gaffney's Estate*, 146 Pa. St. 49, 23 Atl. 163. It appeared that Hugh Gaffney deposited \$560 in his own name, as trustee for Polly Kim, and the court held the entry itself *prima facie* evidence of the trust, and, unexplained, sufficient to uphold it.

In *Gerrish v. Institution*, supra, the court says: "No particular form of words is required to create a trust in another, or to make the party himself a trustee for the benefit of another; that it is enough for the latter purpose if it be unequivocally declared in writing,—or orally, if the property be personal; that it is held in trust for the person named; that when the trust is thus created, it is effectual to transfer the beneficial interest, and operates as a gift perfected by delivery."

The same case holds that notice to the beneficiary is unnecessary where the transaction is clear; but when ambiguous, or susceptible of different interpretations, it removes the doubt, and is decisive of the purpose of the donor. Some of the earlier Massachusetts cases seem to hold notice to the beneficiary essential to the validity of a trust, but, when

considered in the light of this case, rather consider the notice a controlling than an essential element in the creation of a voluntary trust. The prevailing doctrine now is that notice is unnecessary, but, when shown, has controlling effect.

In this case, the entry "in trust for" is of clear and unmistakable import, and sufficient to create a prima facie trust. It might have been controlled by evidence that would have shown a contrary intention, but such evidence is wholly wanting. Moreover, all the declarations, acts, and conduct of the donor are consistent with the presumption arising from the entry itself, and show that it expresses the true import of the transaction, and creates a completed trust in favor of the donee.

Decree accordingly, with costs against the estate.

KIRKLAND v. COX et al.

(94 Ill. 400.)

Supreme Court of Illinois. Jan. Term, 1880.

Appeal from circuit court, Montgomery county; Charles S. Zane, Judge.

Alex. J. P. Garesche and E. Lane, for appellant. James M. Truitt and Rice & Miller, for appellees.

SCHOLFIELD, J. In this form of action, since the naked legal title must control, we think it sufficient to show that title is not in appellees, and the judgment below cannot, therefore, be sustained.

The rule is, undoubtedly, as claimed by appellees' counsel, that trustees must be presumed to take an estate only commensurate with the charges or duties imposed on them; but this, however, is subject to the qualification that such presumption shall be consistent with the intention of the party creating the trust, as manifested by the words employed in the instrument by which it is created. *Shelley v. Edlin*, 4 Adol. & El. 582-589, 31 E. C. L. 143; *Cadogan v. Ewart*, 7 Adol. & El. 636, 666; *Davies v. Davies*, 1 Adol. & El. (N. S.) 430, 41 E. C. L. 611.

Under the statute of uses, which is in force here, where an estate is conveyed to one person for the use of or upon a trust for another, and nothing more is said, the statute immediately transfers the legal estate to the use, and no trust is created, although express words of trust are used. *Perry, Trusts*, § 298. And so we have expressly held. *Witham v. Brooner*, 63 Ill. 344; *Lynch v. Swayne*, 83 Ill. 336.

But this, it will be observed, has reference only to passive trusts, or what are sometimes termed simple or dry trusts; and in such cases the legal estate never vests in the feoffee for a moment, but is instantaneously transferred to the cestui que use as soon as the use is declared. 2 Bl. Comm. (Sharswood's Ed.) 331, 332; and *Witham v. Brooner*, supra.

It is said in *Perry on Trusts* (section 300): "Although it is probable that it was the intent of the statute (i. e., of uses) to convert all uses or trusts into legal estates, yet the convenience to the subject of being able to keep the legal title to an estate in one person, while the beneficial interest should be in another, was too great to be given up altogether, and courts of equity were astute in finding reasons to withdraw a conveyance from the operation of the statute. Three principal reasons or rules of construction were laid down whereby conveyances were excepted from such operation: First, where a use was limited upon a use; second, where a copyhold or leasehold estate, or personal property was limited to uses; third, where such powers or duties were imposed with the estate upon a donee to uses that it was necessary that he should continue to hold the

legal title in order to perform his duty or execute the power. In all of these three instances courts, both of law and equity, held that the statute did not execute the use, but that such use remained as it was before the statute, a mere equitable interest to be administered in a court of equity." And again, in section 305, it is said: "The third rule of construction is less technical, and relates to special or active trusts, which were never within the purview of the statute. Therefore, if any agency, duty or power be imposed on the trustee, as, by a limitation to a trustee and his heirs to pay the rents, or to convey the estate, or if any control is to be exercised or duty performed by the trustee in applying the rents to a person's maintenance, or in making repairs, or to preserve contingent remainders, or to raise a sum of money, or to dispose of the estate by sale, in all these and in other and like cases, the operation of the statute is excluded, and the trusts or uses remain mere equitable estates. So, if the trustee is to exercise any discretion in the management of the estate, in the investment of the proceeds or the principal, or in the application of the income, or if the purpose of the trust is to protect the estate for a given time, or until the death of some one, or until division. * * * And again, in regard to enlarging and extending estates given to trustees, the same author, in section 315, says: "So, if land is devised to trustees without the word heirs, and a trust is declared which can not be fully executed but by the trustees taking an inheritance, the court will enlarge or extend their estate into a fee simple to enable them to carry out the intention of the donors. Thus, if land is conveyed to trustees without the word heirs, in trust to sell, they must have the fee, otherwise they could not sell. The construction would be the same if the trust was to sell the whole or a part, for no purchasers would be safe unless they could have the fee, and a trust to convey or to lease at discretion would be subject to the same rule. A fortiori, if an estate is limited to trustees and their heirs, in trust to sell or mortgage or to lease at discretion, or if they are to convey the property in fee, or to divide it equally among certain persons, for to do any or all of these acts requires a legal fee." See, also, to the same effect, *Hill, Trustees* (4th Am. Ed.) 376; *Rees v. Williams*, 2 Mees. & W. 749.

In those cases where the legal fee is not vested in the trustee, it will, of course, in the absence of a devise prevailing to the contrary, vest in the heir at law. And there are also cases in which, it having been the duty of the trustee to convey to the heir at law, it will be presumed, after the lapse of considerable time, that such conveyance has been made. *Hill, Trustees* (4th Am. Ed.) 401; *Perry, Trusts*, § 350; *Gibson v. Rees*, 50 Ill. 383; *Pollock v. Maison*, 41 Ill. 516. But it is not claimed, nor could it be, that there is

any foundation for such presumption in the facts found in this record.

In *Harris v. Cornell*, 80 Ill. 67, it was said, referring to *Hardin v. Osborn*, Sept. Term, 1875, that it had been held the purposes of a trust having been accomplished, the owner of the trust became, by operation of law, re-invested with the legal title and could sue in ejectment. This was unadvisedly said. A rehearing was granted in *Hardin v. Osborn*, and the opinion therein referred to was withdrawn. In *McNab v. Young*, 81 Ill. 11, language of like import as that used in *Harris v. Cornell*, supra, was used upon the authority of the same case, although it is therein erroneously referred to as being reported in 60 Ill., at page 93. The case there reported, of that name, does not discuss that or any kindred question.

The true doctrine in regard to active trusts, and that adhered to by this court, is expressed in *Vallette v. Bennett*, 69 Ill., at page 636, that where the legal title is vested in the trustee, nothing short of a reconveyance can place the legal title back in the grantor or his heirs, subject, of course, to the qualification that, under certain circumstances, such reconveyance will be presumed without direct proof of the fact.

The language of Walsh's will is: "As to my worldly estate, all the real, personal and mixed, of which I shall die seized and possessed, * * * I hereby grant, devise, convey and confirm unto" (naming the trustees), "in trust," etc. He then directs his said trustees to assume and take entire control of his estate; to collect all outstanding dues, rents, profits and interests of whatever character, derived therefrom, and to govern and control all such interests as may accrue and arise to said estate from time to time; to make such disposal of said estate as shall in their judgment benefit and increase the value of said estate; that said trustees "shall pay, or cause to be paid, out of said estate," to his daughter, Mary Lucy, "such installments of money as in the judgment of said trustees shall be deemed proper and sufficient to meet her current expenses, and provide her an ample and comfortable support;" that said trustees should transfer his estate to his said daughter upon her reaching the age of 35 years, she being then unmarried, but if then married, they are directed to transfer the estate to her only upon the contingency that they should deem her husband a person in whom confidence might be placed; but if the trustees should deem the husband an incompetent and unfit person to have the care and control of the estate, they are directed to continue to make payments to his daughter, "in such amounts and at such times as in their judgment they may think proper," and that the circumstances and station of his daughter may demand; that in the event of the death of his daughter without issue, certain specific legacies, amounting to some \$2,-

600 in the aggregate, are given, and the balance of his estate is to be divided equally between the House of the Good Shepherd, Saint Joseph's Male Orphan Asylum, and Saint Ann's Infant Asylum; and he then exempts his trustees from liability for all losses occurring without their fault.

This very clearly gave the entire control and management of the estate to the trustees until Mary Lucy should arrive at the age of 35 years—being unmarried; and she having died before she reached that age, the control and management of the estate continued to devolve upon them. The language employed so plainly conveys this idea that it can admit of no controversy.

The power "to make such disposal of the estate as shall," in the judgment of the trustees, "benefit and increase the value of said estate,"—as also the duty of paying Mary Lucy "such installments of money as in the judgment of said trustees shall be proper and sufficient to meet her current expenses and provide an ample and comfortable support,"—necessarily imply the power to sell the lands and convert them into money or interest bearing securities; for this might well, in the judgment of the trustees, benefit and increase the estate, and be essential to make payment of the sums directed to be paid to Mary Lucy. The power implied to sell, is to sell the whole title,—and to this is essential the power to convey that title, requiring, as a condition precedent, a fee-simple estate in the trustees.

The property is devised to the trustees to sell and convey, if they deem it advisable, or to hold and control until it is to be transferred as directed; and in the contingency that has arisen, it was intended that it should be the duty of the trustees to make the equal division of the property between the corporations designated and convey it accordingly; for the grant to these corporations is in severalty, and not as tenants in common, and their title must necessarily rest on the conveyance of the trustees.

Whether the corporations can hold or not is not now material. The words of the devise show the intention of the testator that the trustees should take a fee, whether he was mistaken in the law as respects the objects of his intended bounty or not. The only difference would be, if the corporations cannot take, the trustees, instead of holding the legal title in trust for them, hold it in trust for the heirs at law. *Hill, Trustees* (4th Am. Ed.) 208, 209.

The legal title, then, being in the trustees, the heirs at law could not maintain ejectment. *Perry, Trusts*, §§ 17, 328, 520; *Hill, Trustees* (4th Am. Ed.) 422, 423, *274; *Id.* 482, *317; *Id.* 672, *428; *Id.* 784, *503; *Bull. & T. Trusts & Trustees*, p. 811.

The judgment of the circuit court is reversed.

Judgment reversed.

DELANEY v. McCORMACK et al.

(88 N. Y. 174.)

Court of Appeals of New York. Feb. 28, 1882.

Appeal from judgment of the general term of the supreme court, in the Second judicial department, entered upon an order made the second Monday of December, 1881, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at special term. Reported below, 25 Hun, 574.

This action was brought to obtain a construction of the will of John Walsh, late of the city of New York, deceased. The clauses of the will as to which there was any controversy are as follows:

"Thirdly. I give, devise, and bequeath unto my said son James, during his natural life, all the rents, issues, and profits of my real estate, and in case he marries and has lawful issue, then and in the last-mentioned event and thereupon I give, devise, and bequeath to my said son James all and singular my real estate, whatsoever and wheresoever, to have and to hold, the same to my said son, his heirs and assigns forever.

"Fourthly. I desire my executors to keep the buildings on my real estate insured against loss or damage by fire, and in repair, and to pay all taxes, assessments, and other charges thereon, and also the interest on incumbrances by mortgage thereon; and, if necessary, they are authorized to receive sufficient of the rents to enable them so to do; and in case of damage or loss by fire they are to receive the avails of the insurance, and to repair or rebuild; but this clause of my will is only to have effect until my said son James shall have lawful issue; and I also authorize my said executors, until that event, to raise, by mortgage of my real estate, or any part thereof, whenever and as often as shall be necessary, a similar amount as is now on mortgage of my said estate, wherewith to discharge the present mortgage if necessary.

"Fifthly. In case of the death of my son James without ever having had any lawful issue, I desire my executors who shall then be surviving, or the last survivor, to sell all my real estate, and to distribute the proceeds thereof amongst my next of kin as personal estate, according to the laws of the state of New York for the distribution of intestate personal estate; and for that purpose I authorize my said surviving executors or the last survivor to execute good, valid, and sufficient conveyances in the law to transfer said estate, and vest the same in the purchaser and purchasers in fee simple.

"Lastly. I appoint my beloved wife, and my beloved son James, and my friend Tighe Davey to be the executors of this my last will and testament."

The testator died in 1836, leaving, surviving him, his son James, one nephew, the plaintiff herein, and four nieces. James died in 1880, unmarried, and having had no

lawful issue. The two other executors died before him, as did also the four nieces of the testator. The defendants are the children of said nieces.

John W. Goff, for appellant McCormack. Luke F. Cozans and J. Woolsey Shephard, for appellants Walker et al. John R. Kuhn, for respondent.

FINCH, J. The testator gave to his son James the whole of his real estate for life, and absolutely and in fee, in case the son married and had issue; but if he died without having had lawful issue, the testator directed his executors who should then be surviving, or the last survivor of them, to sell his real estate and distribute the proceeds among the testator's "next of kin, as personal estate, according to the laws of the state of New York, for the distribution of intestate personal estate." The executors named were the testator's wife, his son James, and his friend Tighe Davey; all of whom are dead. James died without having had lawful issue. At testator's death his next of kin were his son James, four nieces, and a nephew, who is the present plaintiff. The four nieces died during the lifetime of James, but leaving children who are defendants here, and claim an interest in the proceeds of the real estate, or in the real estate itself. At the date of the death of James the plaintiff was the sole next of kin of the testator, and claiming the entire proceeds of the real estate, brought an action for a construction of the will and the appointment of a trustee to carry out its unexecuted provisions. The trial court determined that it had jurisdiction to appoint a trustee, and made such appointment, and that the plaintiff was entitled to the entire proceeds of the real estate after payment of the liens thereon. That judgment was affirmed, and the children of two of the nieces bring this appeal.

It is contended in their behalf that the devise to James, before marriage and the birth of issue, was but a life estate; that the remainder in fee vested at the death of testator in his heirs at law; that the four nieces and plaintiff took such remainder in fee as tenants in common, subject to be divested by the marriage of James and birth of lawful issue; that this contingency not having occurred the fee was not divested; and that it cannot be divested by a sale of the real estate and disposition of the proceeds as personalty because the power of sale given to the executors was a mere naked power, not coupled with any interest; died with the donees to whom it was given; and cannot be executed by a court of equity.

It might prove to be the better opinion that James took a base, or determinable fee, subject to be divested upon his death without having had lawful issue, so that during his life there was no fragment of the estate

to descend upon his heirs at law, but the character of his interest need not be particularly discussed if the power of sale survived the death of the executors, and the real estate is to be distributed as personality. That is the vital point in the case, and the appellant's view of it is sought to be sustained by a reference to the rule at common law, which, it is said, the Revised Statutes have not seriously changed, but have omitted any provision, express or implied, which gives the court authority to appoint a trustee to execute a naked power. The argument turns in the end upon the single inquiry whether the authority given to the executors to sell is a mere naked power, or a power in trust and its execution imperative. The statutory provisions must control and determine the result, and render unnecessary any discussion or examination of the cases previously decided, which were not always harmonious and in some instances not easily reconciled. They were very ably and patiently examined in *Dominick v. Sayre*, 3 Sandf. 555, resulting in a general conclusion that the statutory revision substantially followed and adopted the rules of the common law, departing from them only to remove doubts and secure greater accuracy and precision. But in any event the statutes must furnish the rule by which we are to be guided to a conclusion, for they begin with a comprehensive provision abolishing all powers as then existing by law, and making their creation, construction and execution to be governed by the succeeding enactments. 1 Rev. St. pt. 2, c. 1, tit. 2, art. 3, § 73. A power is there defined to be "an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power might himself lawfully perform." Section 74. The authority here given to the executors of John Walsh to sell the lands and distribute the proceeds in the event of the death of James without having had issue was clearly a power within the statutory definition. It was also a general and not a special power, for the former exists where the authority permits the alienation in fee by means of a conveyance, will or charge of the lands embraced in the power to any alienee whatever (section 77), and the latter when the alienation must be to designated persons, or of a less estate or interest than a fee. Section 78. A distinction is then drawn between cases in which no person other than the grantee of the power has any interest in its execution, in which case the power, whether general or special, is denominated beneficial (section 79), and cases in which the grantee has no interest in its execution, but holds it for the benefit of others. A general power is in trust "when any person or class of persons, other than the grantee of such power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from the alienation of the lands according to the pow-

er." Within this definition the general power conferred upon the executors to sell the lands and distribute the proceeds to testator's next of kin was a power in trust, in the execution of which the grantees had no interest, for, although James was one of them, the power, by its terms, was to be exercised upon his death, and in an event which left him without any interest in its execution. These statutory definitions seem to us entirely accurate and clear and scarcely need, at least for present purposes, the "authoritative exposition" invoked. A power to be exercised by the grantee, not at all for his own benefit but wholly and entirely for the benefit of some other person or class of persons, is necessarily exercised by such grantee in a trust capacity. The element of trust inheres in its substance and is its essential and vital characteristic. The statutes then provide that every trust power shall be imperative, and impose a duty upon the grantee, the performance of which may be compelled in equity, unless in a case where its execution or non-execution is made expressly to depend upon the will of the grantee, and does not cease to be such even though he may have the right to select some and exclude others from among the objects of the trust. Sections 96, 97. So far, it is determined for us, that the authority granted to the executors of John Walsh is a general power in trust, and imperative. Being such, a further provision, reaching the emergency of the death of the grantees, becomes applicable. It is enacted (section 102) that the provisions of sections 66 to 71 of article 2, relating to express trusts, shall apply to powers in trust, and section 68 of that article confers upon the court, upon the death of the surviving trustee, his powers and duties, and permits them to be exercised by some person appointed for that purpose under the direction of the court. The statutes therefore answer the whole argument of the appellants. The power in trust conferred upon the executors did not die with them, but survived and vested in the courts of equity having full power to compel the execution of the trust. If in *Catton v. Taylor*, 42 Barb. 578, there is any thing to the contrary, which seems to be the fact, it was decided without reference to the statutes and does not alter or modify our conclusion. The power in this case was general, in trust and imperative. It was not of a character personal to the trustees as involving the exercise of their individual choice and discretion, and might as well be executed by persons other than themselves. Probably it would have survived before the Revised Statutes, but certainly remains and is enforceable since.

Assuming then the validity of the trust power and the jurisdiction of equity to provide for its exercise, the appellants still contend that the "next of kin," to whom the proceeds of the real estate were to be distributed, are the persons or their representa-

tives who were such at the date of the death of the testator, and not those who were such at the date of the death of James. There is no question here of the suspension of the power of alienation, for the sale and distribution awaited only the termination of a single life; but nevertheless the argument of the appellants proceeds, and must necessarily proceed, upon the idea that the next of kin of the testator at his death took vested interests in a legacy, payable in the future, since otherwise the right of each would lapse and nothing would pass to their representatives. But there is no gift to the next of kin, and no language importing such gift, except in the direction to convert the real estate into money and then make distribution; and in such case the rule is settled that time is annexed to the substance of the gift and the vesting is postponed. Much more is that true where the gift is only to vest upon the happening of a future contingency, until the occurrence of which it is uncertain whether a gift will be made at all. *Warner v. Durant*, 76 N. Y. 136; *Leake v. Robinson*, 2 Mer. 387; *Smith v. Edwards*, 88 N. Y. 92. Here a future condition or contingency attached to the substance of the gift. It was conditioned upon the death of James without hav-

ing had lawful issue, so that the vesting was plainly postponed and the gift was future. There is the further and important fact that at the death of James the land was to be converted into personalty and be distributed as such, and the very subject of the gift was not to come into existence until the prescribed contingency. *Vincent v. Newhouse*, 83 N. Y. 511; *Hoghton v. Whitgreave*, 1 Jac. & W. 145. The case therefore falls within the rule that where the gift is money, and the direction for the conversion absolute, the legacy given to a class of persons vests in those who answer the description and are capable of taking at the time of distribution. *Teed v. Morton*, 60 N. Y. 506. Adding to these considerations the incongruity of a construction which would include James himself among the next of kin in the testator's mind and intention, we are entirely clear that the courts below correctly decided that the next of kin entitled were those who answered that description at the date of the distribution. We discover therefore no error in the disposition of the case.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

JACKSON v. PHILLIPS et al.

(14 Allen, 539.)

Supreme Judicial Court of Massachusetts.
Suffolk. Jan. Term, 1867.

Bill in equity by the executor of the will of Francis Jackson, of Boston, for instructions as to the validity and effect of the following bequests and devises:

"Article 4th. I give and bequeath to William Lloyd Garrison, Wendell Phillips, Edmund Quincy, Maria W. Chapman, L. Maria Child, Edmund Jackson, William I. Bowditch, Samuel May, Jr., and Charles K. Whipple, their successors and assigns, ten thousand dollars; not for their own use, but in trust, nevertheless, for them to use and expend at their discretion, without any responsibility to any one, in such sums, at such times and such places, as they deem best, for the preparation and circulation of books, newspapers, the delivery of speeches, lectures, and such other means, as, in their judgment, will create a public sentiment that will put an end to negro slavery in this country; and I hereby constitute them a board of trustees for that purpose, with power to fill all vacancies that may occur from time to time by death or resignation of any member or of any officer of said board. And I hereby appoint Wendell Phillips president, Edmund Jackson treasurer, and Charles K. Whipple secretary, of said board of trustees. Other bequests, hereinafter made, will sooner or later revert to this board of trustees. My desire is that they may become a permanent organization; and I hope and trust that they will receive the services and sympathy, the donations and bequests, of the friends of the slave.

"Article 5th. I give and bequeath to the board of trustees named in the fourth article of this will, their successors and assigns, two thousand dollars, not for their own use, but in trust, nevertheless, to be expended by them at their discretion, without any responsibility to any one, for the benefit of fugitive slaves who may escape from the slaveholding states of this infamous Union from time to time.

"Disregarding the self-evident declaration of 1776, repeated in her own constitution of 1780, that 'all men are born free and equal,' Massachusetts has since, in the face of those solemn declarations, deliberately entered into a conspiracy with other states to aid them in enslaving millions of innocent persons. I have long labored to help my native state out of her deep iniquity and her barefaced hypocrisy in this matter. I now enter my last protest against her inconsistency, her injustice, and her cruelty, towards an unoffending people. God save the fugitive slaves that escape to her borders, whatever may become of the commonwealth of Massachusetts!

"Article 6th. I give and bequeath to Wendell Phillips of said Boston, Lucy Stone, formerly of Brookfield, Mass., now the wife

of Henry Blackwell of New York, and Susan B. Anthony of Rochester, N. Y., their successors and assigns, five thousand dollars, not for their own use, but in trust, nevertheless, to be expended by them, without any responsibility to any one, at their discretion, in such sums, at such times, and in such places, as they may deem fit, to secure the passage of laws granting women, whether married or unmarried, the right to vote; to hold office; to hold, manage, and devise property; and all other civil rights enjoyed by men; and for the preparation and circulation of books, the delivery of lectures, and such other means as they may judge best; and I hereby constitute them a board of trustees for that intent and purpose, with power to add two other persons to said board if they deem it expedient. And I hereby appoint Wendell Phillips president and treasurer, and Susan B. Anthony secretary, of said board. I direct the treasurer of said board not to loan any part of said bequest, but to invest, and, if need be, sell and re-invest, the same in bank or railroad shares, at his discretion. I further authorize and request said board of trustees, the survivors and survivor of them, to fill any and all vacancies that may occur from time to time by death or resignation of any member or of any officer of said board. One other bequest, hereinafter made, will, sooner or later, revert to this board of trustees. My desire is that they may become a permanent organization, until the rights of women shall be established equal with those of men; and I hope and trust that said board will receive the services and sympathy, the donations and bequests, of the friends of human rights. And being desirous that said board should have the immediate benefit of said bequest, without waiting for my exit, I have already paid it in advance and in full to said Phillips, the treasurer of said board, whose receipt therefor is on my files.

"Article 8th. I now give to my three children equally the net income of the residue of my estate, during the term of their natural lives, in the following manner, namely: After the payment of my debts and the foregoing gifts and bequests, I give, bequeath and devise one undivided third part of the residue of my estate, real, personal and mixed, to my brother Edmund Jackson of said Boston, his successors and assigns, not for his or their own use, but in trust, nevertheless, with full power to manage, sell and convey, invest and re-invest, the same at his discretion, with a view to safety and profit;" and "the whole net income thereof shall be paid semi-annually to my daughter Eliza F. Eddy, during her natural life;" and at her decease, one-half of such income to be paid semi-annually "to the board of trustees constituted in the sixth article of this will, to be expended by them to promote the intent and purpose therein directed," and the other half to Lizzie F. Bacon, her daughter, during her

natural life; and at the decease of both mother and daughter, "to pay and convey the whole of said trust fund to said board of trustees constituted in the sixth article of this will, to be expended by them in the manner, and for the intent and purpose, therein directed."

By article 9th, the testator gave another undivided third part of the said residue to his brother Edmund, his successors and assigns, in trust, with like powers of management and investment, "and the whole net income thereof shall be paid semi-annually to my son James Jackson, during the term of his natural life; at his decease, I direct said trustee, or whoever may then be duly qualified to execute this trust, to pay semi-annually one-half part of the net income thereof to the board of trustees constituted in the fourth article of this will, and the other half-part of said net income shall be paid semi-annually to his children equally, during their natural lives; at the decease of all his children, if they survive him, I direct said trustee, or whoever shall then be duly authorized to execute this trust, to pay and convey the whole of said trust fund to said board of trustees constituted in said fourth article in this will, to be expended by them for the intent and purpose directed in said fourth article; but, in case my said son James should leave no child living at the time of his decease, then, at his decease, I direct said trustee, or whoever shall then be duly authorized to execute this trust, to pay and convey the whole of said trust fund to said board of trustees constituted in the fourth article of this will, to be expended by them for the intent and purpose therein directed."

By article 10th, the testator made a similar bequest and devise of the remaining undivided third part of said residue to his brother George Jackson, his successors and assigns, and in trust to pay the whole net income thereof semi-annually to the testator's daughter Harriette M. Palmer, during her natural life, and at her decease, one half of such income "to the board of trustees constituted in the fourth article of this will, to be expended by them in the manner and for the intent and purpose therein directed;" and the other half, in equal proportions, to all her children that may survive her, during the term of their natural lives; and, at their decease, to pay and convey the whole of said trust fund to said board of trustees; "but, in case my said daughter Harriette M. Palmer should outlive all her children, then, at her decease, I direct said trustee, or whoever shall then be duly authorized to execute this trust, to pay and convey the whole of said trust fund to the board of trustees constituted in said fourth article in this will, to be expended by them as aforesaid."

S. E. Sewall, for one of the trustees. G. W. Phillips, for others of the trustees. S. Bartlett and J. G. King, for certain heirs at law.

GRAY, J. This case presents for decision many important and interesting questions, which have been the subject of repeated discussion at the bar and of much deliberation and reflection by the court. The able and elaborate arguments of counsel have necessarily involved the consideration of the fundamental principles of the law of charities, and of a great number of the precedents from which they are to be derived; and have disclosed such diversity of opinion upon the extent and application of those principles, and the just interpretation and effect of the adjudged cases, as to require the principles in question to be fully stated, and supported by a careful examination of authorities, in delivering judgment.

I. By the law of this commonwealth, as by the law of England, gifts to charitable uses are highly favored, and will be most liberally construed in order to accomplish the intent and purpose of the donor; and trusts which cannot be upheld in ordinary cases, for various reasons, will be established and carried into effect when created to support a gift to a charitable use. The most important distinction between charities and other trusts is in the time of duration allowed and the degree of definiteness required. The law does not allow property to be made inalienable, by means of a private trust, beyond the period prescribed by the rule against perpetuities, being a life or lives in being and twenty-one years afterwards; and if the persons to be benefited are uncertain and cannot be ascertained within that period, the gift will be adjudged void, and a resulting trust declared for the heirs at law or distributees. But a public or charitable trust may be perpetual in its duration, and may leave the mode of application and the selection of particular objects to the discretion of the trustees. *Sanderson v. White*, 18 Pick. 333; *Odell v. Odell*, 10 Allen, 5, 6, and authorities cited; *Saltonstall v. Sanders*, 11 Allen, 446; *Lewin, Trusts*, c. 2.

Each of the bequests in the will of Francis Jackson, which the court is asked in this case to sustain as charitable, is to a permanent board of trustees, for a purpose stated in general terms only. The question of the validity of these trusts is not to be determined by the opinions of individual judges or of the whole court as to their wisdom or policy, but by the established principles of law; and does not depend merely upon their being permitted by law, but upon their being of that peculiar nature which the law deems entitled to extraordinary favor because it regards them as charitable.

It has been strenuously contended for the heirs at law that neither of the purposes declared by the testator is charitable within the intent and purview of St. 43 Eliz. c. 4, which all admit to be the principal test and evidence of what are in law charitable uses. It becomes necessary therefore to consider the spirit in which that statute has been construed and applied by the courts.

The preamble of the statute mentions three classes of charitable gifts, namely, First: For the relief and assistance of the poor and needy, specifying only "sick and maimed soldiers and mariners," "education and preferment of orphans," "marriages of poor maids," "supportation, aid and help of young tradesmen, handicraftsmen and persons decayed," "relief or redemption of prisoners and captives," and assistance of poor inhabitants in paying taxes, either for civil or military objects. Second: For the promoting of education, of which the only kinds specified in the statute (beyond the "education and preferment of orphans," which seems more appropriately to fall within the first class) are those "for maintenance of schools of learning, free schools, and scholars of universities." Third: For the repair and maintenance of public buildings and works, under which are enumerated "repair of ports, havens," and "seabanks," for promoting commerce and navigation and protecting the land against the encroachments of the sea; of "bridges," "causeways" and "highways," by which the people may pass from one part of the country to another; of "churches," in which religion may be publicly taught; and of "houses of correction."

It is well settled that any purpose is charitable in the legal sense of the word, which is within the principle and reason of this statute, although not expressly named in it; and many objects have been upheld as charities, which the statute neither mentions nor distinctly refers to. Thus a gift "to the poor" generally, or to the poor of a particular town, parish, age, sex, race, or condition, or to poor emigrants, though not falling within any of the descriptions of poor in the statute, is a good charitable gift. *Saltonstall v. Sanders*, 11 Allen, 455-461, and cases cited; *Magill v. Brown*, Brightly, N. P. 405, 406; *Barclay v. Maskelyne*, 4 Jur. (N. S.) 1294; *Chambers v. St. Louis*, 29 Mo. 543. So gifts for the promotion of science, learning and useful knowledge, though by different means and in different ways from those enumerated under the second class; and gifts for bringing water into a town, for building a town-house, or otherwise improving a town or city, though not alluded to in the third class; have been held to be charitable. *American Academy v. Harvard College*, 12 Gray, 594; *Drury v. Natick*, 10 Allen, 177-182, and authorities cited. By modern decisions in England, gifts towards payment of the national debt, or "to the queen's chancellor of the exchequer for the time being, to be applied for the benefit and advantage of Great Britain," are legal charities. *Tudor, Char. Trusts* (2d Ed.) 14, 15, and cases cited. Sergeant Maynard, long before, gave an opinion that a bequest "to the public use of the country of New England" was a good disposition to a charitable use. 1 *Hutch. Hist. Mass.* (2d Ed.) 101, note. And it may be mentioned as evidence of the use of the word "charitable" by the founders of Massa-

chusetts, that it was applied by the Massachusetts Company in 1628, before they crossed the ocean, to "the common stock" to be "raised from such as bear good affection to the plantation and the propagation thereof, and the same to be employed only in defrayment of public charges, as maintenance of ministers, transportation of poor families, building of churches and fortifications, and all other public and necessary occasions of the plantation." 1 *Mass. Col. Rec.* 68.

No kind of charitable trusts finds less support in the words of St. 43 Eliz. than the large class of pious and religious uses, to which the statute contains no more distinct reference than in the words "repair of churches." Such uses had indeed been previously recognized as charitable, and entitled to peculiar favor, by many acts of parliament, as well as in the courts of justice. St. 13 Edw. I. c. 41; 17 Edw. II. c. 2; 23 Hen. VIII. c. 10; 1 Edw. VI. c. 14; *Anon.*, And. 43, pl. 108; *Pitts v. James*, Hob. 123; *Cheney's Case*, Co. Litt. 342; *Gibbons v. Matyard*, Poph. 6, Moore, 594; *Coke's note to Porter's Case*, 1 *Coke*, 26a; *Bruerton's Case*, 6 *Coke*, 1b, 2a; *Barry v. Ley*, *Dwight, Char. Cas.* 92. In the latest of those acts, the "erecting of grammar schools for the education of youth in virtue and godliness, the further augmenting of the universities, and better provision for the poor and needy," were classed with charities for the maintenance of preachers, and called "good and godly uses;" and grammar schools were considered in those times an effectual means of forwarding the progress of the Reformation. St. 1 Edw. VI. c. 14, §§ 1, 8, 9; *Attorney General v. Downing*, *Wilm.* 15; *Boyle, Char.* 7, 8. Sir Francis Moore, who drew St. 43 Eliz., indeed says that a gift to maintain a chaplain or minister to celebrate divine service could not be the subject of a commission under the statute; but "was of purpose omitted in the penning of the act," lest, in the changes of opinion in matters of religion, such gifts might be confiscated in a succeeding reign as superstitious. Yet he also says that such a gift might be enforced by "the chancellor by his chancery authority;" and cites a case in which it was so decreed. *Duke, Char. Uses* (*Bridgman's Ed.*) 125, 154. And from very soon after the passage of the statute, gifts for the support of a minister, the preaching of an annual sermon, or other uses connected with public worship and the advancement of religion, have been constantly upheld and carried out as charities in the English courts of chancery. *Anon.*, *Cary*, 39; *Nash, Char.*; *Dwight, Char. Cas.* 114; *Pember v. Inhabitants of Knighton*, *Herne, Char. Uses*, 101, *Toth.* (2d Ed.) 34; *Duke, Char. Uses*, 354, 356, 381, 570, 614; *Boyle, Char.* 39-41; *Tudor, Char. Trusts*, 10, 11. So in this commonwealth, trusts for the support of public worship and religious instruction, or the spreading of religion at home or abroad, have always been deemed charitable uses. 4 *Dane, Abr.* 237; *Bartlet v. King*, 12 *Mass.* 536; *Go-*

ing v. Emery, 16 Pick. 107; *Sohler v. St. Paul's Church*, 12 Metc. (Mass.) 250; *Brown v. Kelsey*, 2 Cush. 243; *Earle v. Wood*, 8 Cush. 445. It is not necessary in this connection to speculate whether the admission of pious uses into the rank of legal charities in modern times is to be attributed to the influence of the civil law; to their having been mentioned in the earlier English statutes; to a more liberal interpretation, after religion had become settled in England, of the words "repair of churches," or, possibly, of the clauses relating to gifts for the benefit of education, in St. 43 Eliz.; or to the support given by the court of chancery to public charitable trusts, independently of any statute. It is sufficient for our present purpose to observe that pious and religious uses are clearly not within the strict words of the statute, and can only be brought within its purview by the largest extension of its spirit.

The civil law, from which the English law of charities was manifestly derived, considered wills made for good and pious uses as privileged testaments, which were not, like other wills, void for uncertainty in the objects, and which must be carried into effect even if their conditions could not be exactly observed; and included among such uses (which it declared to be in their nature perpetual) bequests for the poor, orphans, widows, strangers, prisoners, the redemption of captives, the maintenance of clergymen, the benefit of churches, hospitals, schools and colleges, the repairing of city walls and bridges, the erection of public buildings, or other ornament or improvement of a city. Poth. Pand. lib. 30-32, Nos. 57-62; Code, lib. 1, tit. 2, cc. 15, 19; Id., tit. 3, cc. 24, 28, 42, 46, 49, 57; Godol. Leg. pt. 1, c. 5, § 4; 2 Kent, Comm. (6th Ed.) 257; 2 Story, Eq. Jur. §§ 1137-1141; *McDonough v. Murdoch*, 15 How. 405, 410, 414.

Charities are not confined at the present day to those which were permitted by law in England in the reign of Elizabeth. A gift for the advancement of religion or other charitable purpose in a manner permitted by existing laws is not the less valid by reason of having such an object as would not have been legal at the time of the passage of the statute of charitable uses. For example, charitable trusts for dissenters from the established church have been uniformly upheld in England since the toleration act of 1 Wm. & M. c. 18, removed the legal disabilities under which such sects previously labored. *Attorney General v. Hickman*, 2 Eq. Cas. Abr. 193, W. Kel. 34; *Loyd v. Spillet*, 3 P. Wms. 344, 2 Atk. 148; *Attorney General v. Cock*, 2 Ves. Sr. 273. And in this country since the Revolution no distinction has been made between charitable gifts for the benefit of different religious sects.

Gifts for purposes prohibited by or opposed to the existing laws cannot be upheld as charitable, even if for objects which would otherwise be deemed such. The bounty must, in

the words of Sir Francis Moore, be "according to the laws, not against the law," and "not given to do some act against the law." *Duke, Char. Uses*, 126, 169. So Mr. Dane defines, as undoubted charities, "such as are calculated to relieve the poor, and to promote such education and employment as the laws of the land recognize as useful." 4 Dane, Abr. 237. Upon this principle, the English courts have refused to sustain gifts for printing and publishing a book inculcating the absolute and inalienable supremacy of the pope in ecclesiastical matters; or for the support of the Roman Catholic or the Jewish religion, before such gifts were countenanced by act of parliament. *De Themmines v. De Bonneval*, 5 Russ. 288; *Tudor, Char. Trusts*, 21-25, and cases cited. And a bequest "towards the political restoration of the Jews to Jerusalem and to their own land," has been held void, as tending to create a political revolution in a friendly country. *Habershon v. Vardon*, 4 De Gex & S. 467. In a free republic, it is the right of every citizen to strive in a peaceable manner by vote, speech or writing, to cause the laws, or even the constitution, under which he lives, to be reformed or altered by the legislature or the people. But it is the duty of the judicial department to expound and administer the laws as they exist. And trusts whose expressed purpose is to bring about changes in the laws or the political institutions of the country are not charitable in such a sense as to be entitled to peculiar favor, protection and perpetuation from the ministers of those laws which they are designed to modify or subvert.

A precise and complete definition of a legal charity is hardly to be found in the books. The one most commonly used in modern cases, originating in the judgment of Sir William Grant, confirmed by that of Lord Eldon, in *Morice v. Bishop of Durham*, 9 Ves. 405, 10 Ves. 541—that those purposes are considered charitable which are enumerated in St. 43 Eliz. or which by analogies are deemed within its spirit and intentment—leaves something to be desired in point of certainty, and suggests no principle. Mr. Binney, in his great argument in the *Girard Will Case*, 41, defined a charitable or pious gift to be "whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives, and to these ends—free from the stain or taint of every consideration that is personal, private or selfish." And this definition has been approved by the supreme court of Pennsylvania. *Price v. Maxwell*, 28 Pa. St. 35. A more concise and practical rule is that of Lord Camden, adopted by Chancellor Kent, by Lord Lyndhurst, and by the supreme court of the United States—"A gift to a general public use, which extends to the poor as well as the rich." *Jones v. Williams*, Amb. 652; *Coggeshall v. Pelton*, 7 Johns. Ch. 294; *Mitford v. Reynolds*, 1 Phil.

191, 192; *Perlin v. Carey*, 24 How. 506. A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature.

If the words of a charitable bequest are ambiguous or contradictory, they are to be so construed as to support the charity, if possible. It is an established maxim of interpretation, that the court is bound to carry the will into effect, if it can see a general intention consistent with the rules of law, even if the particular mode or manner pointed out by the testator is illegal. *Bartlet v. King*, 12 Mass. 543; *Inglis v. Sailor's Snug Harbor*, 3 Pet. 117, 118. If the testator uses a word which has two meanings, one of which will effect and the other defeat his object, the first is to be adopted. *Saltonstall v. Sanders*, 11 Allen, 455. When a charitable intent appears on the face of the will, but the terms used are broad enough to allow of the fund being applied either in a lawful or an unlawful manner, the gift will be supported, and its application restrained within the bounds of the law. The most frequent illustrations of this in the English courts have arisen under St. 9 Geo. II. c. 36 (commonly called the "Statute of Mortmain"), prohibiting devises of land, or bequests of money to be laid out in land, to charitable uses. In the leading case, *Lord Hardwicke* held that a direction to executors to "settle and secure, by purchase of lands of inheritance, or otherwise, as they shall be advised, out of my personal estate," two annuities to be paid yearly forever for charitable objects, was valid, because it left the option to the executor to make the investment in personal property, which was not prohibited by the statute; and said, "This bequest is not void, and there is no authority to construe it to be void, if by law it can possibly be made good," or (according to another and perhaps more accurate report) "no authority to construe it to be void by law, if it can possibly be made good." *Sorresby v. Hollins*, 9 Mod. 221, 1 Coll. Jurid. 439. The doctrine of that case has ever since been recognized as sound law. *Attorney General v. Whitchurch*, 3 Ves. 144; *Curtis v. Hutton*, 14 Ves. 539; *Dent v. Allcroft*, 30 Beav. 340; *Mayor, etc., of Faversham v. Ryder*, 5 De Gex, M. & G. 353; *Edwards v. Hall*, 11 Hare. 12, 6 De Gex, M. & G. 89. In a like spirit the house of lords recently decided that a bequest to erect buildings for charitable purposes if other lands should be given was valid, and could not be

held to be impliedly prohibited by St. 9 Geo. II. *Philpott v. St. George's Hospital* 6 H. L. Cas. 338. The rule stated in *Attorney General v. Williams*, 2 Cox, Ch. 388, and *Tatham v. Drummond*, 11 L. T. (N. S.) 325, upon which the heirs at law rely, that "the court will not alter its conception of the purposes of a testator, merely because those intentions happen to fall within the prohibition of the statute of mortmain," shows that no forced construction of the testator's language is to be adopted to avoid illegality, but does not affect the principle that a bequest which according to the fair meaning of the words may include a legal as well as an illegal application is to be held valid.

In the light of these general principles, we come to the consideration of the language of the different bequests in this will.

II. The first bequest which is drawn in question is that contained in the fourth article of the will, by which the sum of ten thousand dollars is given in trust to be used and expended at the discretion of the trustees, "in such sums, at such times and such places as they deem best, for the preparation and circulation of books, newspapers, the delivery of speeches, lectures and such other means as in their judgment will create a public sentiment that will put an end to the negro slavery in this country;" and the testator expresses a desire that they may become a permanent organization, and a hope "that they will receive the services and sympathy, the donations and bequests, of the friends of the slave."

Among the charitable objects specially designated in St. 43 Eliz. is the "relief or redemption of prisoners and captives." And this was not a peculiarity of the law of England or of that age. The civil law regarded the redemption of captives as the highest of all pious uses—in the words of Justinian, *causa piissima*—and not only declared that no heir, trustee or legatee should infringe or unjustly defeat the pious intentions of the testator by asserting that a legacy or trust for the redemption of captives was uncertain, and provided for the appointment of a trustee when none was named in the will, and for informing him of the bequest, but even authorized churches to alienate their sacred vessel and vestments for this one purpose, upon the ground that it was reasonable that the souls or lives of men should be preferred to any vessels or vestments whatsoever—"Quoniam non absurdum est animas hominum quibuscunque vasis vel vestimentis preferri." Code, lib. 1, tit. 2, c. 22; Id., tit. 3, cc. 28, 49; Id., lib. 8, tit. 54, c. 36; Nov. 7, c. 8; Id., p. 115, c. 3; Id., p. 120, c. 10; Id., p. 131, c. 11; *Godol. Leg. pt. 1, c. 5, § 4*.

The captives principally contemplated in St. 43 Eliz. were doubtless Englishmen taken and held as slaves in Turkey and Barbary. And the relief of our own citizens from such captivity was always deemed charitable in

Massachusetts, an illustration of which is found in the records of the governor and council in 1693, by whom a petition of the relations of two inhabitants of the province, "some time since taken by a Salley man of war, and now under Turkish captivity and slavery," for permission "to ask and receive the charity and public contribution of well disposed persons for redeeming them out of their miserable suffering and slavery," was granted; "the money so collected to be employed for the end aforesaid, unless the said persons happen to die before, make their escape, or be in any other way redeemed; then the money so gathered to be improved for the redemption of some others of this province, that are or may be in like circumstances, as the governor and council shall direct." Council Rec. 1693, fol. 323. But there is no more reason for confining the words of the statute of Elizabeth to such captives, than for excluding from the class of religious charities gifts for preaching the gospel to the heathen, which have uniformly been sustained as charitable, here and in England. Boyle, Char. 41; *Bartlet v. King*, 12 Mass. 536. Indeed it appears by Sir Francis Moore's reading upon the statute, that even in his time the word "captives" might include captive enemies. Duke, Char. Uses, 158.

It was argued that the slave trade was fostered and rewarded by the English government in the reign of Elizabeth, and therefore gifts for the relief of negro slaves could not be deemed within the purview of the statute of charitable uses. The fact is undoubted; but the conclusion does not follow. The permission of slavery by law does not prevent emancipation from being charitable. A commission of manumission, granted by Queen Elizabeth, twenty-seven years before the statute, recites that in the beginning God created all men free by nature, and afterwards the law of nations placed some under the yoke of slavery, and that the queen believed it would be pious and acceptable to God and according to Christian charity—"pium fore credimus et Deo acceptabile Christianæque charitati consentaneum"—to wholly enfranchise the vassals of the crown on certain royal manors. 20 Howell, St. Tr. 1372. See, also, Bar. Ob. (5th Ed.) 305, 308. The spirit of the Roman law upon this point is manifested by an edict of Constantine, which speaks of those who with a religious sentiment in the bosom of the church grant their slaves that liberty which is their due—"Qui religiosâ mente in ecclesiæ gremio servis suis meritam concesserint libertatem." Code, lib. 1, tit. 13, c. 2. That the words of the statute of charitable uses may be extended to negro slaves of English masters is clearly shown by the decision of Lord Cottenham, when master of the rolls, applying for the benefit of negroes in the British colonies in the West Indies the accumulations of a bequest made in 1670 "to redeem poor slaves." *Attorney General v. Gibson*, 2 Beav.

317, note; *Id.*, cited Craig & P. 226. In dealing with such a question, great regard is to be had to the favor which the law gives to liberty, so eloquently expressed by Chief Justice Fortescue: "*Crudelis enim necessario judicabitur lex, quæ servitutem augmentat et minuit libertatem. Nam pro eâ natura semper implorat humana. Quia ab homine et pro vitio introducta est servitus. Sed libertas a Deo hominis est indita naturæ. Quare ipsa ab homine sublata semper redire gliscit, ut facit omne quod libertati naturali privatur. Quo ipse et crudelis judicandus est, qui libertati non favet. Hæc considerantia Angliæ jura in omni casu libertati dant favorem.*" Fortes. De Laud. c. 42.

But the question of the lawfulness of this gift, if falling within the class of charitable uses, depends not upon the laws and the public policy of England at the time of the passage of the statute, but upon our own at the time of the death of the testator. It was seriously argued that, before the recent amendment of the constitution of the United States, "a trust to create a sentiment to put an end to negro slavery, would, having regard to the constitution and laws under which we live, be against public policy and thus be void;" but the court is unable to see any foundation for this position in the constitution and laws, either of the United States or of this commonwealth.

The law of Massachusetts has always been peculiarly favorable to freedom, as may be shown by a brief outline of its history. The "rights, liberties and privileges," established by the general court of the colony in 1641, to be "impartially and inviolably enjoyed and observed throughout our jurisdiction forever," declared: "There shall never be any bond slavery, villenage or captivity amongst us, unless it be lawful captives taken in just wars, and such strangers as willingly sell themselves or are sold to us. And these shall have all the liberties and Christian usages which the law of God established in Israel concerning such persons doth morally require. This exempts none from servitude who shall be judged thereto by authority." The last proviso evidently referred to punishment for crime. Body of Liberties, art. 91. This article, leaving out the word "strangers" in the clause as to slaves acquired by sale, was included in each revision of the laws of the colony. Mass. Col. Laws (Ed. 1660) 5; *Id.* (Ed. 1672) 10; 4 Mass. Col. Rec. pt. 2, p. 467. It is worthy of observation, that the tenure upon which the Massachusetts Company held their charter, as declared in the charter itself, was as of the manor of East Greenwich in the county of Kent; that no one was ever born a villein in Kent (Y. B. 30 Edw. I, p. 168; Fitzh. Abr. "Villenage," 46; 3 Seld. Works, 1876); and that the Body of Liberties contained articles upon each of the principal points distinctive of the Kentish tenure of gavelkind—freedom from escheats on attainder and execution for felony, the power to devise, the

age of alienation, and descent to all the sons together—adopting some and modifying others. Body of Liberties, arts. 10, 11, 53, 81; 2 Bl. Comm. 84.

In the laws of Europe, at the time of the foundation of the colony, descent was named first among the sources of slavery. The common law, following the civil law, repeated "*Servi aut nascuntur aut fiunt*," and differed only in tracing it through the father, instead of the mother; and each system recognized that a man might become a slave by capture in war, or by his own consent or confession in some form. Just. Inst. lib. 1, tit. 3; Bract. 4b; Fleta, lib. 1, c. 3; Eedes v. Holbadge, Act. Can. 393; Swinb. Wills, pt. 2, § 7; Co. Litt. 117b. And such was then the established law of nations. Gro. De Jure B. lib. 2, c. 5, §§ 27, 29; Id. lib. 3, c. 7. In parts of England, hereditary villenage would seem to have still existed in fact; and it was allowed by law until since the American Revolution. Pigg v. Caley, Noy, 27; Co. Litt. 116-140; 2 Inst. 28, 45; 2 Rolle, Abr. 732; Smith v. Brown, 2 Salk. 666, Holt, 495; Smith v. Gould, 2 Salk. 667, 2 Ld. Raym. 1275; Treblecock's Case, 1 Atk. 633; The King v. Ditton, 4 Doug. 302. Lord Bacon, in explaining the maxim, "*Jura sanguinis nulla jure civili dirimi possunt*," with a coolness which shows that in his day and country the illustration was neither unfamiliar nor shocking, says, "If a villein be attainted, yet the lord shall have the issue of his villein born before or after his attainder; for the lord hath them jure nature but as the increase of a flock." Bac. Max. reg. 11.

The Massachusetts Body of Liberties, as Governor Winthrop tells us, was composed by Nathaniel Ward, who had been "formerly a student and practiser in the course of the common law." 2 Winthrop's Hist. New England, 55. In view of the other laws of the time, the omission, in enumerating the legal sources of slavery, of birth, the first mentioned in those laws, is significant. No instance is known in which the lawfulness of hereditary slavery in Massachusetts under the charter of the colony or the province was affirmed by legislative or judicial authority; and it has been denied in a series of judgments of this court, beginning in the last century, in each of which it was essential to the determination of the rights of the parties. Littleton v. Tuttle, 4 Mass. 128, note; Lanesborough v. Westfield, 16 Mass. 74; Edgartown v. Tisbury, 10 Cush. 408. The case of Perkins v. Emerson, 2 Dane, Abr. 412, did not touch this question; but simply determined that a person received into a house as a slave of the owner was not received "as an inmate, boarder or tenant," so that notice of the place whence such person last came must be given to the selectmen under Prov. St. 10 Geo. II.; Anc. Chart. 508. No doubt many children of slaves were in fact held as slaves here, especially after the Province

Charter, during the period of which all acts of the general court were required to be transmitted to England for approval. Earlier ordinances which had not been so approved were hardly recognized by the English government as of any force. The policy of England restrained the colonists from abolishing the African slave trade, and the number of slaves (which had been very small under the comparatively independent government of the colony) was much increased. The practice of a whole people does not always conform to its laws. Thousands of negroes were held as slaves in England and commonly sold in public at the very time when Lord Mansfield and other judges decided such holding to be unlawful. *Sommersett's Case*, 20 Howell, St. Tr. 72, 79, Lofft, 17; Quincy, 97, note; *The Slave Grace*, 2 Hagg. Adm. 105, 106.

While negro slavery existed in Massachusetts, it was in a comparatively mild form. The marriages of slaves were protected by the legislature and the courts; according to the opinion of Hutchinson and of Dane, slaves might hold property; they were admitted as witnesses, even on capital trials of white persons, and on suits of other slaves for freedom; they might sue their masters for wounding or immoderately beating them; and indeed hardly differed from apprentices or other servants except in being bound for life. See authorities and records cited in Quincy, 30, 31, note; 2 Dane, Abr. 313. The annual tax acts show that before the Declaration of Independence they were usually taxed as property, always afterwards as persons. The general court in September 1776 forbade the sale of two negroes taken as prize of war on the high seas and brought into this state, and resolved that any negroes so taken and brought in should not be allowed to be sold, but should be treated like other prisoners. Res. Sept. 1776, c. 83.

It was in Massachusetts, by the first article of the declaration of rights prefixed to the constitution adopted in 1780, as immediately afterwards interpreted by this court, that the fundamental axioms of the Declaration of Independence—"that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness"—first took at once the form and the force of express law; slavery was thus wholly abolished in Massachusetts; and it has never existed here since, except so far as the constitution and laws of the state were held to be prevented by the constitution and laws of the United States from operating upon fugitive slaves. *Caldwell v. Jennison*, Rec. 1781, fol. 79, 80; *Jennison's Petition*, Jour. H. R. June 18, 1782, fol. 89; *Comm. v. Jennison*, Rec. 1783, fol. 85; *Parsons, C. J.*, in *Winchendon v. Hatfield*, 4 Mass. 128; 4 Mass. Hist. Coll. 203, 204; *Comm. v. Aves*, 18 Pick. 208, 210, 215, 217; 2 Kent, Comm. (6th Ed.) 252; *Betty v. Horton*, 5 Leigh, 623.

The doctrine of our law, upon this subject, as stated by Chief Justice Shaw in delivering the judgment of the court in *Com. v. Aves*, just cited, is that slavery is a relation founded in force, contrary to natural right and the principles of justice, humanity and sound policy; and could exist only by the effect of positive law, as manifested either by direct legislation or settled usage. The same principle has been recognized by Chief Justice Marshall and Mr. Justice Story, speaking for the supreme court of the United States. *The Antelope*, 10 Wheat. 120, 121; *Prigg v. Pennsylvania*, 16 Pet. 611.

The constitution of the United States uniformly speaks of those held in slavery, not as property, but as persons; and never contained anything inconsistent with their peaceable and voluntary emancipation. As between master and slave, it would require the most explicit prohibition by law to restrain the right of manumission. *McCutchen v. Marshall*, 8 Pet. 238. We cannot take judicial notice of the local laws of other states of the Union except so far as they are in proof. *Knapp v. Abell*, 10 Allen, 488. But it appears by cases cited at the bar that bequests of manumission were formerly favored in Virginia; and that it was more recently decided in Mississippi that a trust created by will for paying the expenses of transporting the testator's slaves to Africa and maintaining them in freedom there was lawful. *Charles v. Hunnicutt*, 5 Call, 311; *Wade v. American Colonization Soc.*, 7 Smedes & M. 663. A state of slavery, in which manumission was wholly prohibited, has never been known among civilized nations. Even when slavery prevailed throughout the world, the same common law of nations, *jus gentium*, which justified its existence, recognized the right of manumission as a necessary consequence. *Just. Inst. lib. 1, tit. 5.*

We fully concur with the learned counsel for the heirs at law that if this trust could not be executed according to the intention of the testator without tending to excite servile insurrections in other states of the Union, it would have been unlawful; and that a trust which looked solely to political agitation and to attempts to alter existing laws could not be recognized by this court as charitable. But such does not appear to us to be the necessary or the reasonable interpretation of this bequest. The manner stated of putting an end to slavery is not by legislation or political action, but by creating a public sentiment, which rather points to moral influence and voluntary manumission. The means specified are the usual means of public instruction, by books and newspapers, speeches and lectures. Other means are left to the discretion of the trustees, but there is nothing to indicate that they are not designed to be of a kindred nature. Giving to the bequest that favorable construction to which all charitable gifts are

entitled, the just inference is that lawful means only are to be selected, and that they are to be used in a lawful manner.

It was further objected that "to create a public sentiment" was too vague and indefinite an object to be sustained as a charitable use. But "a public sentiment" on a moral question is but another name for public opinion, or a harmony of thought—*idem sentire*. The only case cited for the heirs at law in support of this objection was *Browne v. Yeall*, 7 Ves. 50, note, in which Lord Thurlow held void a perpetual trust for the purchase and distribution in Great Britain and its dominions of such books as might have a tendency to promote the interests of virtue and religion and the happiness of mankind. But the correctness of that decision was doubted by Sir William Grant and Lord Eldon in *Morice v. Bishop of Durham*, 9 Ves. 406, 10 Ves. 534, 539; and it is inconsistent with the more recent authorities, here and in England. The bequest now before us is quite as definite as one "for the increase and improvement of Christian knowledge and promoting religion," and the purchase from time to time of such bibles and other religious books, pamphlets and tracts as the trustees should think fit for that purpose, which was upheld by Lord Eldon in *Attorney General v. Stepney*, 10 Ves. 22; or "to the cause of Christ, for the benefit and promotion of true evangelical piety and religion," through the agency of trustees, to be by them "appropriated to the cause of religion as above stated, to be distributed in such divisions and to such societies and religious charitable purposes as they may think fit and proper," which was sustained by this court in *Going v. Emery*, 16 Pick. 107; or "for the promotion of such religious and charitable enterprises as shall be designated by a majority of the pastors composing the Middlesex Union Association," as in *Brown v. Kelsey*, 2 Cush. 243; or to be distributed, at the discretion of trustees, "in aid of objects and purposes of benevolence or charity, public or private," as in *Saltonstall v. Sanders*, 11 Allen, 446; or "for the cause of peace," to be expended by an unincorporated society, whose object, as defined in its constitution, was "to illustrate the inconsistency of war with Christianity, to show its baleful influence on all the great interests of mankind, and to devise means for insuring universal and permanent peace," as in *Tappan v. Deblois*, 45 Me. 122; or to found "an establishment for the increase and diffusion of knowledge among men;" or "for the benefit and advancement and propagation of education and learning in every part of the world, as far as circumstances will permit;" as in *Whicker v. Hume*, 7 H. L. Cas. 124, 155, and *President of U. S. v. Drummond*, there cited. See, also, *McDonough v. Murdoch*, 15 How. 405, 414.

The bequest itself manifests its immediate

purpose to be to educate the whole people upon the sin of a man's holding his fellow-man in bondage; and its ultimate object, to put an end to negro slavery in the United States; in either aspect, a lawful charity.

It is universally admitted that trusts for the promotion of religion and education are charities. Gifts for the instruction of the public in the cure of the diseases of quadrupeds or birds useful to man, or for the prevention of cruelty to animals (either by publishing newspapers on the subject, or by providing establishments where killing them for the market might be attended with as little suffering as possible), have been held charitable in England. *London University v. Yarrow*, 23 Beav. 159, 1 De Gex & J. 72; *Marsh v. Means*, 3 Jur. (N. S.) 790; *Tatham v. Drummond*, 11 L. T. (N. S.) 325. To deliver men from a bondage which the law regards as contrary to natural right, humanity, justice and sound policy, is surely not less charitable than to lessen the sufferings of animals. The constitution of Massachusetts, which declares that all men are born free and equal, and have the natural, essential and unalienable rights of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, of seeking and obtaining their safety and happiness; also declares that a frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety and justice, are absolutely necessary to preserve the advantages of liberty and to maintain a free government; that "the encouragement of arts and sciences, and all good literature, tends to the honor of God, the advantage of the Christian religion, and the great benefit of this and the other United States of America;" and that "wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties, and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth," besides cherishing the interests of literature and the sciences, "to countenance and inculcate the principles of humanity and general benevolence, public and private charity," "and all social affections and generous sentiments among the people." Declaration of Rights, arts. 1, 18; Const. Mass. c. 5. This bequest directly tends to carry out the principles thus declared in the fundamental law of the commonwealth. And certainly no kind of education could better accord with the religion of Him who came to preach deliverance to the captives, and taught that you should love your neighbor as yourself and do unto others as you would that they should do unto you.

The authorities already cited show that the

peaceable redemption or manumission of slaves in any manner not prohibited by law is a charitable object. It falls indeed within the spirit, and almost within the letter, of many clauses in the statute of Elizabeth. It would be an anomaly in a system of law, which recognized as charitable uses the relief of the poor, the education and preferment of orphans, marriages of poor maids, the assistance of young tradesmen, handicraftsmen and persons decayed, the relief of prisoners and the redemption of captives, to exclude the deliverance of an indefinite number of human beings from a condition in which they were so poor as not even to own themselves, in which their children could not be educated, in which marriages had no sanction of law or security of duration, in which all their earnings belonged to another, and they were subject, against the law of nature, and without any crime of their own, to such an arbitrary dominion as the modern usages of nations will not countenance over captives taken from the most barbarous enemy.

III. The next question arises upon the bequest in trust for the benefit of fugitive slaves who might from time to time escape from the slaveholding states of the Union.

The validity of this bequest must be determined according to the law as it stood at the time when the testator died and from which his will took effect. It is no part of the duty of this court to maintain the constitutionality, the justice, or the policy of the fugitive slave acts, now happily repealed. But the constitution of the United States, at the time of the testator's death, declared that no person held to service or labor in one state should be discharged therefrom by escaping into another. It may safely be assumed that, under such a constitution, a bequest to assist fugitive slaves to escape from those to whom their service was thus recognized to be due could not have been upheld and enforced as a lawful charity. The epithets with which the testator accompanied this bequest show that he set his own ideas of moral duty above his allegiance to his state or his country; and warrant the conjecture that he would have been well pleased to have the fund applied in a manner inconsistent with the constitution and laws of the United States. But he has used no words to limit its use to illegal methods, and has left his trustees untrammelled as to the mode of its application.

Whether this bequest is or is not valid, is to be ascertained from a fair construction of its language, in the light of the maxims of interpretation stated in the earlier part of this opinion, by which the court is bound to carry into effect any charitable bequest in which can be seen a general intention consistent with the law, even if the particular mode pointed out is illegal; and there is no authority to construe it to be void if it can be applied in a lawful manner consistently with the intention of the testator as manifested in

the words by which it is expressed. One illustration of these maxims may be added in this connection.

In *Isaac v. Gompertz, Amb.* (2d Ed.) 228, note, the will contained one bequest for the support and maintenance of a Jews' synagogue; and another bequest of an annuity "to the gabas of the said synagogue," who were found, upon inquiry by a master, to be treasurers of the synagogue, whose office it was to collect and receive the annual subscriptions for the support of poor Jews belonging to the synagogue, and to apply the same to the expenses of supporting the synagogue and to the maintenance of such poor Jews. This last bequest was upheld, and referred to a master to report a scheme, although the support of the synagogue was adjudged to be an unlawful use; and thus a bequest manifestly intended for the benefit of persons professing a religion not tolerated by law, and which might, according to its terms, be applied either in an unlawful or a lawful manner, was sustained as charitable, and its application confined to the lawful mode.

A bequest for the benefit of fugitive slaves is not necessarily unlawful. The words "relief or redemption of prisoners and captives" have always been held in England to include those in prison under condemnation for crime, as well as persons confined for debt; and to support gifts for distributing bread and meat among them annually, or for enabling poor imprisoned debtors to compound with their creditors. *Duke, Char. Uses*, 131, 156; *Attorney General v. Ironmongers' Co., Coop. Prac. Cas.* 285, 290; *Attorney General v. Painterstainers' Co.*, 2 Cox, Ch. 51; *Attorney General v. Drapers' Co.*, Tudor, Char. Trusts, 591, 592, 4 Beav. 67; 36th Report of Charity Commissioners to Parliament, pt. 6, pp. 856-868. It would be hardly consistent with charity or justice to favor the relief of those undergoing punishment for crimes of their own committing, or imprisonment for not paying debts of their own contracting; and yet prohibit a like relief to those who were in equal need, because they had withdrawn themselves from a service imposed upon them by local laws without their fault or consent.

It was indeed held in *Thrupp v. Collett*, 26 Beav. 125, that a bequest to be applied to purchasing and procuring the discharge of persons committed to prison for non-payment of fines under the game laws was not a lawful charity. But such persons were convicted offenders against the law of England, who would by such discharge be wholly released from punishment. A fugitive slave was not a criminal by the laws of this commonwealth or of the United States.

To supply sick or destitute fugitive slaves with food and clothing, medicine or shelter, or to extinguish by purchase the claims of those asserting a right to their service and labor, would in no wise have tended to impair the claim of the latter or the operation

of the constitution and laws of the United States; and would clearly have been within the terms of this bequest. If, for example, the trustees named in the will had received this fund from the executor without question, and had seen fit to apply it for the benefit of fugitive slaves in such a manner, they could not have been held liable as for a breach of trust.

This bequest therefore, as well as the previous one, being capable of being applied according to its terms in a lawful manner at the time of the testator's death, must, upon the settled principles of construction, be held a valid charity.

It is hardly necessary to remark that the direction of the testator that his trustees shall not be accountable to any one is simply void. No testator can obtain for his bequests that support and permanence which the law gives to public charities only, and at the same time deprive the beneficiaries and the public of the safeguards which the law provides for their due and lawful administration.

As the trustees named in the will are not a corporation established by law, and these two bequests are unlimited in duration, and by their terms might cover an illegal as well as a legal appropriation, it is the duty of the court, before ordering the funds to be paid to the trustees, to refer the case to a master to settle a scheme for their application in a lawful manner. *Isaac v. Gompertz, Amb.* 228, note; *Attorney General v. Stepney*, 10 Ves. 22; *Boyle, Char.* 100, 217.

IV. It is quite clear that the bequest in trust to be expended "to secure the passage of laws granting women, whether married or unmarried, the right to vote, to hold office, to hold, manage and devise property, and all other civil rights enjoyed by men," cannot be sustained as a charity.

No precedent has been cited in its support. This bequest differs from the others in aiming directly and exclusively to change the laws; and its object cannot be accomplished without changing the constitution also. Whether such an alteration of the existing laws and frame of government would be wise and desirable is a question upon which we cannot, sitting in a judicial capacity, properly express any opinion. Our duty is limited to expounding the laws as they stand. And those laws do not recognize the purpose of overthrowing or changing them, in whole or in part, as a charitable use. This bequest therefore, not being for a charitable purpose, nor for the benefit of any particular persons, and being unrestricted in point of time, is inoperative and void.

For the same reason, the gift to the same object, of one third of the residue of the testator's estate after the death of his daughter Mrs. Eddy and her daughter Mrs. Bacon, is also invalid, and will go to his heirs at law as a resulting trust.

It is proper to add that the conclusion of the court upon this point, as well as upon the

gift to create a public sentiment which would put an end to negro slavery in the United States, had the concurrence of the late Mr. Justice Dewey, whose judicial experience and large acquaintance with the law of charitable uses give great weight to his opinion, and whose lamented death, while this case has been under advisement, has deprived us of his assistance in determining the other questions in controversy.

V. The validity of the other residuary bequests and devises depends upon the law of perpetuities as applied to private trusts. The principles of this branch of the law have been so fully considered by the court in recent cases as to require no extended statement.

The general rule is that if any estate, legal or equitable, is given by deed or will to any person in the first instance, and then over to another person, or even to a public charity, upon the happening of a contingency which may by possibility not take place within a life or lives in being (treating a child in its mother's womb as in being) and twenty-one years afterwards, the gift over is void, as tending to create a perpetuity by making the estate inalienable; for the title of those taking the previous interests would not be perfect, and until the happening of the contingency it could not be ascertained who were entitled. *Brattle Square Church v. Grant*, 3 Gray, 142; *Odell v. Odell*, 10 Allen, 5, 7. If therefore the gift over is limited upon a single event which may or may not happen within the prescribed period, it is void, and cannot be made good by the actual happening of the event within that period.

But if the testator distinctly makes his gift over to depend upon what is sometimes called an alternative contingency, or upon either of two contingencies, one of which may be too remote and the other cannot be, its validity depends upon the event; or, in other words, if he gives the estate over on one contingency which must happen, if at all, within the limit of the rule, and that contingency does happen, the validity of the distinct gift over in that event will not be affected by the consideration that upon a different contingency, which might or might not happen within the lawful limit, he makes a disposition of his estate, which would be void for remoteness. The authorities upon this point are conclusive. *Longhead v. Phelps*, 2 W. Bl. 704; *Sugden and Preston*, arguing, in *Beard v. Westcott*, 5 Barn. & Ald. 809, 813, 814; *Minter v. Wraith*, 13 Sim. 52; *Evers v. Challis*, 7 H. L. Cas. 531; *Armstrong v. Armstrong*, 14 B. Mon. 333; 1 Jarm. Wills, 244; *Lewis*, Perp. c. 21; 2 Spence, Eq. Jur. 125, 126.

By the ninth and tenth articles of the will, the income of one third of the residue of the testator's estate, real and personal, is to be paid to his son James and to his daughter Mrs. Palmer, respectively, during life. Each of these articles contains a distinct direction that, in case such son or daughter shall die

leaving no child surviving, the principal of his or her share shall be paid and conveyed to the board of trustees named in the fourth article, to be expended for the intent and purpose therein directed. As the first tenant for life in each bequest is living at the death of the testator, the event of such tenant's dying, leaving no child then living, must happen within the period of a life in being, if at all; and, if it does happen, the gift over to the charity will be valid. Neither James Jackson nor Mrs. Palmer therefore is entitled to a present equitable estate in fee. But as James, though now unmarried, may marry and have children who survive him, and as Mrs. Palmer's children may survive her, in either of which cases half of the income of the share would by the will go to such children during their lives and the bequest over to the charity be too remote, the validity and effect of that bequest over cannot be now determined. If the contingency upon which it is valid should hereafter occur, namely, the death of the testator's son or daughter, respectively, leaving no children surviving, the whole remainder of the share will then go to the charity established by the fourth article, and be paid, after the settlement of a scheme for its lawful application, to the trustees therein named.

VI. By the thirteenth amendment of the constitution of the United States, adopted since the earlier arguments of this case, it is declared that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." The effect of this amendment upon the charitable bequests of Francis Jackson is the remaining question to be determined; and this requires a consideration of the nature and proper limits of the doctrine of *cy pres*.

It is contended for the heirs at law, that the power of the English chancellor, when a charitable trust cannot be administered according to its terms, to execute it so as to carry out the donor's intention as nearly as possible—*cy pres*—is derived from the royal prerogative or St. 43 Eliz. and is not an exercise of judicial authority; that, whether this power is prerogative or judicial, it cannot, or, if it can, should not, be exercised by this court; and that the doctrine of *cy pres*, even as administered in the English chancery, would not sustain these charitable bequests since slavery has been abolished.

Much confusion of ideas has arisen from the use of the term "*cy pres*" in the books to describe two distinct powers exercised by the English chancellor in charity cases, the one under the sign manual of the crown, the other under the general jurisdiction in equity; as well as to designate the rule of construction which has sometimes been applied to executory devises or powers of appointment to individuals, in order to avoid the objec-

tion of remoteness. It was of this last, and not of any doctrine peculiar to charities, that Lord Kenyon said, "The doctrine of cy pres goes to the utmost verge of the law, and we must take care that it does not run wild;" and Lord Eldon, "It is not proper to go one step farther." *Brudenell v. Elwes*, 1 East, 451, 7 Ves. 390; 1 Jarm. Wills, 261-263; *Sugd. Powers*, c. 9, § 9; *Coster v. Lorillard*, 14 Wend. 309, 348.

The principal, if not the only, cases in which the disposition of a charity is held to be in the crown by sign manual, are of two classes; the first, of bequests to particular uses charitable in their nature, but illegal, as for a form of religion not tolerated by law; and the second, of gifts of property to charity generally, without any trust interposed, and in which either no appointment is provided for, or the power of appointment is delegated to persons who die without exercising it.

It is by the sign manual and in cases of the first class, that the arbitrary dispositions have been made, which were so justly condemned by Lord Thurlow in *Moggridge v. Thackwell*, 1 Ves. Jr. 469, and Sir William Grant in *Cary v. Abbot*, 7 Ves. 494, 495; and which, through want of due discrimination, have brought so much discredit upon the whole doctrine of cy pres. Such was the case of *Attorney General v. Baxter*, in which a bequest to Mr. Baxter to be distributed by him among sixty pious ejected ministers, (not, as the testator declared, for the sake of their nonconformity, but because he knew many of them to be pious and good men and in great want,) was held to be void, and given under the sign manual to Chelsea College; but the decree was afterwards reversed, upon the ground that this was really a legacy to sixty individuals to be named. 1 Vern. 248; 2 Vern. 105; 1 Eq. Cas. Abr. 96; 7 Ves. 76. Such also was the case of *Da Costa v. De Pas*, in which a gift for establishing a jesuba or assembly for reading the Jewish law was applied to the support of a Christian chapel at a foundling hospital. Amb. 228; 2 Swanst. 489, note; 1 Dickens, 258; 7 Ves. 76, 81.

This power of disposal by the sign manual of the crown in direct opposition to the declared intention of the testator, whether it is to be deemed to have belonged to the king as head of the church as well as of the state, "intrusted and empowered to see that nothing be done to the disherison of the crown or the propagation of a false religion" (*Rex v. Portington*, 1 Salk. 162, 1 Eq. Cas. Abr. 96); or to have been derived from the power exercised by the Roman emperor, who was sovereign legislator as well as supreme interpreter of the laws (Dig. 33, 2, 17; 50, 8, 4; Code, lib. 1, tit. 2, c. 19; Id., tit. 14, c. 12); is clearly a prerogative and not a judicial power, and could not be exercised by this court; and it is difficult to see how it could be held to exist at all in a republic, in which charitable bequests have never been forfeited to the

use or submitted to the disposition of the government, because superstitious or illegal. 4 Dane, Abr. 239; *Gass v. Wilhite*, 2 Dana, 176; *Methodist Church v. Remington*, 1 Watts, 226.

The second class of bequests which are disposed of by the king's sign manual is of gifts to charity generally, with no uses specified, no trust interposed, and either no provision made for an appointment, or the power of appointment delegated to particular persons who die without exercising it. *Boyle, Char.* 238, 239; *Attorney General v. Syderfen*, 1 Vern. 224, 1 Eq. Cas. Abr. 96; *Attorney General v. Fletcher*, 5 Law J. Ch. (N. S.) 75. This too is not a judicial power of expounding and carrying out the testator's intention, but a prerogative power of ordaining what the testator has failed to express. No instance is reported, or has been discovered in the thorough investigations of the subject, of an exercise of this power in England before the reign of Charles II. *Moggridge v. Thackwell*, 7 Ves. 69-81; *Dwight's Argument in the Rose Will Case*, 272. It has never, so far as we know, been introduced into the practice of any court in this country; and, if it exists anywhere here, it is in the legislature of the commonwealth as succeeding to the powers of the king as *parens patriæ*. 4 Kent, Comm. 508, note; *Fontain v. Ravenel*, 17 How. 369, 384; *Moore v. Moore*, 4 Dana, 365, 366; *Witman v. Lex*, 17 Serg. & R. 93; *Attorney General v. Jolly*, 1 Rich. Eq. 108; *Dickson v. Montgomery*, 1 Swan, 348; *Le-page v. Macnamara*, 5 Iowa, 146; *Bartlet v. King*, 12 Mass. 545; *Sohier v. Massachusetts General Hospital*, 3 Cush. 496, 497. It certainly cannot be exercised by the judiciary of a state whose constitution declares that "the judicial department shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." Declaration of Rights, art. 30.

The jurisdiction of the court of chancery to superintend the administration and decree the performance of gifts to trustees for charitable uses of a kind stated in the gift stands upon different grounds; and is part of its equity jurisdiction over trusts, which is shown by abundant evidence to have existed before the passage of the statute of charitable uses. Sir Francis Moore records a case in which a man sold land to another upon confidence to perform a charitable use, which the grantor declared by his last will that the grantee should perform; "the bargain was never enrolled, and yet the lord chancellor decreed that the heir should sell the land to be disposed according to the limitation of the use; and this decree was made the 24th of Queen Elizabeth, before the statute of charitable uses, and this decree was made upon ordinary and judicial equity in chancery." *Symon's Case*, Duke, Char. Uses, 163. About the same time the court of chancery entertained a suit between two parties, each claim-

ing to be trustee, to determine how bequests for the weekly relief of the poor of certain towns, for the yearly preferment of poor children to be apprentices, and for the curing of divers diseased people lying by the highway's side, should be "employed and bestowed according to the said will." *Reade v. Silles* (27 Eliz.) Act. Can. 559. A decree in 16 Eliz., confirming a report of the master of the rolls and others to whom a suit for enforcing a charitable trust founded by will had been referred, is cited in 1 Spence, Eq. Jur. 588, note. For years before St. 43 Eliz., or the similar act of 39 Eliz., suits in equity by some in behalf of all of the inhabitants of a parish were maintained to establish and enforce bequests for schools, alms or other charitable purposes for the benefit of the parish, which would have been too indefinite to be enforced as private trusts. *Parker v. Browne* (12 Eliz.) 1 Cal. Pro. Ch. 81, 1 Mylne & K. 389, 390; *Dwight, Char. Cas.* 33, 34; in which the devise was in trust to a corporation incapable at law of taking. *Parrot v. Pawlet* (21 Eliz.) Cary, 47; *Elmer v. Scot* (24 Eliz.) Cho. Cas. Ch. 155; *Matthew v. Marow* (32-34 Eliz.); and *Hensman v. Hackney* (38 Eliz.) *Dwight, Char. Cas.* 65, 77; in which the decrees approved schemes settled by masters in chancery. Many other examples are collected in the able and learned arguments, as separately printed in full, of Mr. Binney in the Case of Girard's Will, and of Mr. Dwight in the Rose Will Case. And the existence of such a jurisdiction anterior to and independent of the statute is now generally admitted. *Vidal v. Girard*, 2 How. 194-196, and cases cited; *Perin v. Carey*, 24 How. 501; *Magill v. Brown, Brightly*, N. P. 346; 2 Kent, Comm. 286-288, and note; *Burbank v. Whitney*, 24 Pick. 152, 153; *Preachers' Aid Soc. v. Rich*, 45 Me. 559; *Derby v. Derby*, 4 R. I. 436; *Urney v. Wooden*, 1 Ohio St. 160; *Chambers v. St. Louis*, 29 Mo. 543; 1 Spence, Eq. Jur. 588; *Tudor, Char. Trusts*, 102, 103.

The theory that St. 43 Eliz. enlarged the discretion of the chancellor to depart from the expressed intention of the founder of a charity is refuted by the words of the statute itself. After reciting that many gifts and appointments for the charitable purposes therein named "have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same;" it then, for redress and remedy thereof, authorizes the lord chancellor or lord keeper to make such decrees that the property "may be duly and faithfully employed to and for such of the charitable uses and intents before rehearsed respectively for which they were given, limited, assigned or appointed by the donors and founders thereof;" which decrees, "not being contrary or repugnant to the orders, statutes or decrees of the donors or founders," shall "stand firm and good, according to the tenor and purpose

thereof, and shall be executed accordingly," until altered by the lord chancellor or lord keeper upon complaint by any party aggrieved; and upon such complaint the chancellor or keeper may "by such course as to their wisdoms shall seem meetest, the circumstances of the case considered, proceed to the examination, hearing and determining thereof; and upon hearing thereof shall and may annul, diminish, alter or enlarge" the decrees of the commissioners as "shall be thought to stand with equity and good conscience, according to the true intent and meaning of the donors and founders thereof." These last qualifications are specially marked by Lord Coke, who was attorney general at the passage of the statute and for some time before and after, and who adds, by way of note to the final clause, "This is the *lapis ductitius*, whereby the commissioners and chancellors must institute their course." 2 Inst. 712. See, also, *Duke, Char. Uses*, 11, 156, 169, 372, 619.

In cases of bequests to trustees for charitable uses, the nature of which is described in the will, the chancellor acts in his equity jurisdiction over trusts; and the prerogative of the king finds its appropriate exercise through his attorney general in bringing the case before the court of chancery for a judicial determination. This has been well explained by Lord Eldon. "It is the duty of a court of equity, a main part, originally almost the whole, of its jurisdiction, to administer trusts; to protect not the visible owner, who alone can proceed at law, but the individual equitably, though not legally, entitled. From this principle has arisen the practice of administering the trust of a public charity: persons possessed of funds appropriated to such purposes are within the general rule; but, no one being entitled to an immediate and peculiar interest to prefer a complaint, who is to compel the performance of these obligations, and to enforce their responsibility? It is the duty of the king, as *parens patriæ*, to protect property devoted to charitable uses; and that duty is executed by the officer who represents the crown for all forensic purposes. On this foundation rests the right of the attorney general in such cases to obtain by information the interposition of a court of equity." *Attorney General v. Brown*, 1 Swanst. 291, 1 Wils. 354. To the like effect are the opinions of Lord Redesdale in *Attorney General v. Mayor, etc., of Dublin*, 1 Bligh (N. S.) 347, 348, and *Corporation of Ludlow v. Greenhouse*, Id. 48, 62; of Lord Keeper Bridgman in *Attorney General v. Newman*, 1 Ch. Cas. 158; of Sir Joseph Jekyll in *Eyre v. Shaftsbury*, 2 P. Wms. 119; and of Lord Hardwicke in *Attorney General v. Middleton*, 2 Ves. Sr. 328; which also state that the jurisdiction of the court of chancery over charities was exercised on such informations before St. 43 Eliz. See, also, *Attorney General v. Carroll*, Act. Can. 729; *Dwight's Ar-*

gument in the *Rose Will Case*, 259-268. This duty of maintaining the rights of the public, and of a number of persons too indefinite to vindicate their own, has vested in the commonwealth, and is exercised here, as in England, through the attorney general. *Going v. Emery*, 16 Pick. 119; *County Attorney v. May*, 5 Cush. 338-340; *Gen. St. c. 14, § 20*. It is upon this ground that, in a suit instituted by the trustees of a charity to obtain the instructions of the court, the attorney general should be made a party defendant, as he has been by order of the court in this case. *Harvard College v. Society for Promoting Theological Education*, 3 Gray, 280; *Tudor, Char. Trusts*, 161, 162. The power of the king or commonwealth, thus exercised, is simply to present the question to a court of justice, not to control or direct its judicial action.

A charity, being a trust in the support and execution of which the whole public is concerned, and which is therefore allowed by the law to be perpetual, deserves and often requires the exercise of a larger discretion by the court of chancery than a mere private trust; for without a large discretionary power, in carrying out the general intent of the donor, to vary the details of administration, and even the mode of application, many charities would fail by change of circumstances and the happening of contingencies which no human foresight could provide against; and the probabilities of such failure would increase with the lapse of time and the remoteness of the heirs from the original donor who had in a clear and lawful manner manifested his will to divert his estate from his heirs for the benefit of public charities.

It is accordingly well settled by decisions of the highest authority, that when a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application, and afterwards, either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund, having once vested in the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible, to carry out his general charitable intent. In all the cases of charities which have been administered in the English courts of chancery without the aid of the sign manual, the prerogative of the king acting through the chancellor has not been alluded to, except for the purpose of distinguishing it from the power exercised by the court in its inherent equitable jurisdiction with the assistance of its masters in chancery.

At the time of the settlement of the Mass-

achusetts Colony, this power was most freely exercised by the court of chancery, either on information by the attorney general, or on proceedings by commission under the statute of charitable uses. *Attorney General v. Warwick* (1615, 1638) *Dwight, Char. Cas.* 140, 141, *West, Ch.* 60, 62; *Bloomfield v. Stowmarket* (1619) *Duke, Char. Uses*, 644. In the last case, lands had been given before the Reformation to be sold, and the proceeds applied, one half to the making of a highway from the town in which the lands were, one fourth to the repair of a church in that town, and the other fourth to the priest of the church to say prayers for the souls of the donor and others; and Lord Bacon decreed the establishment of the uses for making the highway and repairing the church, and directed the remaining fourth (which could not, by reason of the change in religion, be applied as directed by the donor) to be divided between the poor of the same town, and the poor of the town where the donor inhabited.

In the *Case of Baliol College*, this doctrine was enforced by successive decrees of the greatest English chancellors between the English Revolution and our own, which have been recently confirmed by the unanimous decision of the house of lords. *Attorney General v. Guise*, 2 Vern. 166; *Attorney General v. Baliol College*, 9 Mod. 407; *Attorney General v. Glasgow College*, 2 Colly. 665, 1 H. L. Cas. 800. The case is of such importance and reported at different stages in so many books and at such length, that it may be well to state it. John Snell, an Episcopalian, who made his last will and died in 1679, while the form of religion established by law in Scotland as well as in England was Episcopal, gave lands in trust to apply the income for the maintenance and education at the university of Oxford of Scotchmen to be designated by the vice chancellor of that university and the heads of certain colleges therein, and who should, upon their admission, give security to enter into holy orders and to be sent into Scotland and there remain. After the Revolution of 1688, Presbyterianism was reestablished in Scotland by act of parliament; and in 1690 an information was filed by the attorney general, at the relation of the vice chancellor and heads of colleges named in the will, against the testator's heiress at law, suggesting a pretence by her that as Episcopacy and Prelacy had been abolished in Scotland, and the Presbyterian form of worship established instead, the testator's intentions could not be carried into effect, the devise became void, and the property reverted to her. But the lords commissioners of the great seal, by a decree passed in 1692, established the devise against her, ordered an account, and reserved all directions for the establishment of the charity. 2 Vern. 267, note; 2 Colly. 665-670, 1 H. L. Cas. 802-804, 820, 822. In 1693 the cause came on for further directions before

Lord Keeper Somers, who, acting upon the doctrine that it was within the province of a court of equity to administer the trust upon the principle of *cy pres*, ordered the estate to be conveyed to the six senior fellows of Balliol College, one of the colleges named in the will, to maintain a certain number of Scotch scholars at that college, and, in consideration of the privileges enjoyed by such scholars, to apply the surplus income to its library; and this decree was made subject to such alteration and disposition as the court should from time to time make, upon the application of any person concerned, for the better and more effectual execution of the trust, as near as could be to the testator's will and intentions. 2 Vern. 267, note; 2 Colly. 670, 671, 1 H. L. Cas. 804, 805, 824. In 1744 Lord Hardwicke, in the execution of the directions in the decree of Lord Somers, referred the cause to a master to approve of a scheme "for the better establishment and regulation of the charity, and carrying the same into effect for the future as near to the will and intention of the testator as the alteration of circumstances since the making of the will would admit;" and upon his report, and against the exceptions of the heads of colleges in Oxford, confirmed a scheme which did not impose any condition of the scholars taking holy orders—thus carrying out the general intention of the trust so far as to educate Scotch scholars at Oxford, although the testator's ultimate object that they should be educated in the Episcopal form of church government to take part in the established religion in Scotland could not, by reason of the change of law since his death, be effected. 9 Mod. 407; 1 H. L. Cas. 805, 806, 825–827. In 1759 Lord Keeper Henley (afterward Lord Northington) varied the scheme in other particulars, but declined to vary it in this; and further orders were afterwards made in chancery as the revenues increased. 2 Colly. 672–674, 1 H. L. Cas. 806, 807, 825, 826; 3 Ves. 650, note. Upon a new information filed at the relation of some Scotch Episcopalians, the house of lords in 1848, reversing an order of Vice Chancellor Knight Bruce, held that the charity must continue to be administered according to the earlier decrees. 1 H. L. Cas. 800.

In another case, Queen Elizabeth, by letters patent, established a hospital for forty lepers, and made the inmates a corporation. After leprosy had become almost extinct in England, and the members of the corporation reduced to three, an information was filed, alleging that the corporation was dissolved, and praying for a new application of the revenues agreeably to the letters patent and the donor's intention, or as near thereto as circumstances would permit and the court should direct. Lord Eldon held that neither the donor's heirs at law nor the crown took the land discharged of the charity; referred the case to a master to report a scheme; and confirmed the report of the master, approv-

ing a scheme for the application of the revenues to a general infirmary, reserving a preference to all lepers who might offer themselves. Attorney General v. Hicks, Highm. Mortm. 336–354, 3 Brown, Ch. 166, note.

Sir John Romilly, M. R., afterwards made a like decision, holding that a gift made in 1687 of land (for which in 1774 other land had been substituted by leave of parliament) in trust out of the income to keep it ready for a hospital and burial place for patients sick of the plague, was a present gift for charitable purposes, and valid, although the plague had not reappeared in England for more than one hundred and eighty years; and, after alluding to a class of cases, cited for the heirs at law in that case, as they have been in this, in which the charitable bequest could never have taken effect, added, "But who can say, when this deed was executed or the act passed, that this was not a charitable trust, capable of being performed;" "and if it were ever wholly devoted to charity, those cases do not apply." Attorney General v. Craven, 21 Beav. 392, 408.

The principle that a bequest to trustees for charitable purposes indicated in the will, which are lawful and capable of being carried out at the time of the testator's death, will not be allowed to fail and result to the heirs at law upon a change of circumstances, but will be applied by the court according to a scheme approved by a master to carry out the intent of the testator as nearly as possible, has been affirmed and acted on in many other English cases. Attorney General v. Pyle, 1 Atk. 435; Attorney General v. Green, 2 Brown, Ch. 492; Attorney General v. Bishop of London, 3 Brown, Ch. 171; Moggridge v. Thackwell, Id. 517, 1 Ves. Jr. 464; Attorney General v. Glyn, 12 Sim. 84; Attorney General v. Lawes, 8 Hare, 32; Attorney General v. Vint, 3 De Gex & S. 705. The dicta of Lord Alvanley, upon which the heirs at law much rely, do not, in the connection in which they were uttered, substantially differ from the general current of authority. Attorney General v. Boulton, 2 Ves. Jr. 387, 388; Attorney General v. Whitchurch, 3 Ves. 143, 144; Attorney General v. Minshull, 4 Ves. 14.

By the opinion of Lord Eldon, formed after great doubt and hesitation, the principle has been held to extend to the case of a bequest of property to a person named, in trust for such charitable purposes, not otherwise described, as he should appoint. Moggridge v. Thackwell, 7 Ves. 96, 13 Ves. 416; Paice v. Archbishop of Canterbury, 14 Ves. 364; Mills v. Farmer, 19 Ves. 483, 1 Mer. 55. Such a trust has been held valid in this commonwealth, so far as to vest a title in the trustee as against the next of kin. Wells v. Doane, 3 Gray, 201. Whether, in case of his death, it could properly be administered by a court of chancery, without the aid of the prerogative power, need not be considered in this

case. See *Fontain v. Ravenel*, 17 How. 387, 388; *Moore v. Moore*, 4 Dana, 366.¹

In most of the cases cited at the argument, in which the heirs at law were held to be entitled to the property, the charitable gift never took effect at all; either because it could not be carried out as directed, without violating the mortmain act of 9 Geo. II., as in *Jones v. Williams*, Amb. 651; *Attorney General v. Whitechurch*, 3 Ves. 141, and *Smith v. Oliver*, 11 Beav. 481; or because the testator had in terms limited it to a special object which could not be accomplished at the time of his death; as in the case of a bequest to build a church in Wheatley, which could not be done without the consent of the bishop, and he refused (*Attorney General v. Bishop of Oxford*, 1 Brown, Ch. 444, note; *Id.*, cited 2 Cox, Ch. 365; 2 Ves. Jr. 388; and 4 Ves. 431, 432); or of a direction to contract with the governors of a hospital for the purchase of a presentation of a boy to that charity, if the residuary assets should prove sufficient for that purpose, and they proved to be insufficient (*Cherry v. Mott*, 1 Mylne & C. 123).

In *Marsh v. Means*, 3 Jur. (N. S.) 790, the testator gave a legacy, after the death of his wife, "for continuing the periodical published under the title of 'The Voice of Humanity,' according to the objects and principles which are set forth in the prospectus contained in the third number of that publication." "The Voice of Humanity" had been published quarterly by an association for the protection of animals, but no number had appeared for nearly a year before the date of the will. Upon the death of the widow twenty years later, Vice Chancellor Wood held that the gift was not to support the principles of the publication, but only the publication itself, and, the publication having ceased and the association perished, that the legacy lapsed. But he added, "It would, I think, have fallen within the description of charity, if this periodical had been subsisting at the date of the will, and afterwards ceased. That would be simply a case where, the particular intention having failed, the general intention must be carried out."

Two striking cases upon this subject have arisen in England under charities for the redemption of captives.

In the Case of *Betton's Charity*, Thomas Betton in 1723 bequeathed the residue of his estate to the Ironmongers' Company, in trust, "positively forbidding them to diminish the capital sum by giving away any part, or that the interest and profit arising be applied to any other use or uses than hereinafter mentioned and directed," namely, one half of the income yearly unto the redemption of British slaves in Turkey or Barbary, one fourth unto charity schools in the city and suburbs of London where the education is according to the church of England, and one

fourth "unto necessitated decayed freemen of the company, their widows and children." The first half of the income of the fund greatly accumulated, few such slaves having been found for a century. Lord Brougham, reversing the decree of Sir John Leach, M. R., held that the court had jurisdiction to apply the surplus income of this moiety and its accumulations as near as might be to the intentions of the testator; having regard to the bequest touching British captives, and also to the other charitable bequests in the will; and that the case should be referred back to the master to approve a proper scheme for such application. *Attorney General v. Ironmongers' Co.*, 2 Mylne & K. 576. Sir Christopher Pepys, M. R. (afterwards Lord Cottenham), accordingly ordered it to be so referred. On the return of the master's report, Lord Langdale, M. R., approved a scheme to apply the whole fund to the second and third purposes declared in the will. 2 Beav. 313. Lord Chancellor Cottenham on appeal reversed this decree; and upon the ground that the testator had not limited the first charity, like the others, to persons in London, ordered the first moiety to be applied to supporting and assisting charity schools in England and Wales, and referred it back to the master to settle a scheme for that purpose. *Craig & P.* 208. And this decree was affirmed in the house of lords with the concurrence of Lord Chancellor Lyndhurst, and Lords Brougham, Cottenham and Campbell. 10 Clark & F. 908. In that case, though there were differences of opinion as to the details of the scheme, the jurisdiction of the court of chancery to frame one in such a case was thus affirmed by the deliberate judgments of five law lords; and all agreed that, for the purpose of ascertaining what was *cy pres* to the particular object which had failed, the court might look at all the charitable bequests in the will; applying in this respect the principle upon which Lord Bacon had acted more than two centuries before in the case of *Bloomfield v. Stowemarket*, above cited.

But the case most like that now before us is that of *Lady Mico's Charity*, *Lady Mico*, by her will made in 1670, gave a thousand pounds "to redeem poor slaves in what manner the executors should think most convenient." This charity was established by decree in chancery in 1686. Upon an information filed in 1827, after the fund had accumulated a hundred fold, it was referred to a master to approve of a scheme for the application of the income according to the will of the testatrix, or, if he should find that it could not be executed according to her will, then as near the intent of the will as could be, regard being had to the existing circumstances and to the amount of the fund. The master, by his general report in 1835, stated that the relators had laid before him a scheme for applying the fund to the enfranchisement of slaves in the British Colonies

¹ See, also, *Lorings v. Marsh*, 6 Wall. 337.

who were too poor to purchase their own freedom; which application, in consequence of St. 3 & 4 Wm. IV. c. 73, abolishing slavery (which took effect in 1834), had become impracticable; that he was of opinion that the testatrix by her will contemplated the redemption of poor slaves in the Barbary States, but that intention could not be carried into effect; and he approved a scheme to apply the capital and income in purchasing and building school-houses for the education of the emancipated apprentices and their issue, qualifying teachers, paying the salaries of masters and other expenses, and to apply the surplus rents to the support of any other schools, and generally in promoting education in the British Colonies. Sir Christopher Pepys, M. R., confirmed this scheme by a decree; and, after he had become lord chancellor, stated the reasons to have been that "in this there was no restriction as to the description of slaves, or the countries in which the slaves were to be looked for;" that upon the reference to the master "it appeared that there were not within any part of the British dominions any poor slaves to be redeemed, but that there were in the colonies many thousands of human beings from whom the odious appellation of slaves had been removed, but whose state was very far short of that of freemen, from whose bodies the chains of slavery had been struck, but whose minds and morals were still in that state of degradation which is inseparable from the unfortunate situation from which they had recently been in part rescued; it was proposed to the master to apply, and he approved of a scheme for the completion of that holy work, by assisting in the education of those poor beings. If, before the slavery abolition act, these funds could properly have been applied to procuring the redemption of slaves in the colonies, the proposed application for the benefit of the apprentices was doubtless *cy pres* to the intention of the donor." And his reason for not applying Betton's Charity in the same manner was that it was in terms limited to slaves in Turkey or Barbary. Attorney General v. Gibson, 2 Beav. 317, note; Attorney General v. Ironmongers' Co., Craig & P. 226, 227.

There is no adjudication of this question by the supreme court of the United States. The dicta of Chief Justice Marshall in *Baptist Ass'n v. Hart's Ex'rs*, 4 Wheat. 1, were based upon an imperfect survey of the authorities, were not required by the decision, and are hardly reconcilable with the more recent judgments of the same court; and that case, as well as *Wheeler v. Smith*, 9 How. 79, arose under the law of Virginia. *Vidal v. Girard's Ex'rs*, 2 How. 192; *Perin v. Carey*, 24 How. 501; *Bartlett v. Nye*, 4 Metc. (Mass.) 380; *American Academy of Arts & Sciences v. President, etc., of Harvard College*, 12 Gray, 593; 2 Kent, Comm. 287. In *Fontain v. Ravenel*, 17 How. 369, the testator authorized his executors or the survivor of them

to dispose of the residue of his estate "for the use of such charitable institutions in Pennsylvania and South Carolina, as they or he may deem most beneficial to mankind," and they died without appointing; and it was held that the title did not vest in the executors as trustees, and that according to the English law the disposition would have been in the crown by sign manual. As Mr. Justice McLean, delivering the opinion of the court, said: "Nothing short of the prerogative power, it would seem, can reach this case. There is not only uncertainty in the beneficiaries of this charity, but behind that is a more formidable objection. There is no expressed will of the testator. He intended to speak through his executors or the survivor of them, but by the acts of Providence this has become impossible. It is then as though he had not spoken. Can any power now speak for him, except the *parens patriæ*?" The further remarks about the power of *cy pres*, if intended to cover a case in which the charitable purposes were described or indicated in the will, were upon a question not before the court. The separate opinion of Chief Justice Taney in *Fontain v. Ravenel* was but his own, based mainly upon that of Chief Justice Marshall in *Baptist Ass'n v. Hart's Ex'rs*. And it is impossible to avoid the inference that the impressions of both of those eminent magistrates were derived from the laws of Maryland and Virginia in which they had been educated, and by which St. 43 Eliz. has been expressly repealed, and charities are not recognized as entitled to any favor, either in duration or construction, beyond other trusts. *Dashiell v. Attorney General*, 5 Har. & J. 392; *Gallego v. Attorney General*, 3 Leigh, 450. In North Carolina, the supreme court once declared that it had all the powers exercised by the English chancellor, either in the equity jurisdiction or under the sign manual; and since, rebounding from that extreme opinion, seems to have adopted the view of Maryland and Virginia. *Griffin v. Graham*, 1 Hawks, 96; *McAuley v. Wilson*, 1 Dev. Eq. 276; *Holland v. Peck*, 2 Ired. Eq. 255. There is a dictum to a like effect in *Carter v. Balfour*, 19 Ala. 830. So in New York, the court of appeals, after some division and vacillation of opinion in the course of the frequent changes in the composition of the court, has recently adjudged that in that state the English law of charitable uses has been wholly abrogated by statute, and that charities are within the rule against perpetuities, and have no privileges about private trusts. *Bascom v. Albertson*, 34 N. Y. 584.

On the other hand, the court of appeals of Kentucky, in an able judgment delivered by Chief Justice Robertson, marked the distinction between the power exercised under the sign manual, and that inherent in the equity jurisdiction; and, after speaking of the former as not judicial, added: "The *cy pres* doctrine of England is not, or should not be, a

judicial doctrine, except in one kind of case; and that is, where there is an available charity to an identified or ascertainable object, and a particular mode, inadequate, illegal or inappropriate, or which happens to fail, has been prescribed. In such case, a court of equity may substitute or sanction any other mode that may be lawful and suitable and will effectuate the declared intention of the donor, and not arbitrarily and in the dark, presuming on his weakness or wishes, declare an object for him. A court may act judicially as long as it effectuates the lawful intention of the donor." *Moore v. Moore*, 4 Dana, 366. See, also, *Gass v. Wilhite*, 2 Dana, 177; *Curling v. Curling*, 8 Dana, 38. The power of cy pres, which was declared by the supreme court of Pennsylvania in *Methodist Church v. Remington*, 1 Watts, 226, and *Witman v. Lex*, 17 Serg. & R. 93, not to exist in that state, was the power exercised under the sign manual in case of a gift to superstitious uses, or of an expression of general intention to devote a sum to charitable purposes not designated. In a very recent case, the same court said: "The rule of equity on this subject seems to be clear, that when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity; for equity will substitute another mode, so that the substantial intention shall not depend upon the formal intention." "And this is the doctrine of cy pres, so far as it has been expressly adopted by us"—"a reasonable doctrine, by which a well defined charity, or one where the means of definition are given, may be enforced in favor of the general intent, even where the mode or means provided for by the donor fail by reason of their inadequacy or unlawfulness." *Philadelphia v. Girard*, 45 Pa. St. 27, 28. Like principles have been maintained in South Carolina and Illinois. *Attorney General v. Jolly*, 1 Rich. Eq. 99, 2 Strob. Eq. 395; *Gilman v. Hamilton*, 16 Ill. 231. The existence of a judicial power to administer a charity cy pres where the expressed intention of the founder cannot be exactly carried out has been either countenanced or left an open question in all the New England states except Connecticut. *Burr v. Smith*, 7 Vt. 287, 288; *Second Congregational Soc. v. First Congregational Soc.*, 14 N. H. 330; *Brown v. Concord*, 33 N. H. 296; *Derby v. Derby*, 4 R. I. 439; *Tappan v. Deblois*, 45 Me. 131; *Howard v. American Peace Soc.*, 49 Me. 302, 303; *Treat's Appeal*, 30 Conn. 113. See, also, 2 Redf. Wills, 815, note; *McCord v. Ochiltree*, 8 Blackf. 15; *Beall v. Fox*, 4 Ga. 427; *Chambers v. St. Louis*, 29 Mo. 590, 592; *Lepage v. Macnamara*, 5 Iowa, 146; *McIntyre v. Zanesville*, 17 Ohio St. 352.

The narrow doctrines which have prevailed in some states upon this subject are inconsistent with the established law of this commonwealth. Our ancestors brought with them from England the elements of the law

of charitable uses, and, although the form of proceeding by commission under St. 43 Eliz. has never prevailed in Massachusetts, that statute, in substance and principle, has always been considered as part of our common law. 4 Dane, Abr. 6, 239; *Earle v. Wood*, 8 Cush. 445. Under the Colony charter, charities were regulated and administered, according to the intent of the donors, under the direction of the general court, the court of assistants, and the county courts; and under the Province charter, although no court was vested with equity jurisdiction, charitable bequests were not the less valid. *Anc. Chart.* 52; *Drury v. Natick*, 10 Allen, 180, 181, and authorities cited; *Winslow v. Trowbridge*, stated in 11 Allen, 459, 460. The English mortmain act of 9 Geo. II. c. 36, did not extend to Massachusetts; and the similar provision in Prov. St. 28 Geo. II. c. 9, was repealed immediately after our Revolution by St. 1785, c. 51. *Odell v. Odell*, 10 Allen, 6. Charities are held not to be within the common rule limiting perpetuities and accumulations. *Dexter v. Gardner*, 7 Allen, 243; *Odell v. Odell*, 10 Allen, 1. Charitable bequests to an unincorporated society here, to a foreign corporation or society, or to a particular religious denomination in a certain county, have been carried into effect, even where no trustees have been named in the will. *Burbank v. Whitney*, 24 Pick. 146; *Bartlett v. Nye*, 4 Metc. (Mass.) 378; *Washburn v. Sewall*, 9 Metc. (Mass.) 280; *Universalist Soc. v. Fitch*, 8 Gray, 421. See, also, *Wells v. Doane*, 3 Gray, 201; *Saltonstall v. Sanders*, 11 Allen, 446.

The intention of the testator is the guide, or, in the phrase of Lord Coke, the lodestone, of the court; and therefore, whenever a charitable gift can be administered according to his express directions, this court, like the court of chancery in England, is not at liberty to modify it upon considerations of policy or convenience. *Harvard College v. Society for Promoting Theological Education*, 3 Gray, 280; *Baker v. Smith*, 13 Metc. (Mass.) 34; *Trustees of Smith Charities v. Inhabitants of Northampton*, 10 Allen, 498. But there are several cases, where the charitable trust could not be executed as directed in the will, in which the testator's scheme has been varied by this court in such a way and to such an extent as could not be done in the case of a private trust. Thus bequests to a particular bible society by name, whether a corporation established by law or a voluntary association, which had ceased to exist before the death of the testator, have been sustained, and applied to the distribution of bibles through a trustee appointed by the court for the purpose. *Winslow v. Cummings*, 3 Cush. 358; *Bliss v. American Bible Soc.*, 2 Allen, 334. At a time when the general chancery jurisdiction of this court over trusts was limited to those arising under deeds and wills, the legislature by a special statute authorized it to hear and determine in equity any

and all matters relating to a certain gift to a scientific corporation, to be invested in a certain manner, and paid in premiums for discoveries or improvements on heat or light published in America within two years before each award. Upon a bill being filed, and it appearing that it had become impracticable to carry out the intent of the donor in the mode prescribed, Chief Justice Shaw authorized a different investment of the fund; and, in accordance with a scheme reported by a master, authorized the corporation to apply the surplus income, after paying such premiums, to purchasing books, papers and philosophical apparatus, and making such publications or securing such lectures, experiments or investigations as should facilitate and encourage the making of such discoveries and improvements; and said: "Whenever it appears that a general object of charity is intended, and the purpose is not unlawful and void, the right of the heir at law is divested." "It is now a settled rule in equity that a liberal construction is to be given to charitable donations, with a view to promote and accomplish the general charitable intent of the donor, and that such intent ought to be observed, and when this cannot be strictly and literally done, this court will cause it to be fulfilled as nearly in conformity with the intent of the donor as practicable. Where the property thus given is given to trustees capable of taking, but the property cannot be applied precisely in the mode directed, the court of chancery interferes, and regulates the disposition of such property under its general jurisdiction on the subject of trusts, and not as administering a branch of the prerogative of the king as *parens patriæ*." "What is the nearest method of carrying into effect the general intent of the donor must of course depend upon the subject matter, the expressed intent, and the other circumstances of each particular case, upon all of which the court is to exercise its discretion." *American Academy v. Harvard College*, 12 Gray, 582. The same principle was also recognized or assumed in 4 Dane, Abr. 242, 243, in *Sanderson v. White*, 18 Pick. 333, and other cases already cited. *Baker v. Smith*, 18 Metc. (Mass.) 41; *Harvard College v. Society for Promoting Theological Education*, 3 Gray, 282, 298; *Trustees of Smith Charities v. Inhabitants of Northampton*, 10 Allen, 501, 502.

By Gen. St. c. 113, § 2, this court may hear and determine in equity all suits and proceedings for enforcing and regulating the execution of trusts, whether the trusts relate to real or personal estate, "and shall have full equity jurisdiction, according to the usage and practice of courts of equity, in all other cases, where there is not a plain, adequate and complete remedy at law." The powers usually exercised by the court of chancery in the course of its jurisdiction in equity have thus been expressly conferred upon this court by the legislature. The authority of ad-

ministering a charitable trust according to the expressed intention of the donor, and, when that cannot be exactly followed, then as nearly as possible, is a part of this jurisdiction, which the court is not at liberty to decline. The only question is, whether the facts of the case show a proper occasion for its exercise according to the settled practice in chancery.

In all the cases cited at the argument, in which a charitable bequest, which might have been lawfully carried out under the circumstances existing at the death of the testator, has been held, upon a change of circumstances, to result to the heirs at law or residuary legatees, the gift was distinctly limited to particular persons or establishments. Such was *Russell v. Kellett*, 3 Smale & G. 264, in which the gift was of five pounds outright to each poor person of a particular description in certain parishes, and Vice Chancellor Stuart held that the shares of those who died before receiving them went to the residuary legatees. Such, also, was *Clark v. Taylor*, 1 Drew. 642, in which it was held that a legacy to a certain orphan school by name, which ceased to exist after the death of the testator, failed and fell into the residue of the estate; and which can hardly be reconciled with the decisions in *Incorporated Soc. v. Price*, 1 Jones & L. 498, 7 Ir. Eq. 260; *In re Clergy Society*, 2 Kay & J. 615; *Marsh v. Attorney General*, 2 Johns. & H. 61; *Winslow v. Cummings*, 3 Cush. 358, and *Bliss v. American Bible Soc.*, 2 Allen, 334. So in *Easterbrooks v. Tillinghast*, 5 Gray, 17, the trust was expressly limited, not only in object, but in duration, to the maintenance of the pastor of a certain church of a specified faith and practice in a particular town, "so long as they or their successors shall maintain the visibility of a church in said faith and order;" and could not have been held to have terminated, had it not been so limited. *Attorney General v. Columbine*, Boyle, Char. 204, 205; *Potter v. Thurston*, 7 R. I. 25; *Dexter v. Gardner*, 7 Allen, 243.

The charitable bequests of Francis Jackson cannot, in the opinion of the court, be regarded as so restricted in their objects, or so limited in point of time, as to have been terminated and destroyed by the abolition of slavery in the United States. They are to a board of trustees for whose continuance careful provision is made in the will, and which the testator expresses a wish may become a permanent organization and may receive the services and sympathy, the donations and bequests, of the friends of the slave. Their duration is not in terms limited, like that of the trust sought to be established in the sixth article of the will, by the accomplishment of the end specified. They take effect from the time of the testator's death, and might then have been lawfully applied in exact conformity with his expressed intentions. The retaining of the funds in the custody of the court while this case has been

under advisement cannot affect the question. The gifts being lawful and charitable, and having once vested, the subsequent change of circumstances before the funds have been actually paid over is of no more weight than if they had been paid to the trustees and been administered by them for a century before slavery was extinguished.

Neither the immediate purpose of the testator—the moral education of the people; nor his ultimate object—to better the condition of the African race in this country; has been fully accomplished by the abolition of slavery.

Negro slavery was recognized by our law as an infraction of the rights inseparable from human nature; and tended to promote idleness, selfishness and tyranny in one part of the community, a destruction of the domestic relations and utter debasement in the other part. The sentiment which would put an end to it is the sentiment of justice, humanity and charity, based upon moral duty, inspired by the most familiar precepts of the Christian religion, and approved by the constitution of the commonwealth. The teaching and diffusion of such a sentiment are not of temporary benefit or necessity, but of perpetual obligation. Slavery may be abolished; but to strengthen and confirm the sentiment which opposed it will continue to be useful and desirable so long as selfishness, cruelty, the lust of dominion, and indifference to the rights of the weak, the poor and the ignorant, have a place in the hearts of men. Looking at the trust established by the fourth article of this will as one for the moral education of the people only, the case is within the principle of those, already cited, in which charities for the relief of leprosy and the plague were held not to end with the disappearance of those diseases; and is not essentially different from that of *Attorney General v. Baliol College*, in which a trust for the education at Oxford of Scotch youths, to be sent into Scotland to preach Episcopalianism in the established church there, was applied by Lords Somers and Hardwicke and their successors to educate such youths, although, by the change of faith and practice of the Church of Scotland, the donor's ultimate object could no longer be accomplished.

The intention of Francis Jackson to benefit the negro race appears not only in the leading clause of the fourth article, and in his expression of a hope that his trustees might receive the aid and the gifts of the friends of the slave, but in the trust for the benefit of fugitive slaves in the fifth article of the will, to which, according to the principle established by the house of lords in the *Case of Betton's Charity*, resort may be had to ascertain his intent and the fittest mode of carrying it out. The negroes, although emancipated, still stand in great need of assistance and education. Charities for the relief of the poor have been often held to be well applied to educate them and their children. Bishop of

Hereford *v. Adams*, 7 Ves. 324; *Wilkinson v. Malin*, 2 Crompt. & J. 636, 2 Tyrw. 544; *Anderson v. Wrights of Glasgow*, 12 L. T. (N. S.) 807. The *Case of Mico Charity* is directly to the point that a gift for the redemption of poor slaves may be appropriated, after they have been emancipated by law, to educate them; and the reasons given by Lord Cottenham for that decision apply with no less force to those set free by the recent amendment of the constitution in the United States, than to those who were emancipated by act of parliament in the West Indies.

The mode in which the funds bequeathed by the fourth and fifth articles of the will may be best applied to carry out in a lawful manner the charitable intents and purposes of the testator as nearly as possible must be settled by a scheme to be framed by a master and confirmed by the court before the funds are paid over to the trustees. In doing this, the court does not take the charity out of the hands of the trustees, but only declares the law which must be their guide in its administration. Shelf. Mortm. 651-654; Boyle, Char. 214-218. The case is therefore to be referred to a master, with liberty to the attorney general and the trustees to submit schemes for his approval; and all further directions are reserved until the coming in of his report.

Case referred to a master.

The case was then referred to John Codman, Esquire, a master in chancery for this county, who, after notice to the trustees and the attorney general, and hearing the parties, made his report, the results of which were approved by the attorney general; and upon exceptions to which the case was argued by W. Phillips for himself and other excepting trustees, and by J. A. Andrew in support of the master's report, before Gray, J., with the agreement that he should consult the whole court before entering a final decree. No account was asked by any party of sums already expended by the trustees.

As to the bequest in the fifth article, the master reported that the unexpended balance (amounting to \$1049.90) was so small that it was reasonable that it should be confined to a limited territory; and that it should therefore be applied by the trustees, in accordance with their unanimous recommendation, to the use of necessitous persons of African descent in the city of Boston and its vicinity. This scheme was approved and confirmed by the court, with this addition: "Preference being given to such as have escaped from slavery."

As to the sum bequeathed in the fourth article of the will, the master reported that a portion had been expended by the trustees before any question arose as to its validity; and that but two schemes had been suggested to him for the appropriation of the residue, namely, first, (which was approved by four of the seven trustees who had accepted the trust,) in part to the support of the Anti-

Slavery Standard, and in part to the New England Branch of the American Freedmen's Union Commission; or, second, (which was approved by the remaining trustees,) that the whole should be applied to the last named object.

The master disapproved of the first of these schemes; and reported that the Anti-Slavery Standard was a weekly newspaper published in the city of New York with a circulation of not more than three thousand copies, which was established nearly thirty years ago for the purpose of acting upon public opinion in favor of the abolition of slavery; that in his opinion, since the abolition of slavery, and the passage of the reconstruction acts of congress, "the support of a paper of such limited circulation as hardly to be self-sustaining would do very little for the benefit of the colored people in their present status, and its direct influence would be almost imperceptible on the welfare of that class most nearly corresponding to those whom the testator had in view in making this bequest;" and that the argument, that it was evidently the intention of the testator to accomplish the object indicated in the fourth article of his will by means of which a newspaper like this might be considered an example, was answered by the fact that the object for which these means were to be used had been already accomplished without them. The master returned with his report a few numbers of the Anti-Slavery Standard, (taken without selection as they were given to him by the chairman of the trustees,) by which it appeared that it was in large part devoted to urging the passage of laws securing to the freedmen equal political rights with the whites, the keeping of the southern states under military government, the impeachment of the president, and other political measures.

The master reported that he was unable to devise any better plan than the second scheme suggested; that this mode of appropriation was in his opinion most in accordance with the intention of the testator as ex-

pressed in the fourth article of the will, because the intention nearest to that of emancipating the slaves was by educating the emancipated slaves to render them capable of self-government; and this could best be done by an organized society, expressly intended and exactly fitted for this function, and which, if the whole or any part of this fund was to be applied to the direct education and support of the freedmen, was admitted at the hearing before him to be the fittest channel for the appropriation. The master returned with his report printed documents by which it appeared that the object of the American Freedmen's Union Commission, as stated in its constitution, was "the relief, education and elevation of the freedmen of the United States, and to aid and coöperate with the people of the South, without distinction of race or color, in the improvement of their condition, upon the basis of industry, education, freedom and Christian morality;" and that the New England and other branches of the commission were now maintaining large numbers of teachers and schools for this purpose throughout the southern states.

The master accordingly reported that what remained of the fund bequeathed by the fourth article of the will should be "ordered to be paid over to the New England Branch of the Freedmen's Union Commission, to be employed and expended by them in promoting the education, support and interests generally of the freedmen (late slaves) in the states of this Union recently in rebellion." And this scheme was by the opinion of the whole court accepted and confirmed, modified only by directing the executor to pay the fund to the trustees, to be by them paid over at such times and in such sums as they in their discretion might think fit to the treasurer of the branch commission; and by substituting for the words "recently in rebellion" the words "in which slavery has been abolished, either by the proclamation of the late President Lincoln or the amendment of the constitution."

Final decree accordingly.

ALLEN et al. v. STEVENS et al.

(55 N. E. 568, 161 N. Y. 122.)

Court of Appeals of New York. Dec. 5, 1899.

Appeal from supreme court, appellate division, Fourth department.

Action by Benjamin G. Allen and others against Charles E. Stevens and others, as executors and trustees under the will of Nathan F. Graves, deceased, to obtain a construction of the will. From an order of the appellate division (54 N. Y. Supp. 8) reversing a judgment in favor of defendants (49 N. Y. Supp. 431), they appeal. Reversed.

This action was brought for the purpose of obtaining a construction of the will of Nathan F. Graves, deceased, and particularly the tenth clause thereof, devising and bequeathing the residuary real and personal estate in trust for the purpose of founding, erecting, and maintaining Graves Home for the Aged, to the effect that the said provisions of the tenth clause be adjudged void and invalid, and also that it be adjudged and determined that the said will is void and invalid so far as it devised and bequeathed more than one-half of the real and personal property of the testator to benevolent, charitable, literary, scientific, religious, and missionary societies, associations, or corporations, in trust or otherwise, and that the surplus of such one-half part be distributed and conveyed to the plaintiffs, who are next of kin of the testator. The special term decided that the will was in all respects valid, and rendered judgment accordingly. The appellate division, by a divided court, held that the tenth clause was invalid, and reversed the judgment. From the order and judgment entered thereon, appeals have been taken to this court.

The will read as follows:

"I Nathan F. Graves, of the city of Syracuse, in the state of New York, being of sound mind and memory, do make, ordain, publish, and declare this to be my last will and testament; that is to say:

"First. After all my lawful debts are paid and discharged, I give, devise, and bequeath unto Catharine H. Graves, my wife, all of the furniture, beds, and bedding of every kind, including paintings, pictures, vases, and statuary of every kind, with all kitchen utensils, in the dwelling house where we now live, the horses, harnesses, carriages, wagons, sleighs, sleds, cows, chickens, and everything appertaining thereto and connected therewith, including feed of every kind, to have and to hold the same to her heirs and assigns, forever. I also give and bequeath to the said Catharine H. Graves the rents, issues, and profits of all of my houses, tenements, and stores south of James street, in Syracuse, to be paid to her monthly, subject only to the necessary repairs and taxes for and during her natural life. I also give and bequeath to the said Catharine

H. Graves all dividends that may be declared by the New York State Banking Company on all the stock standing in my name, to be paid to her when declared and due, payable to her immediately, for and during her natural life.

"Second. I give and bequeath to the Oneida Cemetery Association, called 'Glenwood Cemetery,' situate in the town of Lenox, near the village of Oneida, in Madison county, in the state of New York, the sum of five hundred dollars, to be received and held in trust by the trustees thereof, or other representatives of said Cemetery Association, to be invested on first bond and mortgage or mortgages, the interest, or so much thereof or so much of the same as may be necessary, be expended in keeping the family burial lot in good order, grading, mowing, enriching, and all other things that may be needed. The lot is known as lot number one in section S in said cemetery, the title of which is in Nathan F. Graves and Catharine H. Graves, his wife. The said money may be deposited in any savings bank in Madison or Onondaga county when not invested in bond and mortgage. Any part of the interest or principal may be used to repair any injury to the monument or headstones caused by any casualty or by lapse of time.

"Third. I give and bequeath to the General Synod of the Reformed Church in America, also known as the General Synod of Church in America, the sum of ten thousand dollars, for the specific purpose of founding and maintaining an annual course of lectures on missions (the choice of the lecturer and the details of the lectureship to be under the direction of the professors in the seminary at New Brunswick, New Jersey, and the corresponding secretary of the board of foreign missions of the Reformed Church of America, or his successor), payable after the death of my wife, Catharine H. Graves; but the sum of five hundred dollars a year is to be paid by my executors, at such times as the same may be needed to sustain the lecture course, during the life of my wife.

"Fourth. I give and bequeath to the Syracuse University, situated in the city of Syracuse, in the state of New York, ten thousand dollars, for the specific purpose of founding and maintaining an annual course of lectures on missions (the choice of the lecturer and the details of the lectureship to be under the direction of the chancellor of the University), payable after the death of my wife, Catharine H. Graves; but the sum of five hundred dollars a year is to be paid by my executors, at such times as the same may be needed to sustain the lecture course, during the life of my wife.

"Fifth. I give and bequeath to Hope College, situated at Holland, in the state of Michigan, ten thousand dollars for the specific purpose of erecting a fireproof building, to be used as a library. The sums that I

have advanced or may hereafter advance during my life will be deducted from the above amount. I also give and bequeath to said Hope College my miscellaneous library in the dwelling house in Syracuse where I now reside. The library will not be delivered to said Hope College during the life of Catharine H. Graves, my wife, unless she consents to the removal in writing.

"Sixth. I give and bequeath to the Syracuse Home Association, situate at the corner of Townsend and Hawley streets, in Syracuse, to the Onondaga County Orphan Asylum, in Syracuse, and the St. Joseph's Hospital, situate on Prospect avenue, corner Union street, in Syracuse, each one thousand dollars, payable after the death of Catharine H. Graves, my wife.

"Seventh. I give and bequeath unto the consistory of the Reformed Church, situated on James street, in Syracuse, in the state of New York, the sum of two thousand dollars in trust for the specific purpose hereinafter named, which sum may be invested in first mortgage or mortgages; the interest to be used in the payment of the rent of a pew in said church, and the balance of interest, if any, to be given to the board of foreign missions of said church. The pew designated by the consistory may be used by the pastor of the church and his family when needed for that purpose, and, when not so needed, to be used as the consistory shall from time to time determine.

"Eighth. I give and bequeath to my executors the sum of fifteen hundred dollars, but in trust to be used for the purpose of placing in the Reformed Church in Syracuse a memorial window for wife, Catharine H. Graves, and myself. The sum may be used for that purpose, or so much thereof as may be necessary. The memorial window may be omitted, and a memorial tablet be placed on the wall inside of the church. In either case the consent and approval of the consistory must first be obtained.

"Ninth. I give and bequeath to Francis H. Loomis, the son of my sister Achsah H. Loomis, one thousand dollars. I give and bequeath to Helen A. Graves, the daughter of my brother Benjamin S. Graves, one thousand dollars. I give and bequeath to Benjamin G. Allen, the son of my sister Mary A. Allen, one thousand dollars. I give and bequeath to Helen M. Hicks, Charles Sterling Graves, William Shaw Graves, Nathan Francis Graves and Mary Elizabeth Graves, the children of my brother Sterling P. Graves, each one thousand dollars. I give and bequeath to Abial S. Graves, my brother, one thousand dollars; to Mary E. Strong, Elizabeth and Benjamin S. Graves, his children, one thousand dollars each. I give and bequeath to Helen Breese Graves, daughter of Maurice A. Graves, one thousand dollars. I give and bequeath to Nathan B. Graves ten thousand dollars. I give and bequeath to Augustus C. Stevens, son of Charles E. Stevens, my law library and my mahogany book

and paper case. I give and bequeath to Maurice A. Graves my three black-walnut book cases, now in my library room where I now reside; also, my library table. I give and bequeath to my brother the portrait of myself, painted by Eliatt; unto Sterling P. Graves. I give and bequeath unto Nathan Francis Graves my watch and chains.

"Tenth. I give, bequeath, and devise all the rest and residue of my property of every kind, personal and real, wherever situate, to my trustees hereinafter named, for the purpose of founding, erecting, and maintaining Graves Home for the Aged, to be located in the city of Syracuse, in the state of New York. It is intended as a home for those who by misfortune have become incapable of providing for themselves, and those who have slender means of support. The institution to be known as the Graves Home for the Aged. I hereby appoint Charles E. Stevens, Rasselas A. Bonta, and Maurice A. Graves for the trustees to execute the above trust. I hereby authorize and empower my executors, or the survivor of them, to rent or sell any part or all of my real estate that I may own at the time of my death. They are authorized to employ a person or persons to have charge of the real estate, to collect rents and make repairs, and to pay such sums for compensation as they may deem reasonable and proper. After my executors have executed their trust, and paid all the legatees provided for in this will, they are authorized and directed to convey to the said trustees above named the balance and remainder of my property of every kind, to be applied for the purposes above provided; and the said trustees, or the survivor, are authorized to rent or sell all or any part of my real or personal property, and to employ such agents as they may deem proper to take charge of the same, and pay them such compensation as they deem best.

"Eleventh. My executors or my trustees are authorized to retain my stock and shares in the New York State Banking Company, and continue the business of banking for a term of years, at their discretion, but may sell the same or any part thereof at any time; but the same is not to be continued, nor any portion of my property held, longer than the lives of Catharine Graves Roby, daughter of Sidney B. Roby, of Rochester, and Helen Breese Graves, daughter of Maurice A. Graves, of Syracuse. Likewise, I make, constitute, and appoint Charles E. Stevens, Rasselas A. Bonta, and Maurice A. Graves to be executors of this, my last will and testament, hereby revoking all former wills by me made.

"In witness whereof, I have hereunto subscribed my name and affixed my seal the fifteenth day of September, in the year of our Lord one thousand eight hundred and ninety-three.

Nathan F. Graves. [Seal.]"

Augustus C. Stevens, for appellant executor. Charles C. Cook, for appellant Syracuse Home Ass'n. Frank Hiscock, for appellant

attorney general. C. E. Stevens, for appellant First Reformed Church. Joseph W. Sutphen, for appellant General Synod. William G. Tracy, for respondents Allen and others. C. Carskadden, for respondent Breese.

PARKER, C. J. (after stating the facts). Under the law of this state, prior to the enactment of chapter 701 of the Laws of 1893, the tenth clause of the will in question would have been void upon two grounds: First, because of the indefiniteness of the beneficiaries (*Bascom v. Albertson*, 34 N. Y. 580; *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33); and, second, because, although intending to found a permanent charity, the testator did not direct the formation of a corporation within two lives in being to take over the trust property. *Burrill v. Boardman*, 43 N. Y. 254; *Cruikshank v. Home for the Friendless*, 113 N. Y. 337, 21 N. E. 64, 4 L. R. A. 140; *People v. Simonson*, 126 N. Y. 299, 27 N. E. 380. The question now presented is whether the act of 1893 has so far amended the law relating to the subject of charitable bequests as to make it possible for the charitable intentions of this testator to be executed. Before examining the statute, which was concededly intended to affect in some wise the law upon the general subject, it will not be out of place to have in mind the situation of such law. No one disputes that it was the intention of the legislature to change in substantial respects the law as it had been settled by the courts of this state. The controversy is as to the extent of the changes intended by the legislature, and upon the question of intent some light will be thrown by a very brief reference to the early state of the law in this state upon the subject of charitable uses, and the changes from time to time which finally resulted in its overthrow. This subject was exhaustively considered in an opinion written by Judge Denio in the case of *Williams v. Williams*, 8 N. Y. 525. In that case the opinion declared that according to the law of England as it existed at the time of the American Revolution, and as it still exists, devises and bequests in support of charity and religion, although defective for want of such grantee or donee as the rules of law require in other cases, would nevertheless be supported in the courts of chancery; that such parts of the common law had become incorporated into our system of jurisprudence prior to the adoption of the constitution, by force of the provisions, of which it became a part, of the common law of this state. In answer to the claim that the law of charitable uses was created by the statute 43 Eliz. c. 4, and hence was abrogated by the repeal in this state of the statute of Elizabeth (Laws 1788, c. 46, § 37), the court asserted that the doctrine of charitable uses was a creation of chancery, and had been regarded as an important part of its jurisdiction long prior to the enactment of the statute of Elizabeth, and such system having become ingrafted upon the common law, and the practice thereof

having been undertaken and carried on by the court of chancery in this state, that it was not affected by the repeal of the statute of Elizabeth; that the provisions of the Revised Statutes did not affect property given in perpetuity for religious or charitable purposes; and hence that the bequest of \$6,000 to Zophar V. Oakley and other individual trustees, with power to perpetuate their successors, as a perpetual fund for the education of children of the poor who should be educated in the academy in the village of Huntington, with directions to accumulate the fund up to a certain point, and apply the income to the education of children whose parents' names were not upon the tax list, was valid.

If that case had continued to be the law of this state, there would have been no opportunity for questioning the validity of the tenth clause of this testator's will. That decision, it would seem, should have settled the question in this state, but the struggle between the advocates of a liberal policy towards charities and the opponents of such a policy did not stop with that decision. In *Levy v. Levy*, 33 N. Y. 97, Judge Wright challenged the position taken by the court in the *Williams Case*, and discussed anew the question whether the English doctrine of trusts for charitable uses was the law of this state. The discussion was continued in *Bascom v. Albertson* and *Burrill v. Boardman*, *supra*; and in *Holmes v. Mead*, 52 N. Y. 332, it was finally decided that the system of charitable uses, as recognized in England prior to the Revolution, has no existence in this state, and that such uses are not exempt from the provisions of the statute abolishing all uses and trusts except such as are authorized thereby. Efforts in the interest of upholding important charitable bequests have from time to time been made to persuade the courts to reopen the subject to a limited extent, without other result than an approval of the case of *Holmes v. Mead*, as in *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. 305, where the court felt called upon to point out that "charity, as a great interest of civilization and Christianity, has suffered no loss or diminution in the change which has been made. The law has been simplified, and that is all." So the fact seemed to be at the time of such writing, and so it may have been, except as to that class of charities which, for convenience, we may call original charities, as where a person desires to found an institution to carry on a charity that will bear his name and be a monument to his memory, or wishes to benefit a class of unfortunate persons in his own community, in whom he may be interested. Many a testator has attempted to provide by his last will and testament for such a charity, but, so far as the decisions show, nearly every such attempt has come to naught, because the courts, in applying the rules resulting from the final overthrow of the *Williams Case*, have been obliged to hold that the language employed by the testator was either indefinite as to beneficiaries, or in violation of the law against

perpetuities. *Holmes v. Mead*, 52 N. Y. 332; *Prichard v. Thompson*, 95 N. Y. 76; *Cottman v. Grace*, 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145; *Read v. Williams*, 125 N. Y. 560, 26 N. E. 730; *Fosdick v. Town of Hempstead*, 125 N. Y. 581, 26 N. E. 801, 11 L. R. A. 715; *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33; *Booth v. Church*, 126 N. Y. 215, 28 N. E. 238. Our attention has not been called to, nor have we discovered, any case in the books, since the decision of *Holmes v. Mead*, where an attempt to create an original charity has survived the test of an application by the courts of the rules of law to the language employed by the testator. Among the last, if not the very last, of the successful attempts in that direction, was in respect to the will of James H. Roosevelt, deceased, which was before the court in *Burrill v. Boardman*, 43 N. Y. 254. In that case the court declined to decide the question whether the peculiar system of charitable uses as it existed in England has ever had foothold in this state. The decision of this court, holding that will to be valid, made *Roosevelt Hospital* a possibility. As these statements seem to make their own comment, we pass to the position of the legislature in 1893, which had its attention sharply drawn to the subject by a comparatively recent decision of this court, the effect of which was to deprive the public of a great charity, in which Samuel J. Tilden sought to employ the bulk of his fortune, aggregating millions. Looking back over the 20 years that had elapsed since the decision of the court in *Holmes v. Mead*, the legislature could discover nothing but wrecks of original charities,—charities that were dear to the hearts of their would-be founders, and the execution of which would have been of inestimable value to the public. Further back of that period, however, it found that in *Williams v. Williams*, supra, the court had declared it to be the law of this state that charitable devises and bequests were not subject to the statute against perpetuities, nor subject to strangulation by the rule against indefinite beneficiaries; for the court, having equitable jurisdiction, claimed the right to administer the law of charitable uses. Our legislature not only saw that a great wrong had been and was being done to the public by the loss of many devises and bequests for the purpose of founding original charities, but it further saw that the remedy could alone be furnished by it. It perceived that its repeal of the statute of Elizabeth furnished the foundation for the decisions of the courts, and did away with the law of England upon that subject, as well as with the practice in this country in that regard which had been founded upon such law, so it set about making a change in the law; and the statute which it enacted, together with the title, reads as follows:

"An act to regulate gifts for charitable purposes.

"Section 1. No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall, in other respects

be valid under the laws of this state, shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the supreme court.

"Sec. 2. The supreme court shall have control over gifts, grants, bequests and devises in all cases provided for by section one of this act. The attorney-general shall represent the beneficiaries in all such cases and it shall be his duty to enforce such trusts by proper proceedings in the court." Laws 1893, c. 701.

Reading the statute in the light of the events to which reference has been made, it seems to me very clear that the legislature intended to restore the law of charitable trusts as declared in the *Williams Case*; that having discovered that legislative enactment had operated to take away the power of the courts of equity to administer trusts that were indefinite as to beneficiaries, and had declared a permanent charity void unless the devise in trust was to a corporation already formed, or to one to be created, it sought to restore that which had been taken away through another enactment. This is markedly indicated, not only by the absence of details in the statute, which is broadly entitled "An act to regulate gifts for charitable purposes," but also in the brevity of the statute, which confers all power over such trusts and trustees on the supreme court, and directs the attorney general to represent the beneficiaries in cases within the purview of the statute, as was the practice in England. Practical effect can be given to the provision that no devise or bequest shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries only by treating it as a part of a general scheme to restore to the courts of equity the power formerly exercised by chancery in the regulation of gifts for charitable purposes; for, in order to ascertain the class of persons who were entitled to the benefits of the trust, the rule formerly in force must necessarily be invoked, by which the court ascertained as nearly as possible the intention of the testator, by decree adjudged who were intended to be the beneficiaries of the trust, and directed its administration accordingly.

Fowler, in his work on Charitable Uses, in speaking of the act of 1893, says: "It must be very obvious that the act of 1893 has seriously affected those decisions of the courts of New York which require great certainty or a vested interest in the beneficiaries of a charitable trust. The act, in this respect only, is designed to restore the ancient law touching charitable uses for uncertain persons, and to this extent to relieve charitable

trusts from the narrow boundaries prescribed by the Revised Statutes for private uses in lands." While that learned author expresses the opinion that the act does not relieve charitable or publicuses from the application of the rules relating to perpetuities, which, he says, "have no reference to public trusts," he asserts that, had that been done, the ancient law would have been almost revived by the legislature. That he is right in saying that the legislature "designed to restore the ancient law touching charitable uses for uncertain persons" seems unquestionable, and it appears to be reasonably clear, from a reading of the entire act, that the legislature designed to restore the law governing the administration of such trusts as well. And, if such was the design of the legislature, then effect must be given to it, though such a construction seems contrary to the letter of the statute. *Smith v. People*, 47 N. Y. 330. As this statute is remedial in its character, it should be liberally construed with a view to the beneficial end proposed. *Hudler v. Golden*, 36 N. Y. 446. The statute provides that, if there is a trustee named to execute the trust, the legal title to the property shall vest in such trustee, and, further, that, if no person be named as trustee, the title shall vest in the supreme court. That there might be no opportunity for questioning the authority of the supreme court in such matters, the second section provides that the supreme court shall have control over all gifts, grants, bequests, and devises in all cases provided by section 1 of this act. Under the provisions of the act a testator may name a corporation as trustee, or provide that a corporation to be founded shall act as trustee, or the trustee named may be an individual; but, if he name none of these, the statute provides, in effect, that the trust shall not fail, but the title to the property devised or bequeathed in trust shall vest in the supreme court, which shall have control over gifts, grants, bequests, and devises provided for by the act. If the contention be well founded that it was not the intention of the legislature to revive the ancient law as to the administration of such trusts by the supreme court, and to do away with the rule requiring the formation of a corporation for such purpose, then no permanent charity can be administered by the supreme court, notwithstanding the title to the trust property is by the command of the statute vested in the supreme court when no trustee is named by the testator. It is insisted that it cannot be, because the trust term is not measured by lives. Neither is a corporation, which may, as a trustee, execute a permanent trust for charity. But, it is answered, the law has created an exception to the general rule in favor of corporations. True, and the lawmaking power had the right to create other exceptions, or change the law altogether; and it has changed the law as to all cases within the scope of the act, "to regulate gifts for charitable purposes," so that now the supreme court must execute such a trust, if the

title to the trust property vests in it under the statute, and shall have control over the administration, if a trustee be named by the testator. A construction of this statute allowing the supreme court to execute a permanent charity when the title to the real estate is vested in it, and at the same time declaring that, where such property is devised to a trustee named, the devise is void, would be absurd.

The learned counsel for the respondent points out that it is not all gifts and devises to religious, educational, charitable, or benevolent uses that shall not be deemed invalid by reason of indefiniteness as to beneficiaries, but only such as "shall in other respects be valid under the laws of this state," and, with signal ability, seeks to persuade us that, in order to give these words effect, it must be held that a trust is not within the protection of the statute if it contravenes the law against perpetuities, and, as a necessary sequence, that if the devise in trust be not to a corporation, or provision be not made for the formation of a corporation, within a period measured by two lives in being, to take over the trust estate, then the devise or bequest is invalid, and this statute is without effect in such case. It will be observed that, if this contention be well grounded, the authority attempted to be conferred upon the supreme court to take title and execute a trust of a permanent character when no trustee is named is practically of no effect, and the statute itself is limited in its application to a case of the type of *Prichard v. Thompson*, 95 N. Y. 76, which is the single case brought to our attention where the only objection to the validity of the trust was that the beneficiaries were indefinite. In the light of the destruction of so many original charities, as shown by the decisions, the thought cannot for a moment be indulged in that the legislature had in view this case only, and sought to furnish a remedy for just such cases in the future, and for none other.

We are thus led to inquire whether this clause in the statute may not have been intended to serve some other purpose than to require the continuance of the practice of the formation of corporations for the administration of permanent, charitable trusts,—a result apparently in conflict with the other provisions of the statute providing for the execution of trusts by trustees or by the supreme court. In the attempt to ascertain the intention of the legislature, it is a just rule, always to be observed, that the court shall assume that every provision of the statute was intended to serve some useful purpose; and, in obedience to that rule, we now inquire whether this clause of the statute does not have a useful place therein, and yet is not in conflict with the letter and spirit of the rest of the statute. It is so obvious that it has, that we need cite but one instance for the need of such a provision, and that is suggested by one of the contentions made in this case. A., having a substantial estate,

and desiring to provide suitably for the support of his wife and two brothers during their lifetime, for which he deemed the income amply sufficient, devised his estate in trust to a trustee during the lifetime of his wife and brothers, directing that the income be apportioned between the cestuis que trustent during their lives, and that after the death of the last survivor of them the property be vested in the supreme court as a permanent trust, the income to be used towards the support and maintenance of the Syracuse Hospital. Such a trust would, of course, be in direct violation of the statute of perpetuities and void; for by it the testator would design to do what the statute aims to prevent from being done, namely, to tie up the estate for the benefit of his family for a period longer than two lives in being (i. e. three lives in being), before the trust for charitable purposes could go into operation. This clause therefore seems to constitute a very useful feature, indeed, of the statute; and, because this is so, all excuse is taken away for an argument that it was intended to serve as such an obstruction to a practical operation of the statute as would render it of no substantial value to the public, and it eliminates all opportunity for questioning that it was the intention of the legislature to restore the ancient law as to gifts for charitable purposes, because experience has shown that, as to original charities, far better results were obtained under it, from the public point of view, and with a more decent regard for the wishes of testators, who do not always love their distant relatives,—occasionally, perhaps, with justification.

We are thus conducted to an examination of the tenth clause of the will. It reads as follows: "Tenth. I give, bequeath, and devise all the rest and residue of my property, of every kind, personal and real, wherever situate, to my trustees hereinafter named, for the purpose of founding, erecting, and maintaining Graves Home for the Aged, to be located in the city of Syracuse, in the state of New York. It is intended for a home for those who by misfortune have become incapable of providing for themselves, and those who have slender means of support. The institution to be known as the Graves Home for the Aged. I hereby appoint Charles C. Stevens, Rasselas A. Bonta, and Maurice A. Graves for the trustees to execute the above trust. I hereby authorize and empower my executors, or the survivor of them, to rent or sell any part or all of my real estate that I may own at the time of my death. They are authorized to employ a person or persons to have charge of the real estate, to collect rents and to make repairs, and to pay such sum for compensation as they may deem reasonable and proper. After my executors have executed their trust, and paid all the legates provided for in this will, they are authorized and directed to convey to the said trustees above named the balance and remainder of my property, of every kind, to be applied for

the purposes above provided; and the said trustees, or the survivor, are authorized to rent or sell all or any part of my real or personal property, and to employ such agents as they may deem proper to take charge of the same, and pay them such compensation as they deem best."

While the place where "Graves Home for the Aged" is to be located is stated, and the general object of the charity is clearly given, namely, to provide a home for the aged who by misfortune have become incapable of providing for themselves, it is still indefinite as to the territory from which such aged people may be accepted at the home. But for the statute that we have been considering, this trust would fail because of the indefiniteness of the beneficiaries; but the practice that it revives makes it necessary for the supreme court, when properly moved by the attorney general, representing the beneficiaries, to ascertain, as nearly as may be, the intention of the testator as to the method of selecting those aged persons who are to be the beneficiaries of the home, and to make such intention efficacious by decree. It seems to have been the opinion of the appellate division that the power of alienation of the bank shares and the real estate south of James street was, under the terms of the will, suspended during three lives in being after the death of the testator, but to us it seems that this is not so. It is true that by the first clause of the will the trustees were directed to pay to testator's wife, during life, the dividends on the bank stocks, when declared, and the net income from the real estate, after making payments for necessary repairs and taxes, while by the eleventh provision of the will the testator authorized his executors and trustees to retain his shares in the New York State Banking Company for a term of years, at their discretion, "but may sell the same, or any part thereof, at any time; but the same is not to be continued, nor any portion of my property held, longer than the lives of Catharine Graves Roby, daughter of Sidney B. Roby, of Rochester, and Helen Breese Graves, daughter of Maurice A. Graves, of Syracuse." It will be observed, therefore, that the will operated to vest the title of the estate in the trustees, in trust for the purposes outlined by the testator, as of the date of the latter's death; and they were directed to pay to the widow certain rents and dividends for life, unless she survived two persons upon whose lives the trust estate was expressly limited.

The next question is whether this trust is to be executed by the trustees named in the will, or by the supreme court. It is the next question because we have already reached the conclusion that a corporation is not necessary for the execution of such a trust, since the adoption of the statute, but that the supreme court, in a proper case, must take upon itself such execution, over

which it shall have control where a trustee is not named for the purpose. In this case trustees were named, and, as the eleventh clause of the will expressly prohibits the trustees from holding any portion of the testator's property longer than the lives of the two persons in being therein named, it must be held that the trustees are charged with the management and conduct of the trust until the expiration of a period measured by the two lives in being, at which time the title to the trust property will vest in the supreme court under the statute.

The plaintiffs claim that the tenth provision of the will is void as to one-half of the remainder of the testator's estate under section 1, c. 360, of the Laws of 1860, which reads as follows: "Section 1. No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts (and such devises or bequests shall be valid to the extent of one-half and no more)." The testator gives about \$25,000 or less than one-seventh of his estate, to organizations that are within the description of the statute, and in addition to that the residuary devises and bequests are charitable, and therefore within the general description of the statute; but as such devises and bequests are not to a "society, association or corporation in trust or otherwise," but, instead, to trustees, they are not within its prohibition. The maxim, "*Expressio unius est exclusio alterius*," is applicable; for it is a man's general right, in this state, to do as he wishes with his own. He may now, as in the past, disinherit his relatives for the benefit of strangers; and this statute was not designed to affect that right, except indirectly. It was recognized, perhaps, that, in the fear of death, men who have never exhibited a charitable impulse suddenly awaken to the fact that behind them are lost opportunities for usefulness that in some way ought to be made good; and in order to balance the account they look about for an opportunity to do good with their money, and find at once a man interested in promoting the fortunes of some religious or charitable institution, who, without hesitation, begins to play, and with a skill acquired by long experience, upon their

fears and hopes. Given such a man and such a situation, it was readily conceived that, in his thought of self, the just demands of wife or child or parent might be temporarily lost sight of, and his all devoted to religious or charitable purposes, through some of the many societies, associations, and corporations which are to be found on every hand. Hence the design of the framers of the statute was to place a limitation upon the power of a person thus moved, to dispose of more than one-half of his property by will to such organizations, to the end that he should have an opportunity to measure the claims of his kindred upon him as to the remaining half, unembarrassed by the importunities of those whose business it is to get money for the societies, associations, or corporations they represent; and this it was thought would be substantially accomplished by an act prohibiting him from giving more than one-half of his property to the societies, associations, and corporations most likely to be considered. But, except as thus restrained by the statute, he may still disinherit his kindred by disposing of his property in such manner and for such purpose as he may desire; and so this testator, in devising his property to trustees in trust for the uses and purposes described in the will, was not within the prohibition of the statute. The result thus reached in this case in no way thwarts the general purpose of the legislature, for the only person who stood in such relation to the testator as to benefit by the statute in any case was the testator's wife, who was over 80 years of age at the time of his death, was amply provided for by the will, and has since died.

The amount of costs awarded seems to be out of all proportion to the work done, and so large that it is not at all surprising that several lawyers have appealed from nearly all allowances except their own; but the supreme court had the power in this suit, brought as it was on the equity side of the court, to award costs to each of the parties; and the question of amount, also, was in the discretion of that court, and not subject to review here, so long as the allowances did not exceed the limitations provided by statute, and this they did not do. The judgment of the appellate division should be reversed, and that of the special term affirmed, with costs to the appellant trustees and to the attorney general.

GRAY, J., dissents.

HUNT, Atty. Gen., et al. v. FOWLER et al.
(12 N. E. 331, 17 N. E. 491, 121 Ill. 269.)

Supreme Court of Illinois. June 17, 1887.

Appeal from circuit court, La Salle county.

Geo. Hunt, Atty. Gen., and Mayo & Widmer, for appellants. Duncan, O'Connor & Gilbert, for appellees Vineria Fowler and others.

SHELDON, J. This was a bill in chancery filed by the heirs at law of Esther S. Chapman, deceased, against the attorney general of the state and the executors of the will of the decedent, to have a certain portion of the estate left by her declared to be intestate, and to belong to the complainants, as heirs at law of the decedent. The will, executed March 15, 1883, after making sundry bequests to various persons other than the complainants, concluded with this residuary clause: "All the residue of my estate I devise and bequeath unto the legatees hereinbefore named, in equal proportions, excepting said Oakwood seminary and said Sylvester M. Chapman." Subsequently, on April 5, 1885, the testatrix executed a codicil which contained this residuary clause: "All the rest and residue of my estate, including that which may lapse for any cause, I direct to be invested or loaned upon the best terms possible, so as to produce the largest income, and said income to be distributed among the worthy poor of the city of La Salle, in such manner as a court of chancery may direct." Executors of the will were appointed. The decedent left both real and personal estate.

The bill alleges that the city of La Salle is situated in the town of La Salle, and includes but a small portion of the territory of the town; and that there is not now, nor has there ever been, in said city, any organization or association, voluntary or otherwise, for the distribution of charity to the poor of the city; and that the municipal authorities have no duties imposed upon them to provide for the poor; and claims that the residuary clause of the codicil is incapable of execution by reason of the uncertainty of the beneficiaries intended by the testator, and void, and that, in consequence, all the rest and residue of the estate, both real and personal, after the payment of the general and specific legacies, was intestate estate. A demurrer to the bill was interposed by the attorney general and the executors, which was overruled by the court, whereupon the executors answered, denying the invalidity of the residuary clause of the codicil, or that it was incapable of execution, and setting up that, even if such were the case, the rest and residue of the estate must be distributed in accordance with the residuary clause of the will. Thereupon the bill was amended by making the residuary legatees specified in

the will additional parties defendant. Subsequently a hearing was had upon pleadings and proofs, and a decree was entered finding that the residuary clause of the codicil was ineffectual to dispose of the property, but that it nevertheless revoked the residuary clause of the will, and declaring that the real estate of which the testatrix died seised belonged to the complainants as her heirs at law, and directing that the rest and residue of the personal estate should be distributed to the complainants as intestate estate. From this decree the attorney general, the executors, and a portion of the legatees specified in the residuary clause of the will have prosecuted this appeal.

There is in American courts much diversity of decision upon the subject of charitable trusts. In express private trusts there is not only a certain trustee who holds the legal estate, but there is a certain specified cestui que trust clearly identified, or made capable of identification, by the terms of the instrument erecting the trust. It is an essential feature of public or charitable trusts that the beneficiaries are uncertain,—a class of persons described in some general language, often fluctuating, changing in their individual numbers, and partaking of a quasi public character. 2 Pom. Eq. Jur. § 1018.

In some of the states the equitable system of distinctively charitable trusts is not recognized, and the courts apply only the rules applicable to express private trusts. In other states the "statute of charitable uses" of 43 Eliz. c. 14, has been adopted or repealed, and thereby decisions have been influenced. And in other cases local legislation, or supposed local policy, to more or less extent, enters into adjudications. In another, and, as believed, the larger, portion of the states, the system of charitable trusts as administered in the English court of chancery, in the exercise of its ordinary judicial power, prevails, with variation in regard to the element of certainty in the trustee and the object of the charity. A classification of the decisions in the several states will be found in 2 Perry, Trusts, § 748, in note, and 2 Pom. Eq. Jur. § 1029, and note. The prerogative power of the crown, exercised through the lord chancellor as the representative of the king, as where there is a gift to charity generally, without appointment of a trustee, and the bounty is devoted to some particular charity, or where there is a gift to a particular charitable purpose which cannot be effectuated, and it is applied to some other charitable use, *cy-pres* the original purpose, is regarded not as a judicial, but a ministerial, prerogative function. This prerogative power courts in this country do not assume to exercise.

Were this subject of charitable trusts a new question with us, there would be opened up a wide and interesting field of discussion, in order for the establishment of the proper rule in this regard. But we are saved labor

in this respect, from the ground having heretofore been gone over by this court, and the rule applicable to charitable trusts having been established to be that which is administered in the court of chancery in England, in the exercise of its ordinary jurisdiction as a court of equity. This was done in the case of *Heuser v. Harris*, 42 Ill. 425, and where it was recognized that the statute of 43 Eliz. c. 4, had been adopted in this state.

The entire contention in this case arises upon the construction, validity, and effect of this residuary clause of the codicil. It is insisted this clause is void for uncertainty as to the beneficiaries.

This is not a bequest to charity generally, or to the poor generally, but to the worthy poor of the city of La Salle. The class here is definite,—the worthy poor of the city of La Salle,—but the individuals of the class to whom the bounty is to be distributed are uncertain. There is always this uncertainty as to individuals, in the case of public charities, and it is this feature of uncertainty which distinguishes public charities from private charities; charitable trusts from private trusts; and to hold charitable gifts to be void because of such uncertainty is to reject this whole distinctive doctrine of charitable trusts. 2 Redf. Wills, 544, (66.)

In the case of a charitable bequest it is immaterial how vague, indefinite, and uncertain the objects of the testator's bounty may be, provided there is a discretionary power vested in some one over its application to those objects. *Domestic & F. M. Soc.'s Appeal*, 30 Pa. 425; *Perry, Trusts*, § 732. It is denied that there is any such discretionary power here given, and *White v. Fisk*, 22 Conn. 31, is cited in support of such denial. The bequest in that case was: "Any surplus income that may remain, to the extent of \$1,000 per annum, I direct to be expended by my said trustees for the support of indigent, pious young men preparing for the ministry in New Haven." The decision was that the gift was void, as the objects of the benefaction were indefinite, and that no power was conferred on the trustees to make them definite by selection. This case, though meeting with seeming approval in *Grimes' Ex'rs v. Harmon*, 35 Ind. 198, has been disapproved by other high authorities. See *Perry, Trusts*, §§ 713, 720, 748, note 1; 2 Redf. Wills (2d Ed.) p. 541, note; *Hesketh v. Murphy*, 36 N. J. Eq. 304. The latter case especially speaks of *White v. Fisk* as a case not likely to be followed.

In *Hesketh v. Murphy* the testator's will empowered and directed the trustees to employ the annual income of the fund "for the relief of the most deserving poor of the city of Paterson aforesaid, forever, without regard to color or sex; but no person who is known to be intemperate, lazy, immoral, or undeserving, to receive any benefit from the said fund." It was objected that the gift could not be applied to its objects and was

void, because the will did not confer upon any one the power of ascertainment of the individuals who should receive the benefit of the bequest. But the court held that the power given the trustees by the will to distribute the fund carried with it, by necessary implication, the power to select the beneficiaries from the designated class, and upheld the bequest. We entirely agree with the criticism there made by Chief Justice Beasley upon the case of *White v. Fisk*, that there was a mistaken assumption on the part of the court in that case that there was no power to select the objects of the charity lodged by the testator in the trustee; that when a power is conferred on the trustees to distribute the fund to members of a class, such members having certain qualifications which can be ascertained only by the exercise of judgment and discretion, as the act of distribution cannot be performed except after such ascertainment of the particular beneficiaries, the principal power to distribute the moneys carries with it the incidental and necessary power of selection; and this, upon the ordinary doctrine that, when one act is authorized to be done by a trustee or other agent, every authority requisite to the doing of such act is, by intendment of law, comprised in such grant of power. See *Pickering v. Shotwell*, 10 Pa. St. 23, that the power in the trustee to act at its discretion need not be expressly given, if it can be implied from the nature of the trust. In the later case of *Ersine v. Whitehead*, 84 Ind. 357, the decision in *Grimes v. Harmon* does not seem to be approved in its full extent.

In *Heuser v. Harris*, supra, the bequest of money was "to the poor of Madison county," the interest only to be used, with no appointment of a trustee. As the county court of Madison county was charged by law with the support of the paupers in the county, it was held in that particular case that the poor of the county were its paupers, and that the fund should be held by the county court to be applied for the latter's support. It is not to be the inference from that case that a charitable bequest to the poor necessarily means to paupers, and that the trust is only to be executed by somebody charged by law with the support of paupers. "A bequest in trust for the poor inhabitants of a particular place, parish, or town is a charitable trust for the poor not receiving parochial or municipal aid and relief as paupers, on the ground that the charity is for the poor, and not for the rich, and, if it was applied to the maintenance of those supported by the parish, town, or county, it would relieve wealthy tax-payers from their taxes, and not materially aid the poor." *Perry, Trusts*, § 698.

It is said in Redf. Wills (2d Ed.) 805, that some of the American cases have gone great lengths in carrying into effect the intention of the testator when there was great indefiniteness in the objects of the trust; "that

the want of a trustee in such cases is never any obstacle in the way of a court of equity carrying into effect any trust, and more especially one of a charitable character." Mr. Pomeroy, in speaking of the distinguishing features between charitable and private trusts, says that, in case of the former, "not only may the beneficiaries be uncertain, but that even when the gift is made to no certain trustee, so that the trust, if private, would wholly fail, a court of equity will carry the trust into effect either by appointing a trustee, or by acting itself in place of a trustee. 2 Pom. Eq. Jur. §§ 1025, 1026. And see *Brown v. Kelsey*, 2 Cush. 243; *Washburn v. Sewall*, 9 Metc. 280.

There can be no question of the general rule. But it is said it does not apply in a case where there is such indefiniteness as to beneficiaries as here. Numerous are the instances which might be cited where there was the want of a trustee, and the court executed the trust in cases of equal indefiniteness as here as to the objects of the trust,—as in *McCord v. Ochiltree*, 8 Blackf. 15, where the legacy was for the education of the pious indigent youths; in *Bull v. Bull*, 8 Conn. 47, where the executors were to dispose of the residue of the estate "among our brothers and sisters and their children as they shall judge shall be most in need of the same,—this to be done according to their best discretion,—and the executors died never having exercised the power; nor executed the trust; in *Williams v. Pearson*, 38 Ala. 299, where the beneficiaries named were "all the paupers and poor children of two designated 'beats,' whose parents were not able to support them;" in *Howard v. American Peace Soc.*, 49 Me. 288, where the gift was to the suffering poor of the town of Auburn. Where a legacy is given to trustees to distribute in charity, and they all die in the life-time of the testator, yet the legacy will be enforced in equity. 2 Story, Eq. Jur. § 1166. An extended collection of cases on the general subject may be found in note to *Hesketh v. Murphy*, 35 N. J. Eq. 23, and in 1 Jarm. Wills, 403, in note.

Mr. Perry sums up, as the result of the principles and authorities, that "a bequest for charity generally, * * * or to the poor generally, or to charity generally, with no trustees appointed, will not be carried into effect by the courts in this country." Perry, Trusts, § 729. That "if a testator makes a general and indefinite bequest to charity, or to the poor, or to religion, and appoints no trustee, but plainly refers such appointment to the court, there would seem to be no impropriety in the court appointing a trustee according to the plain intent of the donor, leaving such trustee to find his power in the will of the donor. But if a testator makes a vague and indefinite gift to charity, and names no trustee, and gives no power to the court to appoint one, there is no power in the American courts to administer such

an inchoate and imperfect gift." Id. § 731. That "it is immaterial how uncertain the beneficiaries or objects are, if the court, by a true construction of the instrument, has power to appoint trustees to exercise the discretion or power of making the beneficiaries as certain as the nature of the trust requires them to be." Id. § 732. See, also, 2 Story, Eq. Jur. § 1169.

In the present case the testatrix appoints no trustee to distribute the fund, but expressly refers its distribution to a court of chancery. The power of distribution, in our opinion, carries with it the power to select the individuals to whom distribution shall be made. The trustee appointed by the court to make the distribution will have the incidental power to select the beneficiaries, so that the case stands the same as if the testatrix herself had appointed a trustee to distribute the fund. The trustee to be appointed by the court will, in effect, be a trustee of her appointment made through the court of chancery.

Courts incline strongly in favor of charitable gifts, and take special care to enforce them. As observed by Mr. Perry (section 687), charitable bequests are said to come within that department of human affairs where the maxim *ut res magis valeat quam pereat* has been, and should be, applied; and, further (section 690), that until the statute of distributions (22 Car. II. c. 13) was enacted, the ordinary was obliged to apply a portion of every intestate estate to charity, on the ground that there was a general principle of piety and charity in every man. This shows the favor in which charity is held in the law. There is to be the most liberal construction of the donor's intention in support of a charitable donation. Charities have always received a more liberal construction than the law will allow in gifts to individuals. 2 Story, Eq. Jur. § 1165.

The charity here is not vague and indefinite, but quite specific,—to the worthy poor of the city of La Salle. Individuals of the class named will ever be readily found to whom the fund may be distributed. The trust is not difficult of execution according to the intention of the testatrix. Instead of herself naming a trustee to make the distribution of her bequest, the testatrix preferred that the distribution should be made by a court of chancery, whose peculiar province it is to effect the administration of trusts, and especially charitable trusts. There can be no doubt that the execution of the trust by such court would be to effectuate the donor's intention, the aim which is always sought to be accomplished.

Under the principles and the strong current of authorities which are properly applicable, we are fully satisfied that the bequest in question is a valid charitable gift, and that it should be carried into effect by a court of chancery, as the testatrix expressly willed that it should be. The residuary

clause of the codicil being held valid, it follows that the complainants take nothing as heirs at law, and are not entitled to maintain their bill. The decree of the circuit court will be reversed, and the cause remanded to that court with directions to dismiss the bill. Decree reversed.

SCHOLFIELD, J. (dissenting). I do not concur in this opinion. I hold that courts of equity in this state exercise no prerogative powers, but, as contradistinguished therefrom, only judicial powers; that, not exer-

cising prerogative powers, the court could not, by the act of the individual, be, and here is not, invested with a power not judicial, namely, that of selecting or designating the "worthy poor" to be the recipients of the testatrix's bounty; and that, since it has not been and could not be invested with such power, it cannot appoint and invest a trustee with such power. I concede the testatrix might have invested a trustee with such power, leaving and directing the court to appoint the trustee; but that is a very different case.

HUTCH.& BUNK.EQ.—28

SKELLENGER'S EX'RS v. SKELLENGER'S EX'R.

(32 N. J. Eq. 659.)

Court of Chancery of New Jersey. May Term, 1880.

Alfred Mills, for complainants. George T. Wert and George W. Forsyth, for next of kin. Edward C. Lyon, for executor of Hannah Skellenger, deceased.

THE VICE CHANCELLOR. This is a bill for direction. The complainants, as the executors of Daniel Skellenger, deceased, ask direction as to what they shall do with certain moneys belonging to their testator, not disposed of by his will. His estate consisted entirely of personalty. By his will, he first gave all his estate to his wife, except his moneys and securities for the payment of money, and then gave all the residue of his estate to his executors, "to have and to hold upon and subject to the following trusts, to wit: upon trust to invest the same at interest, on good security, and the interest and income thereof, after payment of taxes and expenses attending investments, annually to pay to his (my) wife during her natural life," and, within six months after her death, to pay from and out of the residue so directed to be invested upon trust, several pecuniary legacies of fixed amounts. No other or further disposition of the residue is made. The testator's widow survived him. They never had a child. The widow is now dead. She left a will. The complainants, after paying all the legacies directed to be paid, have still in hand over \$1,700. The will makes no disposition of the beneficial interest in this sum. The legal title to it was given to the complainants to enable them to perform certain trusts, but, the trusts having been fully performed without it, the question arises, what shall be done with it, or who is entitled to it?

There are three different claimants: first, the executors, who claim the whole to the exclusion of all others; second, the next of kin of the testator, who also claim the whole in exclusion of the executors, and likewise to the exclusion of the representative of the widow, and, third, the representative of the widow, who claims a moiety of the fund.

At common law, an executor, by virtue of his appointment, is entitled to the whole of the personal estate, and if, after the payment of debts and legacies, any surplus remains, it vests in him beneficially. 2 Wms. Ex'rs, 1475, marg. note. But this rule has never prevailed in the United States. On the contrary, it has uniformly been held in this country that, if any part of the personal estate happens to be undisposed of by the will, the executor takes it, as trustee for those who are entitled under the statute of distribution. 1 Perry, Trusts, § 155; Story, Eq. Jur. § 1208.

No doctrine of equity jurisprudence is more firmly established than that where personal

estate is given by will to a trustee, upon certain trusts, and the purposes of the trust do not exhaust the whole estate, or the trusts fail, either in whole or in part, by lapse or otherwise, the trustee shall not take the surplus for his own benefit, unless such appears to have been the intention of the testator, but a trust results in favor of those who are entitled under the statute of distribution as the next of kin of the testator. Hill, Trustees, 113, marg. note; 1 Perry, Trusts, § 152; 2 Wms. Ex'rs, 1475, marg. note. Where the gift is made to the donee as trustee, or in trust, without any words indicating an intention to confer a beneficial interest upon him, the form of the gift will be considered conclusive against his right to take for his own benefit. Hill, Trustees, 114, marg. note; 1 Perry, Trusts, § 158. These authorities dispose of the claim of the complainants.

Technically, the testator did not die intestate as to any part of his estate. He gave the legal title of the whole to his executors. They would have taken it anyhow, in virtue of their office, if the will had contained no express gift to them. But he did die intestate as to the beneficial interest in this fund. No disposition was made of that. This interest is an equitable estate, and, as such, is entitled, in equity, to be considered, to all intents and purposes, as a legal estate. Such estates, in equity, are subject to the same incidents, properties and consequences that similar legal estates are at law, and are transmissible in the same manner. Cushing v. Blake, 30 N. J. Eq. 695. The income of this fund passed by the will, but no beneficial interest in the corpus itself. As to that the will is silent and inoperative, and it therefore stood, on the testator's death, in exactly the same condition that it would if he had left no will. As to that it must be declared, as a matter of law, that he had no will.

This being so, it would seem to follow, as a necessary sequence, that the widow was entitled to participate in its distribution. As a general rule, the right of the distributees vests immediately on the death of the intestate. But it is contended that our statute was intended to regulate distribution only in cases of total intestacy, and has no application to a case of partial intestacy. This argument, however, proves too much, for, if sound, it will exclude the next of kin quite as effectually as the widow. The right of distribution is not a common-law right, but depends upon statute. Originally the ordinary took the whole surplus for pious uses. To cure this wrong, parliament took away the right of the ordinary, and gave it, by statute, to the widow and next of kin. They hold under the same grant, and one cannot take unless the other does also. In the words of Chief Justice Shaw, uttered in a case identical in all material points with the one under consideration, "the same provision in the statute of distribution which gives property not disposed of by will, where there is

a will, to the next of kin, gives a distributive share to the widow." *Nickerson v. Bowly*, 8 Metc. (Mass.) 430.

It is also insisted that the widow should not be permitted to take any part of this fund, because it is apparent, upon the face of the will, that the testator intended she should not. This intention, it is said, must be inferred from the fact that he gave her the use of the whole during her life, and he could not, therefore, have intended that she should take a part absolutely. In other words, having given her a part by express words, it must necessarily be inferred that he did not intend she should have any more. This argument, it will be observed, proceeds upon the assumption that the right of distribution is to be regulated by the intention of the testator. But this, I think, is a mistake. The intention of the testator is to govern only so far as he has declared it by his will. With regard to that part of his property which his will did not pass, it must be declared he had no will, and therefore the court cannot know his intention concerning it. The next of kin cannot take until intestacy is found, and then they take, not in pursuance of the testator's intention, but

by force of law, regardless of what his intentions were. Upon this point, Chief Justice Shaw, in the case already cited, says: "If it were thought important to inquire into the intent of the deceased, when he has made a will, but left property undisposed of, either in terms or by implication, as every man is presumed to know the law, it may reasonably be inferred as his intention that the residue should be disposed of according to law."

The rule upon this subject is settled. It has recently been adjudged by this court that where a testator dies intestate as to part of his estate, in consequence of the lapsing of a legacy, his widow is entitled to a distributive share of it, though she had accepted the provision made for her in lieu of dower, by the will. *Handy v. Marcy*, 28 N. J. Eq. 59. The other pertinent authorities are *Davers v. Dewes*, 3 P. Wms. 40; *Dicks v. Lambert*, 4 Ves. 725; *Oldham v. Carleton*, 2 Cox, 399; *Ex parte Kempton*, 23 Pick. 163; *Dale v. Johnson*, 3 Allen, 364.

The decree will direct the complainants to pay one moiety of the fund to the representative of the widow, and the other to the next of kin of the testator.

BOND et al. v. MOORE et al.

(90 N. C. 239.)

Supreme Court of North Carolina. Feb. Term, 1884.

Civil action tried at fall term, 1883, of superior court, Chowan county; Avery, Judge.

John M. Jones, owning the lot of land in the town of Edenton described in the complaint, and the recovery of possession of which is the object of this action, on February 9, 1866, conveyed the same by deed executed by himself of the first part, Thomas W. Hudgins of the second, and Martha A. Jones, his wife, of the third part, to the said Thomas W. Hudgins in fee upon the following declared trusts:

1. That the said trustee shall at any time convey the said lot and improvements to such person as the said party of the third part shall direct in writing attested by one witness.

2. That he will convey said lot and improvements to such person as the said party of the third part shall give or devise the same to, by last will and testament, or by an appointment in the nature of one, which power to make a will or appointment in the nature of one is expressly conferred upon the said party of the third part, notwithstanding her coverture.

3. Upon the death of the party of the first part, he will convey the said lot and improvements to the said party of the third part.

4. Upon the death of the party of the third part without having made a last will and testament or appointment in the nature of one, he will convey the said lot and improvements to the party or parties entitled by the laws of North Carolina.

5. The party of the first part shall occupy or rent out the lot and improvements for his own use during the joint lives of himself and the party of the third part, unless the same shall be sooner sold by her order.

These declarations of the trusts upon which the trustee was to hold are preceded by recitals in the deed, which in substance state that the said Martha A. had theretofore united with her said husband in the sale and conveyance of certain lots owned by her previous to her marriage, the purchase money whereof he had received, under an arrangement by which he agreed to convey the lot herein described "to a trustee for the use of the party of the third part and upon the trusts hereinafter declared."

The said Martha died before her husband, without heirs, having made no disposition of the estate under the forms conferred in the deed, by deed, will or other writing.

John M. Jones, her survivor, died in 1879, leaving a will, wherein the plaintiff Bond is named executor and the other plaintiffs are the devisees.

The trustee died in 1872, intestate, and the defendants, other than the defendant Moore, who is in possession of the lot, are his heirs at law.

The defendant Moore claims the lot by virtue of a judgment against the university, an execution issued thereon, a sale and a sheriff's deed to him.

The relief demanded is a recovery of the possession and damages for detention against Moore, and a judgment against the other defendants requiring a conveyance of the legal title.

The defendants demur to the complaint, and the demurrer being overruled and judgment rendered for the plaintiffs they appeal.

Pruden & Bunch, for plaintiffs. W. A. Moore, for defendants.

SMITH, C. J. (after stating the case). The question to be decided arises from the construction of the deed, and is whether an equitable estate in remainder vests in the plaintiffs, entitling them to demand a conveyance of the legal estate from the heirs at law of the trustee and possession from the defendant Moore.

It is not important to consider the force and effect of the terms used in the declaration of the trust in favor of the wife, and the necessity of words of inheritance to enlarge an estate for life into a fee. This trust is, as are the others, executory, and not an executed trust,—created by a direction to the trustee to convey,—not itself a conveyance; and the same technical rules of construction do not prevail in interpreting both. When the trustee is required to act in execution of the trust, in order to effectuate the expressed purpose of the instrument, that purpose is ascertained by employing the ordinary rules of interpretation; and a direction to convey the lot, in the absence of restriction or qualifying words, when applied to instructions given to the trustee, is a direction to convey the full estate vested in him, and the trust consists in the right to have it performed. In the latter case the intent is ascertained by giving a fair and reasonable meaning to the language in which it is expressed, and in this sense the trust is enforced. This is the distinction taken in *Levy v. Griffis*, 65 N. C. 236, and is warranted in *Holmes v. Holmes*, 86 N. C. 206.

But it is a settled rule in the interpretation of written instruments to look to other provisions for light to guide in arriving at the meaning of any doubtful clause. In applying the rule, we think it plainly appears that a life estate only was intended to be secured to the wife, associated with a power of disposition of the whole estate, by a written instrument in the form prescribed. The recitals in the deed show that it is drawn in pursuance of the agreement between Jones and his wife, and in precise fulfillment of its

terms; for it declares the promise to have been to convey the lot to a trustee for her use "upon the trusts hereinafter declared."

Among the trusts enumerated, the third undertakes to provide for the contingency of the death of the wife without having exercised the power conferred, clearly contemplating a remainder and limiting her estate under a preceding clause for the term of her life. Nor is it material whether this final limitation of the trust estate is effectual or inoperative by reason of an insufficient description of the party to take under it. In either case the clause subserves the same purpose in showing the character and extent of the estate secured to the wife.

Her death, then, without her having exercised the dispositive power, her husband still being alive, and his estate also becoming extinct, which endured only during their joint lives, presents the very contingency upon whose happening the trustee is required to convey "to the party or parties entitled by the laws of North Carolina." Who is the party meant? The plaintiffs appropriate this designation to the grantor, the defendants to the heirs of the wife, and there being none, to the university substituted in their place under the law of escheat.

In our opinion, the words do not and were not intended to point out any particular persons to take the inheritance remaining, but to leave it to pass under the law as undisposed of property. They show such estate, depending on a contingency, to have been in the mind of the grantor as capable of subsisting beyond the life of the wife and of his own, and to place it under the control of the law.

This being the proper construction of the clause upon well established principles, the undisposed of remainder was freed from the intervening life estate in the wife, became united with the then expiring life estate of the husband, and he became the equitable owner of the entire inheritance.

"Another form in which a resulting trust may appear," says Mr. Justice Story, "is where there are certain trusts, created either by deed or will, which fail in whole or part, or which are of such an indefinite nature that courts of equity will not carry them into effect, or which are illegal in their nature or

character, or which are fully executed and yet leave an unexhausted residuum. In all such cases there will arise a resulting trust to the party creating the trust, or to his heirs or legal representatives, as the case may require." 2 Story, Eq. Jur. § 1106a; Lewin, Trusts, 175; Mosely v. Mosely, 87 N. C. 69; Robinson v. McDiarmid, Id. 455.

But the defendants contend that inasmuch as the husband was permitted to receive the purchase money of the wife's land, under his agreement to convey his lot in trust for her, this money constitutes the consideration of his deed and the trust arises to her. The rule which raises a trust in favor of one whose money was used in payment for land bought, has no application to the facts of the present case. The deed to which she consents in becoming a party contains all the trusts, and, in the very form he agreed to make and secure to her, the full fruits of his contract. He stipulates to make precisely such a conveyance, and with such declaration of trusts as are found in the present deed. This exhausts her equity in the premises. Her money is the consideration of, and given for, the interests and benefits secured to her in its provisions, and for no other portion of the trust estate. The land was her husband's, not her's; and whatever estate remains after all the trusts in her behalf have been executed, must be vested in him. This does not belong to the class of cases in which the purchase money of one party has been used and the title to the land conveyed to another.

"The doctrine," remarks the same author, "is strictly limited to cases in which the purchase has been made in the name of one person and the purchase money has been paid by another." 2 Story, Eq. Jur. § 1201a. The authorities cited in the argument sustain this view of the law. Unless the constructive trust was raised in such case, a successful fraud would be perpetrated by the grantee. King v. Weeks, 70 N. C. 372; Cunningham v. Bell, 83 N. C. 328; Kisler v. Kisler, 27 Am. Dec. 308.

We therefore affirm the judgment overruling the demurrer, and remand the cause to be proceeded with in the court below.

No error.

Affirmed.

GOULD v. LYNDE et al.

(114 Mass. 366.)

Supreme Court of Massachusetts. Jan. Term,
1874.W. P. Harding, for defendants. T. H.
Sweetser & W. B. Stevens, for plaintiff.

ENDICOTT, J. It is conceded by the plaintiff that there was no express trust upon which the conveyances were made, the alleged agreement between the parties being oral; but it is claimed, that a resulting trust to the plaintiff arises out of the transaction.

The rule that on a voluntary conveyance without consideration a trust results to the grantor was confined to common law conveyances, and does not apply to modern conveyances in common form, with recitals of consideration, to the use of the grantee and his heirs. Such deeds to a stranger, and a fortiori when the purpose of the grant is to convey to a wife, exclude any resulting trust to the grantor.

The distinction between such a conveyance and a conveyance to a third party where another furnishes the money to whom a trust

results, he not being estopped by the recitals and covenants of the deed, is too well established by our authorities to require illustration. *Walker v. Locke*, 5 Cush. 90; *Whitten v. Whitten*, 3 Cush. 191; *Bartlett v. Bartlett*, 14 Gray, 277; *Titcomb v. Morrill*, 10 Allen, 15; *Blodgett v. Hildreth*, 103 Mass. 484; *Cairns v. Colburn*, 104 Mass. 274; *Peirce v. Colcord*, 113 Mass. 372; *Perry, Trusts*, §§ 161, 162, and cases cited.

The subsequent agreement, or attempt by the wife to convey, does not affect the question, as a trust must result, if at all, the instant the deed passes. *Barnard v. Jewett*, 97 Mass. 87.

The wife therefore held the estate, subject to no trust for the use and benefit of the plaintiff, and the respondents cannot be called upon to release and assign to him any title they may have therein, as her heirs at law.

The statute is peremptory that no conveyance of real estate by a married woman shall be valid without the assent of her husband in writing, or his joining with her in the conveyance. Gen. St. c. 108, § 3. As the plaintiff's wife made the deed to Wiley without such assent or joinder no title passed.

Demurrer sustained; bill dismissed.

BOTSFORD v. BURR.

(2 Johns. Ch. 405.)

Court of Chancery of New York. 1817.

The bill, filed March the 9th, 1815, stated, that the plaintiff, on the first of May, 1813, applied to the defendant for the loan of 900 dollars, to which the defendant agreed, provided he was permitted to purchase in a farm of the plaintiff, bought by him of S. Skidmore, subject to a mortgage given by Skidmore to J. Bogardus, and which was advertised for sale under that mortgage, as security for the payment of the loan. That the defendant accordingly purchased the farm. That the plaintiff had made an agreement to purchase of Peter Elmendorf, lot No. 3, lying opposite to the farm of the plaintiff, for 3,600 dollars; that the defendant consented to assume this contract, and become responsible to Elmendorf for the purchase money. That this lot was accordingly conveyed to the defendant, who executed a mortgage to Elmendorf, to secure the purchase money. That part of the purchase money, being 500 dollars, was to be paid down, to make up which sum, the plaintiff advanced to the defendant 90 dollars; that he also endorsed to the defendant a note of Edmund Bruyn, dated 10th of March, 1809, for 1,150 dollars, as security for the plaintiff's advances and responsibilities; and the amount of which note the defendant afterwards recovered. That the defendant has since sold the property for 7,000 dollars. The bill prayed for an account, and that the defendant might be decreed to pay over to him the balance, after deducting his advances, &c. and that he assign over to the plaintiff the securities taken, &c.

The defendant, in his answer, admitted that the plaintiff applied to him for a loan of about 900 dollars to pay off the mortgage on his farm, then advertised for sale. The defendant refused to lend the money, but offered to purchase the farm, and that if the plaintiff repaid the money and interest, and the costs and charges, in one month thereafter, the defendant would reconvey to him the farm, but on no other condition whatever. That on the 20th of May, 1813, he purchased the property (the Bogardus farm) at auction, being the highest bidder, for 930 dollars, which he paid to the mortgagee, and received his deed. He admitted the verbal agreement between the plaintiff and Elmendorf, but the plaintiff being embarrassed, Elmendorf applied to the defendant to purchase the lot No. 3, and he accordingly made the purchase, for 3,600 dollars, with a view to secure to himself certain advantages for pine timber and a mill dam, &c. essential to the Bogardus farm, and for no other object or benefit, and without any understanding, express or implied, with the plaintiff. The deed was dated 1st of May, 1813, but executed the 28th of June; that to make up 500 dollars to be paid to Elmendorf, the de-

fendant borrowed of the plaintiff 90 dollars, which was not understood to be any part of the purchase money, or to give the plaintiff any interest in the purchase, which was made solely for the defendant's benefit, and without any trust, expressed or implied, whatever. For the residue of the purchase money, he executed a mortgage to Elmendorf, which had been paid off. That the plaintiff was insolvent, and had committed waste on the premises; that in the fall of 1813, the plaintiff being desirous to have some part of the property, the defendant told him, if he would pay 100 dollars monthly, he would convey to him some part of the Bogardus farm, in proportion to the money paid; but that if the plaintiff failed, the defendant would enter on the premises. That on the 30th of December, 1813, the plaintiff formally assigned to the defendant, the note of E. Bruyn, as an indemnity for the waste committed, and for boards of the defendant sold by the plaintiff, and agreed to pay 100 dollars a month, and if he failed to do so, there was to be an end of the business. The defendant recovered the amount of the note; but the plaintiff never paid a single sum according to the agreement. The assignment of the note expressed the consideration to be the amount of the note paid by the defendant to the plaintiff. That on the 31st of January, 1814, he contracted to sell the whole property, on both farms, for 7,000 dollars, but no conveyance had been executed; and he sold it in his own right, and for his own use, without any reference to the plaintiff, or any agreement with him.

The material parts of the evidence are stated in the judgment of the court.

R. Tillotson, for plaintiff. Mr. Sudam, for respondent.

THE CHANCELLOR. The bill proceeds on the assumed fact that the defendant purchased the Bogardus farm, and the Elmendorf lot, as trustee for the plaintiff, and took the deeds in his own name, by agreement between them, for his better security and indemnity, as he was obliged to advance, or become bound for nearly the whole of the consideration money. The defendant is, therefore, called on, as trustee, to account for the proceeds of the subsequent sale of the lands, after being credited for the advances which he has been obliged to make, together with a reasonable allowance for his services as the plaintiff's agent.

But as the defendant purchased, at public auction, what is called the Bogardus farm, and took the deed in his own name, and paid his own money; and as he purchased, at private sale, the Elmendorf lot, and paid part of the purchase money, principally with his own funds, and gave his bond and mortgage for the residue; and as both these purchases were made with the knowledge and assent of the plaintiff, it will be somewhat

difficult to raise a trust in favour of the plaintiff, without violating the statute of frauds. The statute (session 10, c. 44, §§ 12, 13) declares, "That all declarations, or creations of trusts, or confidences of any lands, &c., shall be manifested and proved by some writing signed by the party, who is, or shall be, by law, enabled to declare such trust, or else they shall be utterly void." The statute, however, excepts the case where "any conveyance shall be made of any lands, &c., by which a trust, or confidence, shall arise, or result, by implication or construction of law."

It is well settled that such a resulting trust may be established by parol proof. This point was fully considered in *Boyd v. McLean*, 1 Johns. Ch. 582. The only real doubt or controversy, in this case, is, whether the facts make out a resulting trust under the statute. If A. purchases an estate with his own money, and takes the deed in the name of B., a trust results to A., because he paid the money. The whole foundation of the trust is the payment of the money, and that must be clearly proved. *Willis v. Willis*, 2 Atk. 71. If, therefore, the party who sets up a resulting trust made no payment, he cannot be permitted to show, by parol proof, that the purchase was made for his benefit, or on his account. This would be to overturn the statute of frauds, and so it was ruled by Lord Keeper Henley, in the case of *Bartlett v. Pickersgill*, 4 East, 577, note; *Hughes v. Moore*, 7 Cranch, 176.

The plaintiff does not pretend, in this case, to have paid any part of the consideration, for the purchase by the defendant, at auction, of the Bogardus farm. The defendant purchased that farm for 930 dollars, and paid the money himself, without any advance from the plaintiff. There is then no pretext for setting up a resulting trust here, and all parol proof, for that purpose, is inadmissible. The conveyance by Bogardus, the mortgagee, and the payment of the purchase money by the defendant, completed the contract; and no parol proof of parol declarations, inconsistent with the deed, can be received. To admit it, would be repealing the statute of frauds, and would endanger the security of real property resting on title by deed. Nor would a subsequent advance of money to the purchaser, after the purchase is thus complete and ended, alter the case. It might be evidence of a new loan, or be the ground of some new agreement, but it would not attach, by relation, a trust to the original purchase; for the trust arises out of the circumstance that the moneys of the real, and not of the nominal purchaser, formed, at the time, the consideration of that purchase, and became converted into the land.

The only money that the plaintiff alleges he advanced was 90 dollars, at the time of the purchase of the Elmendorf lot, and this, he says, was part of the 500 dollars paid by the defendant on receiving the conveyance. It is

not pretended, that any further payment was made by the plaintiff at the time of the purchase, though it is alleged, that, some time afterwards, he assigned over to the defendant the note of Edmund Bruyn, in furtherance of the same object.

A doubt has been suggested in the books, whether a resulting trust can be sustained, where only a part of the consideration was paid by the party claiming to be cestuy que trust. Lord Hardwicke held that it could not, according to the case of *Crop v. Norton*, 2 Atk. 74, 9 Mod. 233. He there said, that where the purchase money was paid by one, and the conveyance taken in the name of another, there was a resulting trust for the person who paid the money, but that this was where "the whole purchase money" was paid by one person, and that he never knew it to be so, where the consideration moved from several persons. He, accordingly, held, that as only part of the consideration, in that case, moved from N., there was no resulting trust in him. I doubt whether this case is to be understood to apply; and it cannot be received as correct, where only a single individual claims the benefit of the trust; for the cases recognize the trust where the money of A. formed only a part of the consideration of the land purchased in the name of B. The land, in such case, is to be charged pro tanto. This seems to be the language of the case of *Ryal v. Ryal*, 1 Atk. 59, Amb. 413, and of *Bartlett v. Pickersgill*, already referred to. So, also, in *Lane v. Dighton*, Amb. 409, only part of the consideration of the purchase arose from trust moneys, and yet the decree followed the money into the land. This is the most reasonable application of the rule; and, in the late case of *Wray v. Steele*, 2 Ves. & B. 388, the vice chancellor held, that there might be a resulting trust by a joint advance, by two or more, upon a purchase in the name of one, and that there was no reason for confining the advance to a single individual, to constitute a resulting trust. He did not believe that Lord Hardwicke, ever used the dictum imputed to him in *Crop v. Norton*, 2 Atk. 74, 9 Mod. 233.

We will now examine the proof of the payments charged to have been made by the plaintiff.

The defendant, in his answer, admits the loan of the 90 dollars, to make up the first payment of the 500 dollars to Elmendorf. He says, it was simply a loan, and not advanced as a payment by the plaintiff of any part of the consideration.

The plaintiff's witnesses, Hixson and Couch, say, that these 80 dollars, or 90 dollars, were advanced by the plaintiff, on account of the purchase under the mortgage sale; one of them says, he was present at the sale under the mortgage, and that the defendant then told him that the plaintiff had, on that day, advanced him the 80 dollars on account of the purchase. It will be recollected, that this sale, under the mortgage of the

Bogardus farm, was on the 12th of May, and the purchase from Elmendorf, on the 28th of June, and that the plaintiff charges, and the defendant admits, that the advance of the 80 dollars, or 90 dollars, was at the latter purchase. None is pretended to have been made at the former purchase, and yet these witnesses fix, with so much precision, the advance at that time. This is a remarkable instance of the inaccuracy and fallacy of parol testimony, and shows the great danger there is of giving much latitude to these implied trusts, founded on naked declarations, in opposition to the solemnity and certainty of written documents.

Another witness (Wm. Doll) says, he heard the defendant acknowledge the receipt of from 80 to 100 dollars from the plaintiff, "on account of their contracts." This is too loose and general to be of much weight. Henry Upham is the only witness who directly supports the allegation in the bill. He says the defendant told him, in the autumn of 1803, that "he had received 80 dollars of the plaintiff, towards purchasing the Elmendorf lot." Here is an inaccuracy in this witness: for both parties admit, that the sum advanced in aid of that purchase, was 90 dollars; but the question still arises, was the money advanced as a loan to the defendant, or as a payment, *pro tanto*, by the plaintiff to the vendor. The testimony which I have stated as to this point (and it is all there is) is extremely imperfect. There was, no doubt, an advance by the plaintiff of 90 dollars, at the time of the purchase of the Elmendorf lot, but whether it was advanced to accommodate the defendant, or as payment of so much by the plaintiff to the vendor, through the agency of the defendant, is a point not clearly ascertained. All the proof seems to consist of confessions of the defendant; yet those confessions will, most of them, apply as well to the pretence on one side as on the other. He received 90 dollars of the plaintiff towards paying for the Elmendorf lot; but it is still uncertain whether it was considered as an advance by the plaintiff towards the purchase, on his own, or on the defendant's account. It is dangerous to trust to such inaccurate witnesses, as those who testify concerning this payment. The observation of Sir Wm. Grant, 10 Ves. 517, is very applicable to this case, and he was speaking on a similar point. "The witness swears to no fact or circumstance, capable of being investigated or contradicted, but merely to a naked declaration of the purchaser, admitting that the purchase was made with the trust money. That is, in all cases, most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection, may totally alter the effect of the declaration."

The situation of the parties, at the time, is sufficient to throw doubt on the suggestion, that the 90 dollars were advanced by the

plaintiff, as part payment of a purchase actually made on his account. He was, at the time, absolutely insolvent, and could not pay a debt of 50 dollars, which he owed to another person. He had not been able, a few weeks before that purchase, to redeem a farm, with its mills, for 930 dollars, but suffered the same to be purchased by the defendant, without any payment on his part. The Elmendorf lot was then purchased for 3,600 dollars, and of which sum 500 dollars were to be paid immediately. The plaintiff was utterly unable to engage in this purchase. Is it then probable that, under all these circumstances, 90 dollars would be seriously considered, by either party, as paid by the plaintiff on his own account, or that the purchase was made for his benefit?

But the plaintiff, on the 30th of December, 1813, which was six months after the purchase of the Elmendorf lot, assigned to the defendant a note against Edmund Bruyn; and this is put forward as a payment of part of the purchase money, from which the resulting trust was to arise.

The bill charges, that the note was endorsed to the defendant, "as a security for the advances and responsibilities entered into by the defendant for the plaintiff," and it says, afterwards, that it was "for the purpose of procuring a reconveyance or assignment of the said farm, so bid off at public auction by the defendant, and of the lot No. 3, purchased of Elmendorf."

It is not easy to reconcile these distinct reasons, stated in the bill, for the assignment of the note; but if we adopt either of them as the true reason, it does not appear that the note was assigned, truly and distinctly, as a part payment, by the plaintiff, of the purchase money belonging to the vendor, upon either of the sales. The note affords no ground for a resulting trust springing out of the purchase of either farm by the defendant, because such a trust arises only from the payment, originally, of the purchase money (or, at least, a part of it) by the party setting up the trust. The assignment of this note was an after thought and transaction: and, according to the latter reason mentioned in the bill, it was made for the purpose of procuring a reconveyance, a matter entirely distinct from the trust we are considering. The answer of the defendant puts the assignment of the note on other ground. It was made "as an indemnity for the waste committed on the property by the plaintiff, and for the boards belonging to the defendant (which had been sold by the plaintiff), and in order to induce the defendant to give to the plaintiff the only opportunity he required of making some payment, so as to induce the defendant voluntarily to convey to him some part of the tract purchased under the mortgage sale."

The plaintiff's witnesses who speak of this note, give a different reason for the assignment, and one not exactly consistent with

the allegations of either party. Hixson says, it was assigned "on account of moneys advanced by the defendant for the plaintiff, on the purchase of both the farms." It does not appear how the witness came to the knowledge of this fact; and considering his great inaccuracy on another point, as I have already shown, we cannot place much reliance upon the correctness of this assertion, unaccompanied with any reason or authority for making it. But assuming the fact as stated (and we may do it with the more safety, since Upham, another witness, testifies to the same fact, as coming to him from the repeated acknowledgments of the defendant) the assignment of the note, even for such a purpose, cannot raise a trust out of either of the conveyances to the defendant. The trust must have been coeval with the deeds, or it cannot exist at all. After a party has made a purchase with his own moneys or credit, a subsequent tender, or even reimbursement, may be evidence of some other contract, or the ground for some other relief, but it cannot, by any retrospective effect, produce the trust of which we are speaking. There never was an instance of such a trust so created, and there never ought to be, for it would destroy all the certainty and security of conveyances of real estate. The resulting trust, not within the statute of frauds, and which may be shown without writing, is when the purchase is made with the proper moneys of the cestuy que trust, and the deed not taken in his name. The trust results from the original transaction, at the time it takes place, and at no other time; and it is founded on the actual payment of money, and on no other ground. It cannot be mingled or confounded with any subsequent dealings whatever. They are to be governed by different principles, and the doctrine of a resulting trust would be mischievous and dangerous, if we once departed from the simplicity of this rule. It is a very questionable doctrine, in the view of policy, even under this limitation; and it has been admitted with great caution, as is manifest from the cases which were reviewed in *Boyd v. McLean*, 1 Johns. Ch. 582.

But there is an objection to the parol proof, in respect to the assignment of the note. It was assigned to the defendant by a very formal instrument under seal, and, as the instrument stated, "in consideration of the said sum of money now due on said note, and to him in hand paid by the defendant." The parties were concluded by this deed from setting up a different consideration, except upon the allegation of fraud, mistake, or surprise. 1 Johns. Ch. p. 429. On no other ground can a deed be contradicted by parol proof. We must take the consideration to be what it is stated to be in the assignment, except so far as the defendant has admitted, in his answer, a different consideration; and that admission in

this case, even if we join with it the admission of the plaintiff, is of no use as to the charge of a resulting trust.

We are, then, brought to this conclusion, that the defendant was not, in any respect, a trustee to the plaintiff in the purchase of the Bogardus farm; and that he was not a trustee in the purchase of the Elmendorf lot, unless in a very small degree, or in the ratio that 90 dollars bear to 3,600. If the payment of part of the consideration raises a trust, it, certainly, cannot raise it beyond the proportion of the money paid. It can only be a charge, as one of the cases expresses it, *pro tanto*; and in this case the trust, even if admitted, is to so inconsiderable an amount, as not to be worth contending for. The difference between the 90 dollars with interest, considered as a loan, and a rateable proportion of the price for which the Elmendorf lot was sold by the defendant, is very immaterial. But if the plaintiff is entitled to pursue that sum into the land, the smallness of the demand will not be an obstacle. The proof of the payment of the 90 dollars by the plaintiff, as a part of the purchase money, is not, however, satisfactory; and if it was, there is evidence that the plaintiff afterwards discharged the trust. It is well settled that parol evidence is admissible to rebut a resulting trust. If the plaintiff, by his bill, sets up an equity founded on parol proof, it may be rebutted, put down, or discharged, by parol proof. *Walker v. Walker*, 2 Atk. 98; *Lake v. Lake*, Amb. 126; *Roe v. Popham*, Doug. 24. There may be a parol waiver even of a written agreement. *Price v. Dyer*, 17 Ves. 356. Now, in this case, it is in proof that after the sale of the Elmendorf lot by the defendant, the plaintiff disclaimed any right or title to it. He declared to Wm. Tremper, "that the defendant had sold the land to Hendrickson and others, and made something by it. That the whole was the defendant's, and he had nothing to do with it. That he had failed in every one of his contracts with the defendant; and that he had no interest in either of the said tracts of land. That the defendant did with it as he pleased, and that he had no claim on the defendant, unless the defendant chose to give him something."

I am, accordingly, of opinion, that the plaintiff has failed in charging the defendant as a trustee, in the purchase of either of the tracts of land mentioned in the bill. The defendant is, therefore, bound to account for the 90 dollars, with interest, and for the amount of the note assigned to him, with interest. This is what he offered to do by his answer. But he claims likewise the benefit of the consideration, for which he admits the note to have been assigned, and which was for waste committed on the lands between the time of the purchase by the defendant and the assignment of the note, and for boards of the defendant's

which the plaintiff sold. It appears, also, by the testimony of two of the witnesses (Hixson and Upham), that after the purchase of the Elmendorf lot by the defendant, and before the sale by him, the plaintiff had made beneficial improvements upon it; and as it appears that the plaintiff was suffered to continue in possession, under some indistinct encouragement held out by the defendant, that he might eventually become interested in the lands, it is equitable, under all the circumstances of this case, that the plaintiff should have a reasonable allowance made him, for such beneficial and permanent improvements as he may have made on the lands, between the time of the purchase and sale of the defendant, as stated in the pleadings.

I shall, accordingly, direct a reference to a master, to take and state an account between the parties upon the following prin-

ciples, viz. That he compute the amount of the loan of 90 dollars, and of the note assigned, with interest; that he ascertain, by proof, the damages, if any, arising from waste, committed by the plaintiff, or by his direction, on any part of the lands, between the time of the purchases and the sale thereof by the defendant; also the amount of boards belonging to the defendant upon the said lands, and sold, or otherwise converted by the plaintiff; and that he further ascertain the value of the beneficial and lasting improvements, if any, made by the plaintiff on either of the tracts of land, during the period aforesaid; also, what would be a reasonable allowance to the defendant for the use and occupation of the said lands by the plaintiff, during the same period. All further questions are reserved until the coming in of the report.

Decree accordingly.

DYER v. DYER.

2 Cox, Ch. 92.

Court of Chancery. Nov. 27, 1788.

In 1737 certain copyhold premises holden of the manor of Heytesbury, in the county of Wilts, were granted by the lord, according to the custom of that manor, to Simon Dyer (the plaintiff's father), and Mary, his wife, and the defendant William (his other son), to take in succession for their lives, and to the longest liver of them. The purchase money was paid by Simon Dyer, the father. He survived his wife, and lived until 1785, and then died, having made his will, and thereby devised all his interest in these copyhold premises (amongst others) to the plaintiff, his younger son. The present bill stated these circumstances, and insisted that the whole purchase money being paid by the father, although, by the form of the grant, the wife and the defendant had the legal interest in the premises for their lives in succession, yet in a court of equity they were but trustees for the father, and the bill therefore prayed that the plaintiff, as devisee of the father, might be quieted in the possession of the premises during the life of the defendant.

The defendant insisted that the insertion of his name in the grant operated as an advancement to him from his father to the extent of the legal interest thereby given to him. And this was the whole question in the cause. This case was very fully argued by Mr. Solicitor General and Ainge for plaintiff, and by Burton & Morris, for defendant. The following cases were cited, and very particularly commented on: *Smith v. Baker*, 1 Atk. 385; *Taylor v. Taylor*, Id. 386; *Mumma v. Mumma*, 2 Vern. 19; *Howe v. Howe*, 1 Vern. 415; *Anon.*, 1 Freem. Ch. 123; *Benger v. Drew*, 1 P. Wms. 781; *Dickinson v. Shaw*, before the lords commissioners in 1770; *Bedwell v. Froome*, before Sir T. Sewell, on the 10th May, 1778; *Row v. Bowden* before Sir L. Kenyon, sitting for the lord chancellor; *Crisp v. Pratt*, Cro. Car. 549; *Scroope v. Scroope*, 1 Ch. Cas. 27; *Elliot v. Elliot*, 2 Ch. Cas. 231; *Ebrand v. Dancer*, Id. 26; *Kingdon v. Bridges*, 2 Vern. 67; *Back v. Andrew*, Id. 120; *Rundle v. Rundle*, Id. 264; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Stileman v. Ashdown*, 2 Atk. 480; *Pole v. Pole*, 1 Ves. Sr. 76.

LORD CHIEF BARON, after directing the cause to stand over for a few days, delivered the judgment of the court.

The question between the parties in this cause is whether the defendant is to be considered as a trustee for his father in respect of his succession to the legal interest of the copyhold premises in question, and whether the plaintiff, as representative of the father, is now entitled to the benefit of that trust. I intimated my opinion of the question on the hearing of the cause, and I

then indeed entertained very little doubt upon the rule of a court of equity, as applied to this subject; but as so many cases have been cited, some of which are not in print, we thought it convenient to take an opportunity of looking more fully into them, in order that the ground of our decision may be put in as clear a light as possible, especially in a case in which so great a difference of opinion seems to have prevailed at the bar. And I have met with a case in addition to those cited, which is that of *Rumboll v. Rumboll*, 2 Eden, 15, on the 20th April, 1761. The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successive,—results to the man who advances the purchase money. This is a general proposition, supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law that, where a feoffment is made without consideration, the use results to the feoffer. It is the established doctrine of a court of equity that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove the circumstance of one or more of the nominees, being a child or children of the purchaser, is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee, being a child, shall have such operation as a circumstance of evidence, that we should be disturbing landmarks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence. I think it would have been a more simple doctrine if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law. Surely, then, it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must be, of course, evidence admitted on the other side. Thus it was resolved into a question of intent, which was getting into a very wide sea, without very certain guides. In the most simple case of all, which is that of a father purchasing in the name of his son, it is said that this shews the father intended an advancement, and therefore the resulting trust is rebutted; but then a circumstance is added to this, namely, that the son happened to be provided for. Then the question is, did the father intend to advance a son already provided for? Lord Not-

tingham could not get over this, and he ruled that in such a case the resulting trust was not rebutted; and in *Pole v. Pole*, 1 Ves. Sr. 76, Lord Hardwicke thought so too; and yet the rule in a court of equity as recognized in other cases is that the father is the only judge as to the question of a son's provision. That distinction, therefore, of the son being provided for or not, is not very solidly taken or uniformly adhered to. It is then said that a purchase in the name of a son is a *prima facie* advancement, and, indeed, it seems difficult to put it in any way. In some of the cases some circumstances have appeared which go pretty much against that presumption, as where the father has entered and kept possession, and taken the rents; or where he has surrendered or devised the estate; or where the son has given receipts in the name of the father. The answer given is that the father took the rents as guardian of his son. Now, would the court sustain a bill by the son against the father for these rents? I should think it pretty difficult to succeed in such a bill. As to the surrender and devise, it is answered that these are subsequent acts; whereas the intention of the father in taking the purchase in the son's name must be proved by concomitant acts; yet these are pretty strong acts of ownership, and assert the right, and coincide with the possession and enjoyment. As to the son's giving receipts in the name of the father, it is said that, the son being under age, he could not give receipts in any other manner; but I own this reasoning does not satisfy me. In the more complicated cases, where the life of the son is one of the lives to take in succession, other distinctions are taken. If the custom of the manor be that the first taker might surrender the whole lease, that shall make the other lessees trustees for him; but this custom operates on the legal estate, not on the equitable interest; and therefore this is not a very solid argument. When the lessees are to take successive, it is said that, as the father cannot take the whole in his own name, but must insert other names in the lease, then the children shall be trustees for the father; and to be sure, if the circumstance of a child being the nominee is not decisive the other way, there is a great deal of weight in this observation. There may be many prudential reasons for putting in the life of a child in preference to that of any other person; and if in that case it is to be collected from circumstances whether an advancement was meant, it will be difficult to find such as will support that idea. To be sure, taking the estate in the name of the child, which the father might have taken in his own, affords a strong argument of such an intent; but where the estate must necessarily be taken to him in succession, the inference is very different. These are the difficulties which occur from considering the purchase in the son's name

as a circumstance of evidence only. Now, if it were once laid down that the son was to be taken as a purchaser for a valuable consideration, all these matter of presumption would be avoided.

It must be admitted that the case of *Dickinson v. Shaw* is a case very strong to support the present plaintiff's claim. That came on in chancery, on 22d May, 1770. "A copyhold was granted to three lives to take in succession, the father, son, and daughter. The father paid the fine. There was no custom stated. The question was whether the daughter and her husband were trustees during the life of the son, who survived the father. At the time of the purchase the son was nine and the daughter seven years old. It appeared that the father had leased the premises from three years to three years to the extent of nine years. On this case Lords Commissioners Smythe and Aston were of opinion that, as the father had paid the purchase money, the children were trustees for him." To the note I have of this case it is added that this determination was contrary to the general opinion of the bar, and also to a case of *Taylor v. Alston*, in this court. In *Dickinson v. Shaw* there was some little evidence to assist the idea of its being a trust, namely, that of the leases made by the father. If that made an ingredient in the determination, then that case is not quite in point to the present; but I rather think that the meaning of the court was that the burthen of proof laid on the child; and that the cases which went the other way were only those in which the estate was entirely purchased in the name of the children. If so, they certainly were not quite correct in that idea, for there had been cases in which the estates had been taken in the names of the father and son. I have been favoured with a note of *Rumboll v. Rumboll*, before Lord Keeper Henley on the 20th April, 1761, where a copyhold was taken for three lives in succession, the father and two sons. The father paid the fine, and the custom was that the first taker might dispose of the whole estate (and his lordship then stated that case fully). Now, this case does not amount to more than an opinion of Lord Keeper Henley, but he agreed with me in considering a child as a purchaser for good consideration of an estate bought by the father in his name, though a trust would result as against a stranger. It has been supposed that the case of *Taylor v. Alston* in this court denied the authority of *Dickinson v. Shaw*. That cause was heard before Lord Chief Baron Smythe, myself, and Mr. Baron Burland, and was the case of an uncle purchasing in the names of himself and a nephew and niece. It was decided in favour of the nephew and niece, not on any general idea of their taking as relations, but on the result of much parol evidence, which was admitted on both sides, and the equity on the

side of the nominees was thought to preponderate. Lord Kenyon was in that cause, and his argument went solely on the weight of the parol evidence. Indeed, as far as the circumstance of the custom of the first taker's right to surrender, it was a strong case in favour of a trust. However, the court determined the other way on the parol evidence. That case, therefore, is not material. Another case has been mentioned, which is not in print, and which was thought to be materially applicable to this (*Bedwell v. Froome*, before Sir T. Sewell); but that was materially distinguishable from the present. As far as the general doctrine went, it went against the opinion of the lords commissioners. His honour there held that the copyholds were part of the testator's personal estate, for that was not a purchase in the name of the daughter. She was not to have the legal estate. It was only a contract to add the daughter's life in a new lease to be granted to the father himself. There could be no question about her being a trustee, for it was as a freehold in him for his daughter's life. But in the course of the argument his honour stated the common principles as applied to the present case, and ended by saying that, as between father and child, the natural presumption was that a provision was meant. The anonymous case in 1 Freem. Ch. 123, corresponds very much with the doctrine laid down by Sir T. Sewell, and it observes that an advancement to a child is considered as done for valuable consideration, not only against the father, but against creditors. *Kingdon v. Bridges*, 2 Vern. 67, is a strong case to this point,—that is, the valuable nature of the consideration arising on a provision made for a wife or for a child; for there the question arose as against creditors.

I do not find that there are in print more than three cases which respect copyholds where the grant is to take successive,—*Rundle v. Rundle*, 2 Vern. 264, which was a case perfectly clear; *Benger v. Drew*, 1 P. Wms. 781, where the purchase was made partly with the wife's money; and *Smith v. Baker*, 1 Atk. 385, where the general doctrine as applied to strangers was recognized; but the

case turned on the question whether the interest was well devised. Therefore, as far as respects this particular case, *Dickinson v. Shaw* is the only case quite in point; and then the question is whether that case is to be abided by. With great reverence to the memory of those two judges who decided it, we think that case cannot be followed; that it has not stood the test of time, or the opinion of learned men; and Lord Kenyon has certainly intimated his opinion against it. On examination of its principles, they seem to rest on too narrow a foundation, namely, that the inference of a provision being intended did not arise, because the purchase could not have been taken wholly in the name of the purchaser. This, we think, is not sufficient to turn the presumption against the child. If it is meant to be a trust, the purchaser must shew that intention by a declaration of trust; and we do not think it right to doubt whether an estate in succession is to be considered as an advancement, when a moiety of an estate in possession certainly would be so. If we were to enter into all the reasons that might possibly influence the mind of the purchaser, many might perhaps occur in every case upon which it might be argued that an advancement was not intended. And I own it is not a very prudent conduct of a man just married to tie up his property for one child, and preclude himself from providing for the rest of his family. But this applies equally in case of a purchase in the name of the child only, yet that case is admitted to be an advancement; indeed, if anything, the latter case is rather the strongest, for there it must be confided to one child only. We think, therefore, that these reasons partake of too great a degree of refinement, and should not prevail against a rule of property which is so well established as to become a landmark, and which, whether right or wrong, should be carried throughout.

This bill must therefore be dismissed; but, after stating that the only case in point on the subject is against our present opinion, it certainly will be proper to dismiss it without costs.

COOK et al. v. PATRICK et al.

(26 N. E. 658, 135 Ill. 499.)

Supreme Court of Illinois. Jan. 21, 1891.

Error to circuit court, McDonough county; CHARLES J. SCHOFIELD, Judge.

Bill by Hannah C. Cook and others, heirs of William L. Stinson, (*alias* Stevenson,) deceased, against Charles Patrick, Georgetta Patrick, and others, to establish title to certain real and personal property. Complainants bring error.

Smith & Helmer and *Prentiss & Baily*, for plaintiffs in error. *Tunnichiff & Tunnichiff* and *C. F. Wheat*, for defendants in error.

BAKER, J. In 1820. a young man, who was known in the community as William L. Stevenson, was living and keeping hotel at a place called Downingsville, in the state of Kentucky. He subsequently removed to Lexington, in that state, and was there engaged in the boot and shoe business for a number of years. He was married at Lexington, on May 4, 1834, to one Catherine B. Patrick, and four children were born of the marriage. A few years after the birth of these children he failed in business, and became insolvent; and then his wife and two of the children died. In 1856 he removed, taking his two remaining children with him, to Colchester, in the state of Illinois, where several brothers of his deceased wife were living, and were engaged in merchandising. He was at first a clerk in the store of John Patrick, then a clerk in the store of William Patrick, and then took charge of the store of the latter. Subsequently he was engaged in a partnership business with Charles Patrick, one of the defendants herein, who was son of another brother of his deceased wife. His other two daughters, Ellen and Mary, died without issue, in 1856 and 1857, respectively. In the years 1859, 1860, 1861, 1863, 1865, 1866, 1869, and 1874, said William L. Stevenson bargained for and purchased various tracts of land and town lots, and paid for the same with his own money, and at the time of the purchase of each of said several premises the deeds therefor were by his special direction made to Martha P. Patrick, (now Ringen,) Charles Patrick, and Georgetta Patrick, the defendants in error, respectively; some of said conveyances being made to one and some to another of said three persons. These conveyances were delivered to Stevenson, were not recorded until after his death, and were held and retained in his possession until after or shortly before his decease. Upon the delivery of each of said deeds to Stevenson he took possession of the premises in each deed described, and used and controlled the same, and received the rents, issues, and profits thereof, and repaired and built houses thereon, with his own money, or with money received from rents, and paid all taxes thereon out of his own moneys, but taking receipts for such taxes in the names of the several grantees mentioned in each of said respective deeds, severally. Said Stevenson also loaned various sums of his own money to different persons, and other persons became other-

wise indebted to him in various amounts, and for such loans and other indebtedness he took promissory notes. Some of these notes were made payable to himself, and others, by his special direction, made payable to Georgetta Patrick; and many of these latter notes were secured by mortgages on real estate, and the mortgages, by his direction, made to said Georgetta. These notes and mortgages were delivered to said Stevenson, and retained in his possession, and he collected all the accrued interest thereon which was paid prior to his death. Said Stevenson died intestate at Colchester on April 6, 1881, being some 80 or 90 years of age, and leaving surviving him no widow or descendants. Charles Patrick was appointed administrator of his estate. The deeds to said Charles Patrick and to Martha C. Patrick (now Ringen) and Georgetta Patrick were placed upon record by them, and they thereupon severally claimed the absolute ownership of the tracts of land and town lots deeded to them respectively, and took possession of the same, and collected and appropriated the rents, and made sales and conveyances to other persons of various parcels thereof.

The present bill in chancery was exhibited in the McDonough circuit court by the plaintiffs in error, Hannah C. Cook and others, against Charles Patrick and his two sisters and the purchasers of real estate from them. It is claimed in the bill that the man commonly called William L. Stevenson, who died intestate at Colchester on the 6th day of April, 1881, was in truth and in fact one William L. Stinson, a son of one Robert Stinson, of Bodenheim, in the state of Maine, and that they (plaintiffs in error) are the heirs at law of the said William L. Stinson, deceased. It is also claimed in the bill that the deeds to the Patricks were not delivered to them in the life-time of the intestate, and that the latter, when he died, was the real owner of all the real estate described in said deeds; and that the notes and mortgages taken by the intestate remained in his possession and control during his life-time, and were his property at the time of his death. The prayer of the bill, succinctly stated, is that the real estate and personal property in question be decreed to be the property of the plaintiffs in error, that all conveyances made by the Patricks of said real estate be set aside; and that the Patricks account for all moneys collected from notes, bonds, accounts, and sales of said property. Answers were filed and issues formed, and upon the hearing of the cause the court found that the promissory notes which were made payable to W. L. Stevenson were not given by said Stevenson in his life-time to Georgetta Patrick so as to invest her with the title to them or the proceeds thereof; and that said Georgetta had, under claim of ownership, and since the death of said Stevenson, collected \$547.47 on said notes; and that said \$547.47. and the unpaid notes which had been made payable to said Stevenson, belonged and were due to the estate of said Stevenson. It was ordered and decreed that said Georgetta pay said \$547.47 collected

by her, and deliver the residue of the notes so payable to Stevenson, within 60 days to the administrator, and that the administrator account to the estate for said money and notes. The court further found that plaintiffs in error were not entitled to any other or further relief in the premises than that above mentioned, and as to all other and further matters the bill was dismissed.

Plaintiffs in error are dissatisfied with the limited measure of relief that was decreed to them upon their bill of complaint, and bring the record to this court. We deem it unnecessary to consider in detail the various assignments of error. There are several matters in controversy which may be disposed of quite briefly. We are inclined to think that the evidence sufficiently shows the identity of the man commonly called William L. Stevenson, who died at Colchester, in this state, in 1881, with the William L. Stinson of Boddenham, in the state of Maine, who left that state early in the present century for the purpose of avoiding the vengeance of the brother of a girl whom he had wronged. We will also assume for the purposes of the decision that the allegations of the bill and the proofs introduced at the hearing make it manifest that plaintiffs in error are heirs at law of said William L. Stinson, deceased. It is claimed that by plaintiffs in error there was no such delivery of the deeds to the grantees named therein as would pass to them the titles to the lands. It would seem that, in order to divest the several grantors in said deeds of their titles, it is essential to the claim made by said plaintiffs in error that the deeds should be regarded as properly delivered. But, waiving this, and waiving any consideration of the testimony tending to show an actual delivery of the conveyance by Stevenson, *alias* Stinson, to Georgetta Patrick for said grantees, we think that a sufficient delivery of the deeds and acceptance of the same by the several grantees named therein appears from the evidence. Stevenson, in making the purchases and taking the deeds, assumed to be acting as agent of the nominal purchasers mentioned in the respective deeds, although he was in fact acting without their knowledge. At the times of the various purchases the grantors in these several deeds delivered the same to Stevenson, the supposed agent, absolutely and unconditionally, and for the express purpose of divesting themselves of their respective titles and vesting such titles in the grantees named in said several conveyances. Subsequently said grantees accepted and approved the acts of the self-constituted agent, and fully ratified and confirmed the same by accepting the deeds, and having the same recorded, and claiming title under them. If a deed is delivered to one who has no authority from the grantee to receive it, yet the grantee may ratify the act of acceptance, and the delivery will be good, even in cases where the deed is made without the grantee's knowledge. *Morrison v. Kelly*, 22 Ill. 610; *Rawson v. Fox*, 65 Ill. 200; *Crocker v. Lowenthal*, 83 Ill. 579; *Bryan v. Wash*, 2 Gilman. 557; *Byars v. Spencer*, 101 Ill. 429. The grantors in the several deeds parted

with all dominion over them when they delivered them to Stevenson, *alias* Stinson, and, as the latter was not a grantor in any of the deeds, it was not essential that he should deliver them or any of them to the grantees, or that there should be a delivery of them to such grantees in his life-time. The absolute delivery of the deeds to Stevenson, and the acceptance of them by him, and the subsequent ratification by the grantees of such acts of acceptance, were amply sufficient to invest such grantees with title. We do not regard the cases cited by plaintiffs in error, where the deeds were not delivered by the grantors, and did not pass from their control and dominion in their life-times, and where it was held that there was no divestiture of the titles of such grantors, as here in point.

We think the material questions in the case whether or not there were resulting trusts in favor of Stevenson, *alias* Stinson, and, if so, in respect to the nature, character, and extent of such trusts. It is suggested by counsel that if Stinson bought the lands, and paid for them with his own money, then he was the equitable owner of such lands, although the deeds were made to third persons. It is a principle of the law that where one buys property and pays the purchase money with his own funds, and has the title placed in the name of another person, a resulting trust arises in favor of him who has so paid the purchase money, and he is regarded as the equitable owner of the property bought. But to this doctrine of implied trusts there are various exceptions, qualifications, and limitations. Such a trust is a mere creature of equity, founded upon presumptive intention, and designed to carry that intention into effect, not to defeat it. If it is not the intention that the estate shall vest in him who pays the purchase price, then no resulting trust in his favor attaches to the property; and there may be a resulting trust as to a part of the property, or a part of the interest therein, and not as to the residue, according to the intent existing in such particular case. In 2 Story, Eq. Jur. § 1202, it is said: "There are other exceptions to the doctrine of a resulting or implied trust, even where the principal has paid the purchase money; or, perhaps, more properly speaking, as the resulting or implied trust is, in such cases, a mere matter of presumption, it may be rebutted by other circumstances established in evidence, and even by parol proofs, which satisfactorily contradict it. And resulting and implied trusts in such cases may, in like manner, be rebutted, as well to part of the land as to part of the interest in the land purchased in the name of another. Thus, where A. took a mortgage in the name of B., declaring that he intended the mortgage to be for B.'s benefit, and that the principal, after his own death, should be B.'s, and A. received the interest therefor during his life-time, it was held that the mortgage belonged to B. after the death of A." In *Lewin, Trusts*, p. 169, § 15, it is said: "As the trust results to the real purchaser by presumption of law, which is merely an arbitrary implication in the absence of reasonable proof to the contrary, the

nominal purchaser is at liberty to rebut the presumption by the production of parol evidence showing the intention of conferring the beneficial interest. And as he may repel the presumption *in toto*, so he may in part; as, by proving the purchasers' intention to permit the legal tenant to enjoy beneficially for life." See, also, 1 Perry, Trusts, § 139; 2 Pom. Eq. Jur. § 1040, and note 1; and Bisp. Eq. § 63, p. 94. *Benbow v. Townsend*, 1 Mylne & K. 506, was in many respects like the case at bar. It was there held that, where land was purchased with the money of A. in the name of B., the resulting trust to A. may be rebutted as to part of the land or part of the interest in the land; and also held that, where A. took a mortgage in the name of B., declaring that the principal sum should be for the benefit of B., and received the interest during his life, it was held that the property, after the death of A., will belong to B. by force of the parol declaration. The master of the rolls there said: "In the case of *Lloyd v. Spillet*, 2 Atk. 148, and also in the case of *Lane v. Dighton*, 1 Amb. 409, it is expressly decided that a resulting trust may be rebutted as to part of the land comprised in a deed, and prevail as to the remainder; and if it can be rebutted as to a part of the land, there can be no reason why it may not be rebutted as to a part of the interest in the land. But in this case, the trust being of personal estate, the case is not within the statute of frauds or the doctrine of resulting trusts under that statute, but the property will belong to the brother after the testator's death, by force of the testator's declaration that the two thousand pounds should, after his death, be the property of his brother Job." It appears from the report of the case that the brother, Job, knew nothing of the transaction of the taking of the mortgage, etc. It also appears therefrom that the same point was there made in argument that seems to be made in the case at bar,—that the equitable title raised by the parol evidence must be exactly commensurate with the legal title on the face of the instrument. From the conclusion reached it is manifest that it was considered that it was competent for A., who loaned the money, to reserve a portion of the equitable interest in the mortgage to himself, giving the remainder of it, as well as the legal title, to his brother. See, also, *Maddison v. Andrew*, 1 Ves. Sr. 58. In *Rider v. Kidder*, 10 Ves. 360, while the case was the reverse in respect to the interests retained and donated, the principle was the same; and Lord Chancellor Eldon said: "Upon the evidence, the utmost intended was to secure to her [meaning the nominal purchaser] an income; and, if that only was intended, it by no means destroys the existence of trust, for, if the intention was to give to her an estate for life, not dependent upon his will, still the capital would be his." *Emmons v. Moore*, 85 Ill. 304, is an authority in this state which fully recognizes the principle that, where a person buys land and pays the consideration money, and takes the deed in the name of another, parol evidence is admissible to show that the real purchaser is not in-

tended to be the beneficiary of the resulting trusts, and to indicate who is the donee of the beneficial interest under such trust.

It only remains to apply the rules of equity above recited to the facts of the present case. William L. Stinson abandoned the home of his boyhood, and left behind him his relatives and the friends of his youth. He went to another and a distant state, changed his name, and formed other and different attachments. He married, and a family of children were born to him. Then, one by one, his wife and all four of his children died. It is manifest from the evidence that after the last of his own immediate family he was more intimate with the relatives of his deceased wife than with any one else, and that he was particularly attached to the nephews and the nieces of his deceased wife, who are the defendants herein. Shortly after the death of his last surviving child he commenced buying real estate, paying therefor with his own money, and taking conveyances of the property bought, some in the name of Charles Patrick, the nephew, and some in the name of Martha P. Patrick, now Ringen, one of the nieces. He persisted for more than 10 years in making such purchases and taking such deeds. He also, from time to time, loaned money belonging to himself, and took notes and mortgages therefor, and had the notes made payable to the other of said nieces, Georgetta Patrick, and had the mortgages executed to him as mortgagee. He retained possession of the deeds, notes, and mortgages. He also took and retained possession of the lands and lots purchased, and received the rents of the same, and repaired and built houses thereon, and paid the taxes levied on the same. He was always particular, however, to have the tax receipts made out in the names of the respective grantees to whom the particular lot or tract of land had been deeded. He also collected and used, as he saw fit, the interest moneys falling due on the notes and mortgages. He expressly directed the deeds to be made as they were made. He refused to accept conveyances made to himself as grantee, and insisted that the deeds should name one or another of the Patrick children as grantee. He frequently announced to different vendors, borrowers, and others that he was buying the property, or loaning the money, as the case might be, for the Patrick children, or the Patrick girls. He often spoke of the property as Mattie's, Charley's, or George's. He frequently spoke of having bought property, and of having caused the deeds to be made to said children; and said that when he got through with the property Charley and the girls should have it. He often said that he intended the property should go to the Patrick children; that Charley and the girls should have it; that no one else had any right to it, or should touch it; that he had it fixed,—had it all arranged; and that no one else could do anything with it. From these facts, and from numerous other circumstances that appear in the record, it is evident that when William L. Stinson, *alias* William L. Stevenson, made his various purchases of real estate, and took

deeds in the name of one or another of the defendants in error, he, as well as the several vendors, fully intended to vest in said several defendants in error the legal titles to such real estate; and that when he loaned money and took notes and mortgages in the name of Georgetta Patrick he intended to vest in her the legal title to said money and mortgages; and that he also fully intended to reserve and retain to his own use a life-estate in the equitable interest in said realty, notes, and mortgages, and to give to defendants in error, respectively, and to vest in them, several-

ly, the remainder and residue of the equitable interest, estate, and title in such real estate, notes, and mortgages, respectively. Such was the manifest intention of the intestate. There is no rule of law or of equity that will operate to prevent such intention from being carried into effect. The means that were adopted by the intestate for the purpose of accomplishing the disposition he desired to make of his own property were such as violate no rule of law, and such as the rules of equity recognize and enforce. The decree of the circuit court is affirmed.

HAGAN v. POWERS.

(72 N. W. 771, 103 Iowa, 593.)

Supreme Court of Iowa. Oct. 29, 1897.

Appeal from district court, Union county; W. H. Tedford, Judge.

Plaintiff states as his cause of action that in December, 1873, he purchased from Joseph Shaw a certain quarter section of land in Adair county, with his own property and funds, and caused the same to be conveyed to his then wife, Mary E. Hagan, by reason of which she thereafter held the title as trustee for plaintiff; that she received said trust, and agreed to safely hold said land for plaintiff's benefit; that at the purchase the land was unimproved; that plaintiff improved it, and has ever since controlled it; that Mrs. Hagan died, intestate, without issue, October 10, 1894, leaving the defendant as her only surviving parent; that defendant claims an undivided one-half of said land by inheritance through said Mary E. Hagan, but that, in truth and in fact, said Mary E. Hagan did not own said land at the time of her death, but held it as trustee, as aforesaid. Plaintiff prays that he may be decreed to be the owner in fee simple in said premises, and that he be quieted in his title as against the claims of the defendant. The defendant answered, admitting that the title was in Mary E. Hagan, but denying that the plaintiff paid for the land with his own money or property, and denying that Mrs. Hagan held the same in trust for the plaintiff, or ever recognized such trust; admits the death of Mrs. Hagan, and that he is her only surviving parent. He avers that Mary E. Hagan had owned and controlled said land since December, 1873, and that her possession and claim of ownership were adverse to the claim of the plaintiff, and that the claim of the plaintiff is barred. He prays for decree awarding him the ownership of an undivided one-half interest in said land. The action was brought in Adair county, where the land is situated, but, by stipulation of parties, was transferred to and heard in the district court of Union county, by which a decree was entered in favor of the plaintiff as prayed, from which the defendant appealed. Affirmed.

D. W. Higbee, for appellant. Maxwell & Winter, for appellee.

GIVEN, J. 1. A consideration of the questions involved renders it necessary that we first determine the facts. There is no dispute that the plaintiff purchased the land in controversy in 1873, it being then unimproved; that he caused the title to be conveyed to his wife, who continued to hold the same until her death October 10, 1894, when she died, intestate, and without issue, leaving the defendant her only surviving parent. During these years the plaintiff and his wife resided upon an adjacent farm in Union county, and the plaintiff improved, controlled, and used the land in question as his own. Plaintiff, being somewhat addicted to the use of strong drink,

and not always prudent in the management of his financial affairs, caused the deed for this land to be made to his wife, without her knowledge, intending that she should hold it in trust for him; and thereafter, when informed of the fact, Mrs. Hagan acquiesced in it, and repeatedly and uniformly throughout said years acknowledged that the land was the property of her husband. Appellant states his contention as follows: "The matters necessary to be proven in order to create the resulting trust claimed by appellee (neither fraud nor mistake being claimed) are: (1) Payment by appellee with his own money; (2) intention on the part of appellee at time of conveyance to create a trust; (3) conveyance to deceased; (4) knowledge on the part of deceased of appellee's intention to create a trust, and assent or failure to dissent after that knowledge." The claim of the plaintiff that he paid for said land with his own money is denied, and the defendant contends that after the contract of purchase from Shaw, and prior to the execution of the deed or payment of the purchase price, appellant promised appellee that, in consideration of a promise on the part of the appellee that he would place the title in the name of Mrs. Hagan, appellant would furnish him help in various ways, to the amount of the cost of the land, and that appellant did so furnish such help by contributing horses and other property at various times. Upon this issue of fact, we think, the appellant has failed to support his contention. It is true, he did furnish to the plaintiff and his wife horses and other property at various times, but it was mostly before this land was contracted for, and without reference thereto. It fairly appears that in every instance that money or property was received from appellant it is accounted for as having been a gift without condition, or as being settled for otherwise than on account of the purchase of this land. That appellee paid for the land, and caused the conveyance to be made to deceased, with the intention to thereby create a trust, and that, after knowledge of these facts, deceased assented thereto, we think, is abundantly proven.

2. It is contended on behalf of the defendant that much of the evidence from which these facts are found is incompetent, because it relates to communications between husband and wife, and communications and transactions with the deceased Mrs. Hagan. In *Dysart v. Furrow*, 90 Iowa, 59, 57 N. W. 644, it is said: "If the transaction or communication was personal, it must be known alike to both, and therefore either may deny. * * * Personal transactions and communications, as contemplated by the statute, are communications between the parties of which both must have had personal knowledge." This rule is approved in the later cases of *Cole v. Marsh*, 92 Iowa, 379, 60 N. W. 659, and *Martin v. Shannon*, 92 Iowa, 375, 60 N. W. 645. The purchase, payment, and conveyance of the land were exclusively transactions between

the plaintiff and the vendor, Mr. Shaw. It was not until after the transaction was completed by the making of the conveyance that Mrs. Hagan learned that the conveyance was to her, and assented thereto, as shown by a number of witnesses other than appellee. The only evidence appearing in the record that comes within the objection is the statement of the plaintiff, as follows: "I then told her I had deeded to her, to take care of it for me, and she said, 'I can do it.'" This statement is clearly incompetent, and must therefore be disregarded.

3. We now inquire whether, under the facts as we find them, the law raises a resulting, or, as it is sometimes called, a presumptive, trust in favor of appellee. In *Cotton v. Wood*, 25 Iowa, 44, the familiar rule is thus announced: "Where, upon the purchase of property, the consideration is paid by one, and the legal title conveyed to another, a resulting trust is thereby raised, and the person named in the deed will hold the property as trustee of the party paying the consideration." In *Perry on Trusts* (section 124) it is said: "The general foundation of this kind of trusts is the natural equity that arises when parties do certain things. Thus, if one pays the purchase money of an estate, and takes the title deed in the name of another, in the absence of all evidence of intention the law presumes a trust from the natural equity that he who pays

the money for property ought to enjoy the beneficial interest." The parties to this transaction being husband and wife, another rule requires consideration. In *Cotton v. Wood* it is further said: "But if the person to whom the conveyance is made be one for whom the party paying the consideration is under obligation, natural or moral, to provide, the transaction will be regarded prima facie as an advancement, and the burden will rest on the one who seeks to establish the trust for the benefit of the payee of the consideration to overcome the presumption in favor of the legal title by sufficient evidence." In the absence of the obligation to provide, it could not be questioned that the law would raise a trust in favor of appellee from the facts established. We think appellee has fully overcome the presumption of advancement, by his own evidence as to his intention, by evidence of repeated admissions of Mrs. Hagan that the land was his, and his continued occupation and improvement of it. This being a trust raised by operation of law, and not by reason of any declaration or creation of the parties, section 1935 of the Code of 1873 does not apply. The facts in this case are in many respects the same as those alleged in *Cotton v. Wood*, supra, and the rulings in that case support our conclusion in this. We think the decree of the district court is correct. Affirmed.

FERRIS v. VAN VECHTEN.

(73 N. Y. 113.)

Court of Appeals of New York. 1878.

Charles A. Fowler, for appellants. J. Newton Fiero, for respondent.

ALLEN, J. This is, I think, a case of the first impression, but it is sought to be brought within the principle of equity by which, at the instance of a *cestui que trust*, trust funds which have been misappropriated by the trustee may be followed and reclaimed, so long as they can be traced and identified, and any property or choses in action into which they have been converted impressed with the same trusts as those upon which the original funds were held.

The claim of the plaintiff briefly stated is, that moneys realized from real estate sold under a power of sale for the payment of debts, and held by Van Vechten, the surviving executor, in trust for the plaintiff, a creditor, have been wrongfully and in violation of the trust applied to the payment of charges and incumbrances upon the lands of the testator described in the complaint, and which were devised to the executors in trust, to receive the rents, issues and profits thereof, and pay the same to the wife of a son of the testator, to be applied by her to the support of the family of such son, and upon her death to convey the same to the children of said son. The relief demanded by the plaintiff is in substance, although not so stated, that she be subrogated to the rights of the creditors and lienors, whose incumbrances have been pro tanto discharged as against the lands to the amount paid thereon from the trust funds. The funds can hardly be said to have been invested in the lands, or in the mortgages, or other charges paid by the executor. There was no purchase of either, but the incumbrances were partially satisfied. The lands were relieved from certain charges by the diversion to that purpose of funds held in trust for creditors, as alleged, and it is sought to revive the liens by subrogating the plaintiff to the rights of the original creditors. Whether a *cestui que trust* can be subrogated to the claims of creditors, to the payment of whose debts the trust fund has been misapplied, need not be determined. See *Winder v. Diffenderffer*, 2 Bland, 198.

Regarding the payments by Van Vechten as investments in the lands, in relief of which they were made, the primary question is whether in that view a case was made upon the evidence for the relief demanded. It must be conceded that trust moneys may be followed into lands to the purchase of which they have been applied, and the *cestui que trust* may elect whether to hold the unfaithful trustee personally responsible, or claim the lands, the fruits of the misappropriation of the funds, or cause the lands to be sold for his indemnity, and

look to the trustee for any deficiency. *Lane v. Dighton*, 1 Amb. 409, per Lord Ellenborough; *Taylor v. Plumer*, 3 Maule & S. 562; *Thornton v. Stokill*, 19 Jur. 751; *Oliver v. Piatt*, 3 How. 333, per Story, J.; *Story*, Eq. Jur. § 1258 et seq.; *Shepherd v. McEvers*, 4 Johns. Ch. 136, 8 Am. Dec. 561; *Dodge v. Manning*, 1 N. Y. 298.

To follow money into lands, and impress the latter with the trust, the money must be distinctly traced and clearly proved to have been invested in the lands. While money, as such, has no ear-mark by which, when once mingled in mass, it can be traced, it is, nevertheless, capable under some circumstances of being followed to, and identified with, the property into which it has been converted; but the conversion of the trust money specifically, as distinguished from other money of the trustee into the property sought to be subjected to the trust, must be clearly shown. It does not suffice to show the possession of the trust funds by the trustee, and the purchase by him of property—that is, payment for property generally by the trustee does not authorize the presumption that the purchase was made with trust funds. The product of, or substitute for, the original trust fund follows the nature of the fund as long as it can be ascertained to be such; and if a trustee purchase lands with trust money, a court of equity will charge them with a resulting trust for the person beneficially interested. But it must be clear that the lands have been paid for out of the trust money. This is illustrated by *Perry v. Philips*, 4 Ves. 108. There a trustee for the purchase of land died without personal assets, but having purchased lands, the estates purchased were held not liable to the trust, the circumstances affording no presumption that they were purchased in execution of the trust.

If the purchase of land with the trust moneys could not be presumed when such purchase would be in execution of the trust, a fortiori it should not be presumed when it would be a violation of the trust. The right of following the trust property, in the new form which has been given to it, or in the property substituted for it, ceases only when the means of ascertainment fail, “which of course is the case when the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description.” 2 *Story*, Eq. Jur. § 1259, and note 4. When the purchase-money, paid by a trustee for lands purchased, corresponds very nearly with that of the trust fund to be invested, that with other circumstances, as the coincidence of the time of the receipt and disbursement, may suffice to show that the property was actually purchased with trust funds. *Lowden v. Lowden*, 2 Browne, Ch. 583; *Price v. Blake-more*, 6 Beav. 507. The money paid by the trustee for lands or other property, or for choses in action sought to be subjected to the original trust, must be identified as trust

moneys; and this is clearly recognized in all the cases, and in very many of them this has been the difficult question of fact upon which they have hinged, and the principle to be deduced from them is, that when the trust fund has consisted of money, and been mingled with other moneys of the trustee in one mass, undivided and undistinguishable, and the trustee has made investments generally from moneys in his possession, the cestui que trust cannot claim a specific lien upon the property or funds constituting the investments. *Hill, Trustees*, m. p. 522. This is consistent with the cases cited and relied upon by the counsel for the plaintiff, and the doctrine is recognized and applied in each case, and as the facts were proved to exist in them respectively. In *Moses v. Murgatroyd*, 1 Johns. Ch. 119, 7 Am. Dec. 478, the property held in trust was readily and certainly traced. In *Kip v. Bank*, 10 Johns. 63, the money, the subject-matter of the trust, was kept separate and distinct, and deposited as such. The court say the only check to the operation of the rule now under consideration is when the property is converted into cash, and has been absorbed in the general mass of the estate so that it cannot be followed or distinguished. It is the difficulty of tracing the trust money, which has no ear-mark, that prevents the application of the rule. See, also, *Hutchinson v. Reed*, Hoff. 316, and cases by Asst. V. Ch., 2 Kent Comm. 623, 624; *Trecothick v. Austin*, 4 Mason, 29, Fed. Cas. No. 14,164.

There can be no presumption as against the defendants whose property is sought to be affected by the trust, which attached to the moneys realized by Van Vechten from the sale of lands under the power. So far as appears they are innocent of all wrongdoing, and have not colluded or combined with the executors to violate the trust, and it is not found that they assented to or had any knowledge of any misappropriation of the fund, and if made trustees in virtue of their ownership of the lands they are made so, not by reason of any act of theirs, but as the legal result of the fact that trust moneys have been misapplied by a trustee of the fund to relieve of a burden their lands, held in trust for another purpose by the same trustee. The fact should be clearly, at least satisfactorily proved. This principal fact, upon which the right of the plaintiff to any relief in this action depends, is only alleged argumentatively in the complaint by the statement that it appeared in the account of the executors filed with the surrogate that large sales of real estate of the testator had been made by the executors, on account of which they had realized large sums of money, and that it also appeared that large amounts of money arising therefrom were issued and applied in keeping the homestead farm in repair, and large sums were paid out for interest and taxes on said farm. There was no proof that one dollar of the

moneys received for lands, and which constituted the trust fund, was paid or applied to any of the purposes mentioned, nor is the fact of such misappropriation of the trust moneys found, nor was any fact proved or found from which such diversion and misappropriation of specific trust moneys can be legitimately inferred. The only proof given upon this branch of the case consisted of the proceedings before and the decree of the surrogate upon the settlement of the accounts of the executor. If these proceedings were competent evidence for any purpose, or to establish any fact as against the defendants, the present appellants, they were only competent in respect of the matters then in issue, and which were determined by the surrogate. The questions before that tribunal related solely to the accounts of the executors and their liability to the creditors, and those entitled under the will of the testator. The executors were charged with the amount of the inventory of the personal estate of the deceased, together with the amounts received upon the sale of real estate. The moneys realized from the sale of lands were the primary fund for the payment of debts, and creditors had the first claim to be paid from those moneys, and the first liability of the executors in respect of such moneys was to creditors. Such liability was discharged by proof of payment to creditors, whether made from the identical moneys received by the executors, or from other moneys of their own, or subject to their control. The moneys realized from lands sold in excess of the debts of the testator belonged to the present appellants, as devisees of the land subject to the power of sale, and the liability of the executors to them was discharged by like proof of payment to them or for their use, from any moneys of the executors, whether received for lands sold under the power or from other sources.

Upon proof of the plaintiff's debt she was of course entitled to a decree for its payment on the admission by the executors in their filed account of the moneys received by them properly applicable to its payment. Proof of payment to or for the use of the devisees of the lands was no discharge of the liability to the plaintiff, and the fact that payments to or for the devisees were set up in discharge of the plaintiff's claim was wholly unimportant. It was unimportant upon that accounting whether Van Vechten, the surviving executor, had the money in his own pocket, or had disposed of it to some third person. His liability to the plaintiff upon that accounting was the same, and the decree was necessarily the same in either event. In no aspect of the case was the surrogate called upon to trace and identify the money received by the accounting executor on the sale of lands. The charges against the executors consisted of the gross receipts, and the discharges of the gross amount of the several payments and disbursements as al-

lowed by the surrogate, and the decree was for the payment of a gross amount, and was a general judgment against a surviving executor for a general balance due, not for a surrender or paying over of specific moneys or securities, and as between the plaintiff, a creditor, and the appellant's devisees it was adjudged that payment claimed to have been made by the executor to or for the latter did not discharge the obligation to the former, and such payments were merely disallowed as credits claimed by the executor. It was not found upon the trial of the present action by the court, as a fact, that the specific moneys received by the executors for lands sold, and which were trust moneys for the payment of debts, were in any way paid to or applied for the use of the devisees in payment of the incumbrances upon the homestead farm, although the general forms of expression, to a limited extent, seem to imply the fact. The learned judge did not intend to so find and does not seem to have regarded it as important. He merely speaks of the moneys which the executor used as, or in place of, the trust moneys and in discharge of his obligation, as trust moneys; but that does not make them the specific trust funds received. It is found in general terms that moneys to an amount stated were received from the sale of real estate under the power, and that the executors had paid various sums for principal and interest upon mortgages upon and repairs of the farm to the amount in the aggregate stated, but the times and amounts of the various receipts, or of the several payments, are not found, nor is it found that the payments were made from the moneys received, or that the moneys were misapplied to these payments. If reference is had to the accounts and schedules filed by the executors with the surrogate as the basis of the accounting, which is the only evidence of the dates and amounts of the several receipts and disbursements, there is nothing by which the moneys received for lands sold can be traced and identified as the moneys paid for the improvement of the homestead farm, or in discharge of incumbrances upon it. There is neither coincidence in the times or amount of the receipts and disbursements of moneys upon the account, and for the purposes mentioned, to connect the one with the other and lead to a presumption that the money received from the one source was the same money that was paid out. The inference would rather be that the moneys, when received, were mingled with other moneys of the executors and used as occasion required, either for purposes connected with the administration of the estate or the individual purposes of the executor. Whatever presumptions might be indulged in favor of the equities of the plaintiff as a creditor against the defaulting trustee or his representatives, were he or they the holders and claimants of the property sought to be realized, none can be indulged as against the present appellants

who are innocent of any participation in the wrongful acts of the executor. If, upon the statement of the accounts by and before the surrogate, the evidence in this case and the findings of fact by the judge, the principle contended for by the plaintiff could be so far extended as to authorize a lien upon the lands in aid and relief of which payments were made by the executor for the benefit of the plaintiff as a *cestui que trust*, there would be no difficulty in giving every *cestui que trust*, as creditor having a debt of a fiduciary character, a preference in respect to the general assets and creditors at large of the trustee or debtor, a lien upon property which the trustee or debtor might have purchased during the existence of the trust or other fiduciary relations. This might be convenient and in furtherance of a general equity in favor of one class of creditors, but would be an unauthorized extension of the equitable doctrine invoked by the plaintiff, which demands for its application that the trust fund or money shall be traced and identified as existing in the new form into which it has been converted. In no other way can the equitable title of a *cestui que trust* to specific property be established.

This question, which is decisive of this appeal, is fairly raised by the exception to the admission, as evidence generally in the case, of the proceedings before the surrogate over the objection of the appellants that they were immaterial and incompetent, and also by the exceptions to the conclusions of law and the judgment of the court upon the trial. It is proper to say that in passing only upon this one question we do not intend to intimate an opinion upon any of the other questions made and ably argued by the learned counsel for the respective parties. The case bristles with interesting and difficult questions, but as the one considered is decisive of this appeal, and the other questions may not re-appear or be obviated by evidence upon another trial, we do not deem it necessary to consider them. Upon another trial it may be shown by competent evidence that the moneys received upon the sale of lands were kept separate from all other moneys, and specifically applied to the payment of the charges and incumbrances upon the homestead farm, and if so the difficulty which the plaintiff now encounters will be obviated. The equities are clearly with the plaintiff, but they cannot override the legal rules of evidence, or be enforced by an unauthorized enlargement and extension of the equitable doctrine which lies at the foundation of the action. There is in truth no competent proof as against the appellants other than Van Vechten, that the payments claimed to have been made by him in relief of the homestead were ever made. The proof consists of the accounts unverified filed with the surrogate by the executors; in which they credit themselves with these payments, and the decree of the surrogate disallowing them, and adjudging an amount

stated to be due the estate from the said executors, and in their hands properly applicable to the payment of the plaintiff's claim, which was less than one-half in amount of the sum decreed to be in the hands of the executors. The surrogate merely held and decided that if the payments had been made as claimed, they could not be allowed to the executors upon that accounting. This is the extent of the decree.

It is possible, although we do not intend to intimate an opinion upon the subject for the reason that parties have not been heard, and the question is not before us, that the plaintiff may have relief in the present action without tracing and identifying the trust moneys as now being invested in the homestead farm, and by treating this complaint as a creditor's bill, filed upon the return of an execution against Van Vechten unsatisfied. Upon proof that Van Vechten had

made the payments alleged, under circumstances which would give him as a trustee a lien upon the trust estate for the benefit of which they were made, it may be that the court would deem it a proper case to enforce the lien for the benefit of the plaintiff—that is, apply a debt due the judgment debtor to the satisfaction of the judgment. Such a claim in favor of a judgment debtor would not be beyond the reach of a creditor's bill.

As Van Vechten's account as trustee of the homestead farm has not been settled, there would arise none of the questions made upon the last trial as to the effect of the statute of limitations as affecting the claim of the plaintiff, upon the theory upon which the case was tried. But without considering this suggestion farther, the judgment must for reasons stated be reversed, and a new trial had. All concur.

Judgment reversed.

LITTLE et al. v. CHADWICK et al.

(23 N. E. 1005, 151 Mass. 109.)

Supreme Judicial Court of Massachusetts.
Suffolk. Feb. 26, 1890.

In equity.

Bill by Samuel Little and Phineas B. Smith, trustees, against Joseph H. Chadwick, the Roxbury Institution for Savings, and others.

George E. Smith, for defendants. Horace G. Allen and Wm. R. Howland, for Roxbury Institution for Savings.

C. ALLEN, J. The executor and trustee under the will of Mrs. Williams, having assigned his property in trust for the benefit of his creditors, the annuitants under that will seek to establish a trust in that property, and to obtain a decree that \$10,000 be set apart by the assignees, and appropriated to secure and raise the annuities. It was, however, found at the hearing that none of the property so conveyed was charged with any such trust, and this finding appears to be the only one that the evidence would warrant. There is nothing to show that there was ever any distinct trust fund in the hands of Williams, the executor and trustee, which was represented by any specific property. He was also the residuary legatee, and nearly *one-half* of the assets of the estate consisted of a debt due from himself. The rest was chiefly notes secured by mortgages. There was no real estate. The moneys received by Williams from the estate were mixed with his own. He paid the debts and other legacies, and rendered an account, called "final," in which he charged himself with "balance of this account retained to pay annuity of \$600 per annum to Charles Bugbee, \$10,000." It was his duty to set apart this sum, and to keep it separately invested, but he did not do so. The settlement of the account merely showed that he was held responsible for that sum; and, if he had set it apart, as he ought to have done, the trust would have attached to the property thus set apart. But, since this was never done, the trust was never impressed upon any specific property or money held by Williams. There was merely an indebtedness or liability on his part to account for that sum. This indebtedness or liability might itself be the subject of a trust, just as if it has been the indebtedness of another person. The trust, however, in such case, attaches merely to the indebtedness, and to whatever may be realized from it, and not to any particular property held by the debtor. The view most favorable to the annuitants that could be taken is that Williams had the sum of \$10,000 in money in his hands, which was retained

for the purpose of raising the annuities. The evidence shows that this was not the case. But assume that it was, the trust would then attach to it as long as the money could be identified or traced, but no longer. When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the *cestui que trust* to follow it fails. Under such circumstances, if the trustee has become bankrupt, the court cannot say that the trust money is to be found somewhere in the general estate of the trustee that still remains. He may have lost it with property of his own. And in such case the *cestui que trust* can only come in and share with the general creditors. The Attorney General v. Brigham, 142 Mass. 248, 7 N. E. Rep. 851; Howard v. Fay, 138 Mass. 104; White v. Chapin, 134 Mass. 230; Bresnihan v. Sheehan, 125 Mass. 11; Harlow v. Dehon, 111 Mass. 195, 198, 199; Andrews v. Bank, 3 Allen, 313; LeBreton v. Peirce, 2 Allen, 8, 13; Johnson v. Ames, 11 Pick. 173, 181, 182; Trecothick v. Austin, 4 Mason, 16, 29; Ferris v. Van Vechten, 73 N. Y. 113; Frith v. Cartland, 2 Hem. & M. 417; Holland v. Holland, L. R. 4 Ch. 449; Isaacson v. Harwood, L. R. 3 Ch. 225; Perry, Trusts, §§ 345, 836-842; Story, Eq. Jur. §§ 1258, 1259; Lewin, Trusts, (8th Ed.) 241, 857, 892. There is nothing to the contrary in Bank v. Insurance Co., 104 U. S. 54, 66-71, and In re Hallett's Estate, 13 Ch. Div. 696, 708-721, which are chiefly relied on by the annuitants. In Wisconsin a majority of the court has declared that it is not necessary to trace the trust fund into any specific property in order to enforce the trust, and that, if it can be traced into the estate of the defaulting agent or trustee, this is sufficient. McLeod v. Evans, 66 Wis. 401, 409, 28 N. W. Rep. 173, 214. But this seems to us to be stated too broadly.

In the present case, there is no such thing as tracing the \$10,000 into any particular pieces of property covered by the assignment by Williams for the benefit of his creditors. The most that can be said is that he had this money, and also other moneys of his own, and used all the moneys together, as his own, for several years, in buying, building, and selling, and that he finally failed. There is no means of ascertaining, as a matter of fact, that the trust money, if it ever was trust money, is now represented by any property in the hands of the assignees. Decree affirmed.

¹ Fed. Cas. No. 14,164.

SLATER et al. v. ORIENTAL MILLS et al.
(27 A. 443, 18 R. I. 352.)

Supreme Court of Rhode Island. July 12,
1893.

Bill in equity by William A. Slater and another against the Oriental Mills and others to establish a charge in favor of the Forest-dale Manufacturing Company, of which complainants are stockholders, on the assigned estate of the Oriental Mills. Defendant filed a demurrer to the bill. Demurrer sustained.

Joseph C. Ely and James M. Ripley, for complainants. James Tillinghast and William G. Roelker, for respondents.

STINESS, J. The question raised by the demurrer to the bill is whether the Forest-dale Manufacturing Company, of which the complainants are stockholders, has a preferred claim upon the respondent assignee of the Oriental Mills, an insolvent corporation, for funds wrongfully taken from the former company and used to pay liabilities of the latter company, and otherwise, by persons who were officers in control of both companies. The rule is clear that one has an equitable right to follow and reclaim his property, which has been wrongfully appropriated by another, so long as he can find the property, or its substantial equivalent if its form has been changed, upon the ground that such property, in whatever form, is impressed with a trust in favor of the owner. If the trustee has mingled it with his own, he will be deemed to have used his own, rather than another's, and so to leave the remainder under the trust; and this is a sufficient identification for the owner. But in this case we are asked to go further, and to hold that, where one's property has been wrongfully applied and dissipated by another, a charge remains upon the estate of the latter for the amount thus wrongfully taken, upon the ground that his estate is thereby so much larger, and that the trust property is really and clearly there, in a substituted form, although it cannot be directly traced. This view is pressed with much skill and some authority, but we are unable to adopt it. While one who has been wronged may follow and take his own property, or its visible product, it is quite a different thing to say that he may take the property of somebody else. The general property of an insolvent debtor belongs to his creditors, as much as particular trust property belongs to a cestui que trust. Creditors have no right to share in that which is shown not to belong to the debtor, and, conversely, a claimant has no right to take from creditors that which he cannot show to be equitably his own. But right here comes the argument that it is equitably his own because the debtor has taken the claimant's money and mingled it with his estate, whereby it is swelled just so much. But, as applicable to all cases, the argument is not sound. Where the property or its

substantial equivalent remains, we concede its force; but, where it is dissipated and gone, the appropriation of some other property in its stead simply takes from creditors that which clearly belongs to them. In the former case, as in *Pennell v. Deffell*, 4 De Gex, M. & G. 372, and *In re Hallett's Estate*, (*Knatchbull v. Hallett*), 13 Ch. Div. 696, the illustration may be used of a debtor mingling trust funds with his own in a chest or bag. Though the particular money cannot be identified, the amount is swelled just so much, and the amount added belongs to the cestui que trust. But in the latter case there is no swelling of the estate, for the money is spent and gone; or, as respondent's counsel pertinently suggests, "Knight Bruce's chest—Jessel's bag—is empty." Shall we therefore order a like amount to be taken out of some other chest or bag, or out of the debtor's general estate? Suppose the general estate consists only of mills and machinery acquired long before the complainants' money was appropriated. Upon what principle could that property be taken to reimburse them? But the complainants say: "Our money has been misappropriated by the debtor without our consent and without our fault. Why should we not be reimbursed out of his estate?" Undoubtedly, it is right that every one should have his own; but, when a claimant's property cannot be found, this same principle prevents the taking of property which equitably belongs to creditors of the trustee to make it up. The creditors have done no wrongful act, and should not be called upon, in any way, to atone for the misconduct of their debtor. It is an ordinary case of misfortune on the part of claimants, whose confidence in a trustee or agent has been abused.

In examining the question upon authority we think it is equally clear that there can be no equitable relief except in cases where the fund claimed is in some way apparent in the debtor's estate. Of the cases cited by the complainants, only four go to the extent of holding that a cestui que trust is entitled to a lien for reimbursement on the general estate of the trustee where the trust fund does not, in some form, so appear. These are *Plow Co. v. Lamp*, 80 Iowa, 722, 45 N. W. Rep. 1049; *McLeod v. Evans*, 66 Wis. 401, 28 N. W. Rep. 173, 214; *Francis v. Evans*, 69 Wis. 115, 33 N. W. Rep. 93; *Bowers v. Evans*, 71 Wis. 133, 36 N. W. Rep. 629. In the first of these cases the court lost sight of the distinction, which we desire to make clear, between funds remaining in the estate, which go to swell the assets, and funds which, having been dissipated or used in the payment of debts, do not remain in the estate, and so do not swell the estate. Upon the former fact, as we have stated above, we concede the right to relief. But the court in the Iowa case seems to ignore this very important distinction, and in so doing overthrows the foundation on which its decision is based, for it

says: "The creditors, if permitted to enforce their claims as against the trust, would secure the payment of their claims out of trust moneys." Now, how can this be so if the trust moneys, or their substantial equivalent, are not there? The court assumes that the payment of debts is the same thing as an increase of assets, or perhaps that it works the same result to a creditor by increasing his dividends. But this is not so. How the satisfaction of a debt by incurring another of equal amount either decreases one's liabilities or increases his assets can only be comprehended by the philosophic mind of a Micawber. If a debtor is solvent, it is all right either way, because he will have enough to pay everything he owes; but, if he is insolvent, the injustice of the doctrine of the Iowa court is made almost painfully plain by the following illustration from the dissenting opinion of Taylor and Cassoday, JJ., in *Francis v. Evans*, supra: "Suppose that an insolvent debtor, D., has only \$1,000 of property, but is indebted to the amount of \$2,000, one-half of which is due to A., and the other half to B. In this condition of things D.'s property can only pay fifty per cent. of his debts. By such distribution A. and B. would each be equitably entitled to \$500. Now, suppose D., while in that condition, collects \$1,000 for F., but instead of remitting the money, as he should, he uses it in paying his debt in full to A. By so doing, D. has not increased his assets a penny, nor diminished his aggregate indebtedness a penny. The only difference is that he now owes \$1,000 each to B. and F., whereas he previously owed \$1,000 each to A. and B. Now if F. is to have preference over B., then his claim will absorb the entire amount of D.'s property, leaving nothing whatever for B. In other words, the \$500 to which B. was equitably entitled from his insolvent debtor, upon a fair distribution of the estate, has, without any fault of his, been paid to another, merely in consequence of the wrongful act of the debtor." It is impossible to state the case more clearly. The illustration demonstrates that the mere fact that a trustee has used the money does not show that it has gone into his estate. If used to pay debts, he has simply turned it over to a creditor, thereby giving him a preference, while his own estate and indebtedness remains exactly as before. Suppose he had stolen the money, and turned it over to somebody from whom it could not be reclaimed. Can any one say the owner should have an equitable lien upon the thief's insolvent estate in preference to his creditors? They and the owner are equally innocent, and each must bear his own misfortune. There seems to be some confusion, also, upon the ground that, because there might be an equitable lien upon the trustee's property

in his own hands, the same lien must follow it into the hands of the assignee, because he has no greater rights than the assignor. The assignee is primarily a trustee for creditors; yet it is indeed true that he has no greater right than the assignor to specific property. But suppose, after a creditor had attached property in possession of a debtor, a complainant should seek an equitable lien upon it for the reason that the debtor had misappropriated property which belonged to the complainant, and of which the attached property was in no way a part. We see no ground upon which he could succeed. When the creditor seeks to establish his lien for his debt he stands equal in equitable right with a claimant who can show no peculiar equitable claim to the property in question. The fact that the cestui que trust has not entered into the relation of debtor and creditor with the trustee does not affect the question. So long as he seeks to recover what he can show to be his own, he is in the position of an owner; but when he cannot do this, and seeks to recover payment out of the trustee's general estate, he is in the position of a creditor. Substantially the same criticisms are applicable to the Wisconsin cases, with the additional remarks that they are decisions of a court nearly evenly divided, and that, in our opinion, the better reason and weight of authority are with the dissentient judges.

In support of the views we have expressed, it is sufficient to select the following cases: *Little v. Chadwick*, 151 Mass. 109, 23 N. E. Rep. 1005; *National Bank v. Insurance Co.*, 104 U. S. 54; *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. Rep. 504; *Englar v. Offutt*, 70 Md. 78, 16 Atl. Rep. 497; *Thompson's Appeal*, 22 Pa. St. 16; *Bank v. Armstrong*, 39 Fed. Rep. 684. The question whether any of the property of the Forestdale Company has gone into the hands of the assignee in original or substituted form, whereby the assets are so much larger, is a question of fact. As to the sum of \$149.39 on deposit in the Columbian National Bank of Boston, no question being made that it was a part of the funds of the Forestdale Company, it may, according to *National Bank v. Insurance Co.*, 104 U. S. 54, be claimed by the owner; but that question cannot be determined in this suit, as the money is not in the hands of the assignee, and the bank is not a party to the suit. As to the \$3,103.33 invested in cotton, and made into manufactured goods, following the doctrine of the cases cited, the court will attribute ownership in such goods, if any such came to the assignee, to be in the cestui que trust to the amount or value disclosed. This being a question of fact, it must stand for hearing, and the demurrer to the bill, upon the points argued, must be overruled.

NONOTUCK SILK CO. v. FLANDERS.

(58 N. W. 383, 87 Wis. 237.)

Supreme Court of Wisconsin. March 16, 1894.

Appeal from circuit court, Bayfield county; J. K. Parish, Judge.

The Nonotuck Silk Company filed a claim against the estate of A. C. Probert, an insolvent, and procured an order to show cause why said claim should not be declared preferred. On the hearing the claim was so declared, and the assignee appeals. Reversed.

The other facts fully appear in the following statement by CASSODAY, J.:

It appears from the record that for several years prior to June, 1893, the defendant's assignor, A. C. Probert, conducted a banking business at Washburn under the name of the Bank of Washburn; that May 24, 1893, the plaintiff, a corporation at Chicago, sent a draft for \$99.67, on one Lemke, to the Bank of Washburn for collection; that June 2, 1893, the draft was presented to Lemke, and paid by his check on the Bank of Washburn on the same day; that June 3, 1893, the Bank of Washburn issued its draft on the Union National Bank, its Chicago correspondent, for the proper amount, and forwarded the same to the plaintiff; that the plaintiff did not receive the draft until June 9, 1893, and deposited the same immediately in the First National Bank of Chicago; that that bank presented the draft to the Union National Bank June 10, 1893, but payment thereof was refused; that the Union National Bank then had no money to the credit of the Bank of Washburn, but did have collaterals, left there expressly to protect overdrafts, more than enough to protect the draft in question, as well as all other drafts issued upon that bank by the Bank of Washburn; that June 7, 1893, the Bank of Washburn closed its doors. Probert having failed; that June 26, 1893, Probert perfected an assignment for the benefit of his creditors, and on that day the defendant, his assignee, took possession of all his property, including the Bank of Washburn and its effects; that Probert's assets at the time of such assignment amounted to \$261,716.31, and his liabilities to \$236,492.31; that such assets consisted of commercial paper, secured and unsecured, stocks, real estate, etc.; that no money whatever came into the hands of said assignee, except a few pennies and a \$2.50 gold piece; that all money in the Bank of Washburn on and after June 1, 1893, was used in paying checks drawn against deposits, and in paying clerk hire or employees of the Bank of Washburn; that none of the moneys of Probert, and none of the proceeds of the collection made for the plaintiff, was used in acquiring other property or invested in other property of any kind, but that all money in the possession of Probert at and after receiving said check of Lemke for the plaintiff was used in paying the debts of Probert, so that no money, or the proceeds of the mon-

ey, in the Bank of Washburn, or the plaintiff's collection, or the proceeds of said collection, ever came into the hands of said assignee in the shape of property of any kind whatsoever; that September 18, 1893, the plaintiff filed its claim against said estate; that October 17, 1893, the plaintiff procured an order to show cause why its said claim should not be declared preferred; that on the final hearing of that application, December 6, 1893, it was ordered by the court that said claim be, and the same was thereby, declared a preferred claim, and the money and effects upon which the same was founded were thereby declared to be trust funds, and the said assignee was thereby ordered to pay said claim of \$99.42, in full, out of any moneys in his hands belonging to said estate, in preference of all claims against said estate not preferred, together with costs and disbursement of such hearing, taxed at \$25. From that order the defendant brings this appeal.

Lamoreux, Gleason, Shea & Wright, for appellant. Warden & Alvord, for respondent.

CASSODAY, J. (after stating the facts). The amount involved is small, but the case is important by reason of others dependent upon it, and the nature of the question involved. It appears that A. C. Probert was the sole owner of the Bank of Washburn; that June 7, 1893, he failed, and his bank closed its doors; that June 26, 1893, he made a voluntary assignment of all his property to the defendant for the benefit of his creditors. There is some force in the suggestion that the receiving of Lemke's check in payment of the plaintiff's draft on him, held by Probert's bank for collection, and the sending to the plaintiff of a draft made by Probert's bank on the Chicago bank for the amount of such collection, four days prior to such failure, was nothing more than the substitution on the books of Probert's bank of a credit to the plaintiff, or to the Chicago bank, for the amount, in lieu of the former credit for the same amount to Lemke. But it appears that, at the time of giving the check, Lemke had funds in Probert's bank to the amount of the check, and hence the transaction would seem to be substantially the same as though Lemke had actually drawn the money on the check, and then immediately handed the same back in payment of the draft on him in favor of the plaintiff, and then held by Probert's bank for collection; and that Probert's bank then retained the money so paid in by Lemke, and in lieu thereof sent to the plaintiff its draft on the Chicago bank, as mentioned in the foregoing statement. As therein indicated, the money so represented by the check was, with other moneys, used up in paying the debts of Probert, so that no part of that money or the proceeds of that collection, either in the shape of money or of property of any kind,

ever came into the hands of the defendant, as such assignee. Such being the facts, it is manifest that the plaintiff is not here reclaiming his own property intrusted to Probert's bank, nor the avails or the proceeds thereof, but is here claiming a preference over other creditors out of other assets and property of Probert received by the defendant by virtue of such assignment. Certainly, there is no statute in this state giving any such preference, nor any authorizing an insolvent debtor, by way of a voluntary assignment, to give such preference. Laws 1883, c. 349; Laws 1885, c. 48; sections 1693a, 1693c, Sanb. & B. Ann. St. It follows that, if the plaintiff is entitled to such preference at all, it must be by virtue of some established principle of equity or the common law.

The early English cases only went to the extent of holding, in effect, that the owner of property intrusted to an agent, factor, bailee, or other trustee could follow and retake his property from the possession of such trustee, or others in privity with him, and not a bona fide purchaser for value, whether such property remained in its original form, or in some different or substituted form, so long as it could be ascertained to be the same property, or the product or proceeds thereof, but that such right ceased when the means of ascertainment failed, as when the subject of the trust was money, or had been converted into money, and then mixed and confounded in a general mass of money of the same description, so as to be no longer divisible or distinguishable. This is apparent from the opinion of Lord Ellenborough, C. J., written nearly 80 years ago, reviewing the adjudications prior to that date. *Taylor v. Plumer*, 3 Maule & S. 575. But the more recent rule in England as to following trust moneys is broader, and goes to the extent of holding, in effect, that "if money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands;" that "if a person who holds money as a trustee, or in a fiduciary character, pays it to his account at his banker's, and mixes it with his own money, and afterwards draws out sums by checks in the ordinary manner, * * * the drawer must be taken to have drawn out his own money, in preference to the trust money." In *re Hallett's Estate* (*Knatchbull v. Hallett*), 13 Ch. Div. 696, overruling some former English cases. In that case there was no dispute but what the money received by the trustee for the property wrongfully converted was deposited with his bankers to the credit of his account, and that the same "remained at his banker's, mixed with his own money, at the time of his death." But in the leading opinion, by Jessel, M. R., in that case, and by way of quoting Mr. Justice Fry approvingly, it is said: "The guiding principle is that a trustee cannot assert a

title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of the trust. But, so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust." *Id.* p. 719. That case is as favorable to the claim of the plaintiff as any in the English courts; and yet it nowhere sanctions the proposition that the owner of the property or money intrusted is entitled to a preference over other creditors of an insolvent estate out of property or assets to which no part of the trust fund, or the proceeds thereof, is traceable. All such cases turn upon the question of fact whether the trust property or fund, or the proceeds thereof, are traceable into any specific property or fund. *Ex parte Hardcastle* (*In Re Mawson*), 44 Law T. 524. Thus, in *Re Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504, it was held that, "to entitle the trust creditor to such a preference, it must, at least, be made to appear that the fund or property of the insolvent, remaining for distribution, includes proceeds of the trust estate." To the same effect, *Atkinson v. Printing Co.*, 114 N. Y. 168, 21 N. E. 178; *Holmes v. Gilman*, 138 N. Y. 376, 34 N. E. 205. In *Little v. Chadwick*, 151 Mass. 110, 23 N. E. 1005, the court said: "When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases. The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the cestui que trust to follow it fails." To the same effect are *Goodell v. Buck*, 67 Me. 514; *Steamboat Co. v. Locke*, 73 Me. 370; *Englar v. Offutt*, 70 Md. 78, 16 Atl. 497; *Thompson's Appeal*, 22 Pa. St. 16; *Columbian Bank's Estate*, 147 Pa. St. 440, 23 Atl. 625, 626, 628; *Appeal of Hopkins* (Pa.) 9 Atl. 867; *Bank v. Goetz*, 138 Ill. 127, 27 N. E. 907; *Neely v. Rood*, 54 Mich. 134, 19 N. W. 920; *Sherwood v. Bank*, 94 Mich. 78, 53 N. W. 923; *Elevator Co. v. Clark* (N. D.) 53 N. W. 175; *National Bank v. Insurance Co.*, 104 U. S. 54, 68; *Peters v. Bain*, 133 U. S. 670, 693, 10 Sup. Ct. 354; 2 Story, Eq. Jur. §§ 1258, 1259; 2 Pom. Eq. Jur. § 1058; 1 Lewin, *Trusts* (1st Am. Ed.) 241.

In speaking of following trust moneys into other property, it is stated in one of the New York cases cited that "the right has its basis in the right of property." It never was based upon the theory of preference by reason of an unlawful conversion. This is made clear by a recent and well-considered opinion by the supreme court of Rhode Island. *Slater v. Oriental Mills* (R. I.) 27 Atl. 443. It follows that the mere fact that Probert's bank used the plaintiff's money towards paying its indebtedness, before making the assignment, did not authorize a preference to the plaintiff, over Probert's other creditors, out of his other property and as-

sets. This is made plain by an illustration having judicial sanction in the case last cited: "Suppose that an insolvent debtor, D., has only \$1,000 of property, but is indebted to the amount of \$2,000, one-half of which is due to A., and the other half to B. In this condition of things, D.'s property can only pay fifty per cent. of his debts. By such distribution, A. and B. would each be equitably entitled to \$500. Now, suppose D., while in that condition, collects \$1,000 for F., but instead of remitting the money, as he should, he uses it in paying his debt in full to A. By so doing, D. has not increased his assets a penny, nor diminished his aggregate indebtedness a penny. The only difference is that he now owes \$1,000 each to B. and F., whereas he previously owed \$1,000 each to A. and B. Now, if F. is to have preference over B., then his claim will absorb the entire amount of D.'s property, leaving nothing whatever for B. In other words, the \$500 to which B. was equitably entitled from his insolvent debtor, upon a fair distribution of the estate, has, without any fault of his, been paid to another, merely in consequence of the wrongful act of the debtor." *Id.*, and dissenting opinion in 69 Wis. 123. See, also, *McClure v. Board* (Colo. Sup.) 34 Pac. 763. We must hold that the plaintiff has no legal right to a preference over Probert's other creditors in the distribution of his estate in the hands of the defendant, as assignee, and into which no part of the plaintiff's money has been traced.

This is not a mere question of practice, nor the construction of a local statute long acquiesced in, but is a question of general equity jurisprudence; and it is very important to the people of the state that this

court should, at least on such questions, adhere to the principles of the common law so well established as to become elementary. It is especially essential that the state and federal courts, on such questions, should be in harmony. In so far as *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173, 214; *Francis v. Evans*, 69 Wis. 115, 33 N. W. 93; and *Bowers v. Evans*, 71 Wis. 133, 36 N. W. 629,—are in conflict with the rules above indicated, they must be regarded as overruled. The order of the circuit court is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

ORTON, C. J. (dissenting). This case is ruled by *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173, 214; *Francis v. Evans*, 69 Wis. 115, 33 N. W. 93; and *Bowers v. Evans*, 71 Wis. 133, 36 N. W. 629. It was a case of a special deposit or trust or agency. It was the employment of the bank to collect a draft. It ought not to make any difference that the bank embezzled the proceeds. The plaintiff was clearly entitled to be a preferred creditor. If this was the first case of the kind, I might not dissent. I respectfully dissent on the ground that the decision in this case overrules three well-considered and reconsidered decisions of this court. In the long history of this court, there have been very few overruled cases. The interests of the public are best subserved by the stability of decisions. If former cases are to be overruled by every change of the personality of the bench, we may soon have no line of decisions on important questions, to which the business of the country has been long adapted and adjusted, and everything will become unsettled.

AMERICAN SUGAR-REFINING CO. v.
FANCHER.

(40 N. E. 206, 145 N. Y. 552.)

Court of Appeals of New York. April 9, 1895.

Appeal from supreme court, general term, First department.

Action by the American Sugar-Refining Company against Charles H. Fancher, assignee. From a judgment of the general term (30 N. Y. Supp. 482), reversing a judgment for plaintiff, plaintiff appeals. Reversed.

Charles E. Hughes, for appellant. James B. Dill, for respondent.

ANDREWS, C. J. This case presents a question of considerable practical importance. It relates to the equitable jurisdiction of the court, under special circumstances, to follow proceeds of personal property in the hands of a fraudulent vendee or his general assignee for the benefit of creditors at the suit of a defrauded vendor, who by false pretenses was induced to part with the property upon credit, the proceeds sought to be reached being the sums due from subvendees of the fraudulent purchaser arising on resales by him made before the discovery by the plaintiff of the fraud. The facts upon which the question arises are substantially conceded and are free from complication. Between the 20th day of September, 1892, and the 20th day of October following, the plaintiff sold and delivered to the mercantile firm of C. Burkhalter & Co., doing business in the city of New York, sugars of various qualities on credit for the price in the aggregate of \$19,121.41, no part of which has been paid, the last sale having been made October 19, 1892. On the next day the firm, being insolvent and owing debts greatly in excess of its assets, made a general assignment to the defendant for the benefit of its creditors. Among the assigned assets were a portion of the sugars sold by the plaintiff to the firm, which he replevied from the assignee; but the firm, prior to the assignment, had sold to numerous persons, customers of the firm, in the ordinary course of trade, portions of the sugars on credit, and claims held by the firm against the subvendees arising out of such sales, exceeding in the aggregate the sum of \$10,000, were among the assets which passed by the assignment. These claims were collected by the assignee after the assignment, and (excepting a small sum) after notice had been served by the plaintiff on the assignee that it rescinded the original sale for fraud, which notice was accompanied by a demand for the sugars then in the possession of the assignee, and for an accounting and the delivery to the plaintiff of the outstanding claims against the customers of Burkhalter & Co. in their hands for the sugars sold by the firm as above stated. The assignee declined to accede to the demand

made. On the trial the parties by stipulation fixed the amount of the claims for sugars sold which had come to the hands of the assignee, and which had been collected by him. The fraud of Burkhalter & Co. was not controverted. It was shown that the sales were induced by a gross misrepresentation in writing made by one of the members of the firm to the plaintiff as to the solvency of the firm, made on or about September 20, 1892, within 30 days before the assignment, and when the firm was owing several hundred thousand dollars more than the value of its whole assets.

The case presented is singularly free from any uncertainty in respect to the facts upon which the equitable jurisdiction to follow the proceeds of the sugars is claimed. They are definite and ascertained, but it is insisted that the court is impotent to give relief by way of subjecting the choses in action or their proceeds, representing the sugars, to a lien in favor of the defrauded vendor, or to adjudge that they shall be applied in partial recompense and restitution for the property so wrongfully obtained, because, as is claimed, such relief is not in any such case within the scope of the powers of courts of equity as heretofore defined and exercised, and for the further reason that new rights have intervened by reason of the assignment. The fraud of Burkhalter & Co. was, as we have said, admitted. They are hopelessly insolvent, and were so at the time they took the plaintiff's goods. They disposed of a large part of the sugars before the plaintiff became cognizant of the fraud. The plaintiff was only apprised of it after the assignment was made. The remedy at law upon the contract against the fraudulent and insolvent purchaser is, under the circumstances, ineffectual. The pursuit of the property, except the small part of it which was unsold and passed to the assignee, is impracticable. If it could yet be found unconsumed and capable of identification, the multiplicity of suits which would be rendered necessary to reclaim it would make the remedy expensive, burdensome, and inadequate. The identification of the proceeds sought to be reached is complete and unquestioned. It is not claimed that the credits or the money into which they have been converted are not the very proceeds of sugars of which the plaintiff was defrauded.

The jurisdiction of a court of equity to follow the proceeds of property taken from the true owner by felony, or misapplied by an agent or trustee, and converted into property of another description, and to permit the true owner to take the property in its altered state as his own, or to hold it as security for the value of the property wrongfully taken or misapplied, or, in case the original property or its proceeds have been mingled with that of the wrongdoers in the purchase of other property, to have a charge declared in favor of the person injured to the extent necessary for his

indemnity, so long as the rights of bona fide purchasers do not intervene, has been frequently exerted, and is a jurisdiction founded upon the plainest principles of reason and justice. The case of *Newton v. Porter*, 69 N. Y. 133, is an illustration of the application of this principle in a case of the larceny of negotiable bonds, sold by the thieves, in which the court subjected securities in which they invested the money, and which they had transferred with notice to third persons as security for services to be rendered, to a charge in favor of the owner of the stolen bonds. The cases upon this head are very numerous, where there has been a misapplication of trust funds by trustees, or persons standing in a fiduciary relation, and the money or property misapplied has been laid out in land or converted into other species of property. The court in such cases lays hold of the substituted property and follows the original fund, through all the changes it has undergone, until the power of identification is lost or the rights of bona fide purchasers stop the pursuit, and holds it in its grasp to indemnify the innocent victim of the fraud. And even in case of money, which is said to have no earmark, its identity will not be deemed lost, though it is mingled with other money of the wrongdoer, if it can be shown that it forms a part of the general mass. *Pennell v. Deffell*, 4 De Gex. M. & G. 372; *In re Hallett's Estate*, 13 Ch. Div. 696; *Holmes v. Gilman*, 138 N. Y. 369, 34 N. E. 205. In the cases of stolen property, or of misapplication by a trustee or agent of the funds of the principal or cestui que trust, the title of the real owner of the property has been in most cases lost, without his consent, and the court, by a species of equitable substitution, repairs, as far as practicable, the wrong, and prevents the wrongdoer from profiting by his fraud.

And, indeed, courts of law, borrowing the equitable principle, in cases of misappropriation by agents, vest in the principal at his election the legal title to a chattel or security in the hands of the agent, purchased exclusively by the application of the embezzled or misappropriated fund. *Taylor v. Plumer*, 3 Maule & S. 562. It is at this point that the controversy in the present case commences, and the divergence arises which has led to this litigation. It is claimed, on behalf of the defendant, that courts of equity in commercial cases, where the claim of the plaintiff originates in a fraud in the sale of personal property, do not undertake to follow proceeds in the hands of the wrongdoer, but that the defrauded party, having consented to part with his title, is remitted exclusively to such legal remedies as are given for the redress of the wrong. The jurisdiction of courts of equity in cases of trust or agency, or cases of like character, it is insisted, is founded upon the ancient jurisdiction of these courts over trusts and fiduciary relations, and has not been and ought not to be extended beyond these cases. It is very true that trusts and trust relations

are peculiarly cognizable in equity, and have been so cognizable from the earliest period of equitable jurisprudence. But it is to be said that these are but branches of the larger jurisdiction over frauds, which equity abhors, and of which it has cognizance admittedly in many cases not connected with technical trusts or agency. It cannot be denied that the protection of cestuis que trustent against frauds of the trustee is an object of peculiar solicitude in the courts of equity. They, in many cases, are incapable, by reason of age, inexperience, or other incapacity, from looking out for themselves, and the court stands in the attitude of guardian of their interests. But, as has been said, a court of equity does not restrict its remedial processes to the aid of the helpless or the ignorant. It embraces within its view the general claims included within what are called quasi trusts, and intervenes to prevent violations of equitable duty by whomsoever committed or whoever may suffer from the violation. It goes altogether outside of trust relations in many cases to prevent fraud, or to compel a restoration of property obtained by fraud. The exercise of the jurisdiction to set aside fraudulent transfers of real or personal property made in fraud of creditors is familiar. And the jurisdiction is most beneficially invoked in cases of private fraud to rescind transfers of real estate procured by fraudulent representations, and to restore to the defrauded vendor the title of which he has been defrauded. It often happens in cases of transfers of real estate procured by fraud that, before the action is brought or the plaintiff is apprised of the fraud, the fraudulent vendee has disposed of the land in whole or in part, or has created liens thereon in favor of the bona fide purchasers for value. In such cases the court will mold the relief to suit the circumstances, and will, at the election of the plaintiff, rescind the contract and compel a reconveyance of the part of the land still remaining in the hands of the vendor, and compel the wrongdoer to account for the proceeds of the land sold, or award compensation in damages. The court in many cases resorts to the fiction of a trust, and, by construction, adjudges that the proceeds in the hands of the wrongdoer are held by him as trustee of the plaintiff. This was the exact nature of the relief granted in the case of *Trevelyan v. White*, 1 Beav. 589, as appears by the recital of the decree in the opinion of the master of the rolls, where part of the estate had been sold by the fraudulent vendee. In *Cheney v. Gleason*, 117 Mass. 557, a bill was filed by the defrauded vendor of real estate to reach a mortgage taken by the vendee on the land on a resale by him, and the court sustained the bill and granted the relief. In *Hammond v. Pennock*, 61 N. Y. 145, the court rescinded, at the instance of the plaintiff, a contract for the exchange of real and personal property, owned by the plaintiff, for a farm of the defendant in Michigan, which had been consummated

on the plaintiff's part by a conveyance and transfer, the contract and conveyance having been obtained by the defendant by fraudulent representations; and the defendant having, after the conveyance to him, contracted to sell part of the land conveyed to him by the plaintiff, the court adapted the relief to the circumstances, and rescinded the conveyance so far as practicable, and adjudged that the defendant account for the proceeds of the personal property included in the sale.

If the jurisdiction exercised by courts of equity in respect to undoing fraudulent conveyances of real estate, and following the proceeds in the hands of the fraudulent grantee, appertains in like manner and degree to sales of personalty, it would seem that the plaintiff in the present case was entitled to relief. The fact that, before the action was brought, Burkhalter & Co. had made a general assignment for the benefit of creditors to the defendant is no obstacle to the relief, if, except for the assignment, the court would have interposed, on the prayer of the plaintiff, its preventive and other remedies, to have enabled the plaintiff to reach the unpaid claims against the sub-vendees. An assignee for creditors is not a purchaser for value, and stands in no other or better position than his assignor as respects a remedy to reach the proceeds of the sales by Burkhalter & Co. *Goodwin v. Wertheimer*, 99 N. Y. 149, 1 N. E. 404; *Barnard v. Campbell*, 58 N. Y. 76; *Ratliffe v. Sangton*, 18 Md. 383; *Bussing v. Rice*, 2 Cush. 48. It is claimed that the general creditors of the firm will be prejudiced if the plaintiff is allowed to prevail, and that he will thereby acquire a preference over the other creditors of the insolvent firm. But general creditors have no equity or right to have appropriated to the payment of their debts the property of the plaintiff, or property to which it is equitably entitled as between it and Burkhalter & Co.

They, so far as appears, advanced nothing, and gave no credit on the faith of the firm's possession of the sugars, assuming that that element would have had any bearing on the case. If the sugars had existed in specie in the hands of the assignee, it cannot be doubted that the plaintiff on rescinding the sale would have been entitled to retake them, and the general creditors are in no worse position, if the plaintiff is awarded the proceeds, than they would have been if the sugars had remained unsold. Much was said on the argument upon the difference between a trespasser taking and disposing of the property of another and the case of a sale of personal property to a vendee induced by fraud. It is the law of this state, as in England, that title passes on such a sale to the fraudulent vendee, notwithstanding that the crime of false pretenses is included in the statute definition of a felony, but which was not such at common law. *Barnard v. Campbell*, supra; *Wise v. Grant*, 140 N. Y.

593, 35 N. E. 1078; *Benj. Sales* (6th Ed.) § 433; *Fassett v. Smith*, 23 N. Y. 252; *Benedict v. Williams*, 48 Hun. 124. But a purchase procured by fraud is in no sense, as between the vendor and vendee, rightful. It was wrongful, and, while a transfer so induced vests a right of property in the vendee until the sale is rescinded, the means and act by which it was procured was a violation of an elemental principle of justice. But the rule is that a sale of personal property induced by fraud is not void, but is only voidable on the part of the party defrauded. "This does not mean that the contract is void until ratified; it means that the contract is valid until rescinded." When a contract of sale infected by fraud of the vendee is consummated, and the property delivered, the vendor on discovering the fraud may pursue one of several courses. He may affirm the contract, and an omission to disaffirm within a reasonable time after notice of the fraud will be deemed a ratification. He may elect to rescind it, and thereby his title to the property is reinstated as against the purchaser and all persons deriving title from him, not being bona fide purchasers for value, and a purchaser is not such who takes the property for an antecedent debt, or who purchased the property on credit, and has not paid the purchase money or been placed in a position where payment to a transferee of the claim cannot be resisted. *Barnard v. Campbell*, supra; *Dows v. Kidder*, 84 N. Y. 121; *Matson v. Melchor*, 42 Mich. 477, 4 N. W. 200; 1 *Benj. Sales*, p. 570, note.

Upon rescission the vendor may follow and retake the property wherever he can find it, except in the case mentioned, or he may sue for conversion. When these legal remedies are available and adequate, clearly there is no ground for going to a court of equity. The legal remedies in such case are and ought to be held exclusive. But in a case like the present, where there is no adequate legal remedy, either on the contract of sale or for the recovery of the property in specie, or by an action of tort, is the power of a court of equity so fettered that where it is shown that the property has been converted by the vendee, and the proceeds, in the form of notes or credits, are identified beyond question in his hands, or in possession of his voluntary assignee, it cannot impound such proceeds for the benefit of the defrauded vendor? The only reason urged in denial of this power which to our minds has any force is based on the assumption that it would be contrary to public policy to admit such an equitable principle into commercial transactions. But with the two limitations adverted to, and which ought strictly to be observed, (1) that it must appear that the plaintiff has no adequate remedy at law, either in consequence of insolvency, the dispersion of the property, or other cause, and (2) that nothing will be adjudged as proceeds except what can be specifically identi-

fied as such, business interests will have adequate protection. Indeed, the disturbance would be much less than is now permitted in following the property from hand to hand until a bona fide purchaser is found.

The case of *Small v. Attwood, Younge*, 507, is a very instructive case, which involved a large amount, was argued by eminent counsel, and received great consideration. It supports, we think, the equitable jurisdiction invoked in the present case. It was an action by the purchaser to rescind a contract for the sale of mines and mining property induced by fraudulent representations, and to recover the purchase money paid to the amount of about £200,000. The court found the fraud and rescinded the contract, and made a decree for an accounting. On a supplemental bill being filed, showing that the purchase money paid had been invested by the seller in public securities in his name, which he afterwards caused to be put in the name of his mother, and that the purchaser had no other means adequate to repay the purchase money, the chancellor, on an application for an injunction restraining the transfer of the securities, held that the money paid could be followed into the stock purchased, and

granted the injunction. The case of *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504, was an attempt to fasten upon the estate of an insolvent a preferential lien for money put into his hands by the plaintiff for the purchase of a mortgage for her, and which he applied, without authority, to the payment of his debts before the assignment, with the exception of a small sum (\$30), which went into the hands of the assignee. The court held that the money, which the insolvent had used to pay debts prior to the assignment, was not a preferred debt, but sustained her right to be paid the small sum which the assignee received belonging to the trust. This case points the distinction. The character of the debt gave it no priority. The fund had been dissipated, and could not be traced among the assigned assets. There was no equitable ground of preference except for the small sum mentioned.

Upon the whole case, we are of the opinion that the judgment on the report of the referee was correct, and the order granting a new trial should therefore be reversed, and the judgment on the report of the referee affirmed, with costs. Judgment accordingly. All concur.

CAVIN v. GLEASON.¹

(11 N. E. 504, 105 N. Y. 256.)

Court of Appeals of New York. April 19, 1887.

J. B. Gleason, for appellant. W. H. Johnson, for respondents.

ANDREWS, J. It may properly be conceded that the \$3,000, received by White from the petitioners on the third day of January, 1883, for investment in the Gould mortgage, constituted in his hands a quasi trust fund, which White was bound to use for the specific purpose contemplated, and which he could not divert to any other use without committing a breach of trust. The securities which formed the greater part of the fund were immediately convertible into money, and authority in White to make such conversion was implied, but only as a means of realizing the money with which to make the mortgage loan. The securities, while in the hands of White, remained the property of the petitioners; and, when converted by him, their title attached to the proceeds of the converted property. White collected the securities actually or constructively. He collected the notes against third persons, and drew the money deposited in the Delaware National Bank. The two certificates of deposit issued by himself, amounting in the aggregate to \$780, he accepted as money.

It is material to a proper understanding of the question presented, to state a few other facts which appear in the record. White was a private banker. On the fifth of January, 1883, two days after the transaction with the petitioners to which we have alluded, he was taken sick, and on or about the ninth of January a run commenced on the bank, and on the twelfth of January he made a general assignment to the defendant, Gleason, for the benefit of creditors, having at the time on hand in cash assets only the sum of \$64.75. The Gould mortgage was never procured by White, and he made no investment for the petitioners of the \$3,000 received on the third day of January. On the contrary, it was found by the judge at special term that White, after receiving and collecting the securities, and prior to the eleventh day of January, in violation of his trust, used the entire fund of \$3,000 excepting the sum of \$30, which came to the hands of the assignee, in paying his personal debts and liabilities. But on the eleventh of January, the day prior to the making of the assignment, for the purpose of securing the claim of the petitioners, he transferred to them a land contract, from which and other sources the petitioners have realized sufficient to reduce their claim to the sum of \$877.27. It was admitted on the hearing of the petition, which took place in January, 1885, that the assignee had then on hand proceeds of the assigned estate sufficient to pay the said sum of \$877.27, but it was con-

ceded by the petitioners that the assigned estate was insufficient to pay in full the debts of the assignor.

The special term granted the prayer of the petitioner, and made an order directing the assignee to pay the claim of the petitioners out of the money in his hands, and this order was affirmed by the general term. The order in effect appropriates out of the assigned estate the sum of \$877.27 to the payment of the claim of the petitioners, in preference to the claims of the general creditors.

The petitioners, to maintain the order in question, rely upon the rule in equity that, as between *cestui que trust* and trustee, and all parties claiming under the trustee otherwise than by purchase for valuable consideration, without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust. *Pennell v. Deffell*, 4 De Gex, M. & G. 387, *Turner, L. J.* This settled doctrine of equity has its basis in the right of property. The owner of personal property which, by the wrongful act of his agent or trustee, has been changed and converted into chattels of another description, may elect to treat the property into which the conversion has been made as his own. Upon such election the title to the substituted property is vested in him as fully as if he had originally authorized the wrongful act, which title he may assert in a legal action to the same extent as he could have asserted title in respect to the original property. The reason of the doctrine is stated by Lord Ellenborough in the leading case of *Taylor v. Plumer*, 3 Maule & S. 562, in language often quoted: "For," he says, "the product or substitute for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail." The question in that case involved the legal title to certain stock and bullion which an agent of the defendant, intrusted by his principal with money to invest in exchequer bills, had wrongfully misapplied to the purchase of the stock and bullion, intending to abscond with it and go to America, and the court sustained the defendants' title.

Courts go very far to protect rights of property as against a wrong-doer. They follow it through whatever changes and transmutations it may undergo in his hands, and as against him, transferred to the changed and altered product the original title, however much the original property has been increased in value by his labor or expenditure, provided only that the product is still a chattel, and is composed of the original materials. *Silisbury v. McCoon*, 3 N. Y. 379. But a court of law, as a general rule, deals only with the legal title; and when the legal identity of the property is destroyed, or the property cannot be traced specifically into another thing, it is

¹ Modifying 39 Hun, 655.

powerless to give relief, except by action for damages against the wrong-doer. The language of Lord Ellenborough, already quoted, that the right to follow property only ceases when the means of ascertainment fail, is illustrated by what follows, "which," he adds, "is the case when the subject is turned into money and mixed and compounded in a general mass of the same description."

It is not important to inquire whether later decisions have not established, even in respect to strictly legal actions, a somewhat less stringent limitation upon the right of pursuit than that indicated in the language just quoted. But it is unnecessary to pursue this inquiry here. It is clear that in this case the trust fund has been dissipated and lost by the act of the trustee. It is neither specifically in the hands of the trustee or of his assignee, nor is it represented by other property into which it has been converted. The fund, according to the finding, (with the exception of the sum of \$30,) was paid out on the debts of White before the assignment. Plainly, there is no room for any contention that the petitioners have legal title to any of the assigned property. The sole inquiry is whether a case is made for equitable intervention in favor of the petitioners in the administration of the insolvent estate. It is clear, we think, that, upon an accounting in bankruptcy or insolvency, a trust creditor is not entitled to a preference over general creditors of the insolvent, merely on the ground of the nature of his claim; that is, that he is a trust creditor as distinguished from a general creditor. We know of no authority for such a contention. The equitable doctrine that, as between creditors, equality is equity, admits, so far as we know, of no exception founded on the greater supposed sacredness of one debt, or that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than another, unless it appears, in addition, that there is some specific recognized equity founded on some agreement, or the relation of the debt to the assigned property, which entitles the claimant, according to equitable principles, to preferential payment. If it appears that trust property specifically belonging to the trust is included in the assets, the court doubtless may order it to be restored to the trust. So, also, if it appears that trust property has been wrongfully converted by the trustee, and constitutes, although in a changed form, a part of the assets, it would seem to be equitable, and in accordance with equitable principles, that the things into which the trust property has been changed, should, if required, be set apart for the trust, or, if separation is impossible, that priority of lien should be adjudged in favor of the trust-estate for the value of the trust property or funds, or proceeds of the trust property, entering into and constituting a part of the assets. This rule simply asserts the right of the true owner to his own property.

But it is the general rule, as well in a court

of equity as in a court of law, that, in order to follow trust funds, and subject them to the operation of the trust, they must be identified. A court of equity, in pursuing the inquiry and in administering relief, is less hampered by technical difficulties than a court of law; and it may be sufficient, to entitle a party to equitable preference in the distribution of a fund in insolvency, that it appears that the fund or property of the insolvent remaining for distribution includes the proceeds of the trust-estate, although it may be impossible to point out the precise thing in which the trust fund has been invested, or the precise time when the conversion took place. The authorities require at least this degree of distinctness in the proof before preference can be awarded. See *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Newton v. Porter*, 69 N. Y. 133; *Ferris v. Van Vechten*, 73 N. Y. 113; *Pennell v. Deffell*, supra; *Frith v. Cartland*, 2 Hem. & M. 417.

The facts in this case fall short of the proof required within any case which has come to our notice. The trust fund, with the single exception mentioned, was misappropriated by White to the payment of his private debts prior to the assignment. It cannot be traced into the property in the hands of the assignee, for the plain reason that it is shown to have gone to the creditors of White in satisfaction of their debts. The courts below seem to have proceeded upon a supposed equity springing from the circumstance that, by the application of the fund to the payment of White's creditors, the assigned estate was relieved pro tanto from debts which otherwise would have been charged upon it, and that thereby the remaining creditors, if entitled to distribution without regard to the petitioner's claim, will be benefited. We think this is quite too vague an equity for judicial cognizance, and we find no case justifying relief upon such a circumstance. In a very general sense, all creditors of an insolvent may be supposed to have contributed to the assets which constitute the residuum of his estate.

The case of *People v. City Bank of Rochester*, 96 N. Y. 32, seems to have been misunderstood. The question considered in this case was not raised there, and it was not claimed in that case that the proceeds of the checks of Sartwell, Hough & Co., the petitioners, had not gone into the general fund of the bank, or that they had not passed in some form to the receiver. The court did not decide that the petitioners would have been entitled to a preference in case the proceeds of the checks had been used by the bank, and were not represented in its assets in the hands of the receiver.

For the reasons stated, we are of opinion that the orders of the special and general terms should be modified by reducing the sum directed to be paid by the assignee to the sum of \$30, with interest from April 19, 1883, but without costs to either party.

All concur.

Ordered accordingly.

NEWTON v. PORTER et al.

(69 N. Y. 133.)

Court of Appeals of New York. March 27, 1877.

Action to recover proceeds of stolen bonds. There was a judgment for plaintiff, from which defendants appealed.

M. Goodrich, for appellants. M. M. Waters, for respondent.

ANDREWS, J. This is an equitable action brought to establish the right of the plaintiff to certain securities, the proceeds of stolen bonds, and to compel the defendants to account therefor.

In March, 1869, the plaintiff was the owner of \$13,000 of government bonds, and of a railroad bond for \$1,000, negotiable by delivery, which, on the 12th of March, 1869, were stolen from her, and soon afterward \$11,500 of the bonds were sold by the thief and his confederates, and the proceeds divided between them. William Warner loaned a part of his share in separate loans and took the promissory notes of the borrower therefor. George Warner invested \$2,000 of his share in the purchase of a bond and mortgage, which was assigned to his wife Cordelia without consideration.

In January, 1870, William Warner, George Warner, Cordelia Warner and one Lusk were arrested upon the charge of stealing the bonds, or as accessories to the larceny, and were severally indicted in the county of Cortland. The Warners employed the defendants, who are attorneys, to defend them in the criminal proceedings, and in any civil suits which might be instituted against them in respect to the bonds, and to secure them for their services and expenses, and for any liabilities they might incur in their behalf; William Warner transferred to the defendants Miner and Warren promissory notes taken on loans made by him out of the proceeds of the stolen bonds, amounting to \$2,250 or thereabouts, and Cordelia Warner, for the same purpose, assigned to the defendant Porter the bond and mortgage above mentioned.

The learned judge at special term found that the defendants had notice at the time they received the transfer of the securities, that they were the avails and proceeds of the stolen bonds, and directed judgment against them for the value of the securities, it appearing on the trial that they had collected or disposed of them and received the proceeds.

The doctrine upon which the judgment in this case proceeded, viz.: that the owner of negotiable securities stolen and afterward sold by the thief may pursue the proceeds of the sale in the hands of the felonious taker or his assignee with notice, through whatever changes the proceeds may have gone, so long as the proceeds or the substitute therefor can be distinguished or identified, and have the proceeds or the property in which they were invested subjected, by the aid of a court of

equity, to a lien and trust in his favor for the purposes of recompense and restitution, is founded upon the plainest principles of justice and morality, and is consistent with the rule in analogous cases acted upon in courts of law and equity. It is a general principle of the law of personal property that the title of the owner cannot be divested without his consent. The purchaser from a thief, however honest and bona fide the purchase may have been, cannot hold the stolen chattel against the true proprietor, but the latter may follow and reclaim it wherever or in whosoever hands it may be found. The right of pursuit and reclamation only ceases when its identity is lost and further pursuit is hopeless; but the law still protects the interest of the true owner by giving him an action as for the conversion of the chattel against any one who has interfered with his dominion over it, although such interference may have been innocent in intention and under a claim of right, and in reliance upon the title of the felonious taker. The extent to which the common law goes to protect the title of the true owner has a striking illustration in those cases in which it is held that where a willful trespasser converts a chattel into a different species, as for example, timber into shingles, wood into coal, or corn into whisky, the product in its improved and changed condition belongs to the owner of the original material. *Silbury v. McCoon*, 3 N. Y. 380, and cases cited. The rule that a thief cannot convey a good title to stolen property has an exception in case of money or negotiable securities transferable by delivery, which have been put into circulation and have come to the hands of bona fide holders. The right of the owner to pursue and reclaim the money and securities there ends, and the holder is protected in his title. The plaintiff was in this position. The bonds, with the exception stated, had, as the evidence tends to show, been sold to bona fide purchasers, and she was precluded from following and reclaiming them.

The right of the plaintiff in equity to have the notes and mortgage while they remained in the possession of the felons or of their assignees with notice, subjected to a lien and trust in her favor, and to compel their transfer to her as the equitable owner, does not, we think, admit of serious doubt. The plaintiff, by the sale of the bonds to bona fide purchasers, lost her title to the securities. She could not further follow them. She could maintain an action as for a conversion of the property against the felons. But this remedy in this case would be fruitless, as they are wholly insolvent. Unless she can elect to regard the securities in which the bonds were invested as a substitute, pro tanto, for the bonds, she has no effectual remedy. The thieves certainly have no claim to the securities in which the proceeds of the bonds were invested as against the plaintiff. They, without her consent, have disposed of her property, and put it beyond

her reach. If the avails remained in their hands, in money, the direct proceeds of the sale, can it be doubted that she could reach it? It is not necessary to decide that in the case supposed she would have the legal title to the money, but if that question was involved in the case I should have great hesitation in denying the proposition. That she could assert an equitable claim to the money I have no doubt. And this equitable right to follow the proceeds would continue and attach to any securities or property in which the proceeds were invested, so long as they could be traced and identified, and the rights of bona fide purchasers had not intervened.

In *Taylor v. Plumer*, 3 Maule & S. 562, an agent, intrusted with a draft for money to buy exchequer bills for his principal, received the money and misapplied it by purchasing American stocks and bullion, intending to abscond and go to America, and absconded, but was arrested before he quitted England, and surrendered the securities and bullion to his principal, who sold them and received the proceeds. It was held that the principal was entitled to withhold the proceeds from the assignee in bankruptcy of the agent, who became bankrupt on the day he received and misapplied the money. Lord Ellenborough, in pronouncing the opinion in that case, said: "I makes no difference, in reason or law, into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of money produced on the sale of the goods of the principal, as in *Scott v. Surman*, Willes, 400, or into other merchandise, as in *Whitecomb v. Jacob*, Salk. 160, for the product or substitute for the original thing still follows the nature of the thing itself so long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fails."

If, in the case now under consideration, the plaintiff had intrusted the Warners with the possession of the bonds, and they had sold them in violation of their duty, for the purpose of embezzling the proceeds, and invested them in the notes and mortgage in question, the plaintiff could, within the authority of *Taylor v. Plumer*, have claimed them while in their hands, or in the hands of their assignees with notice, and would be adjudged to have the legal title.

In courts of equity the doctrine is well settled and is uniformly applied that when a person, standing in a fiduciary relation, misapplies or converts a trust fund into another species of property, the beneficiary will be entitled to the property thus acquired. The jurisdiction exercised for the protection of a party defrauded by the misappropriation of property, in violation of a duty, owing by the party making the misappropriation, is exceedingly broad and comprehensive. The doctrine is illustrated and applied most frequently in cases of trusts, where

trust moneys have been, by the fraud or violation of duty of the trustee, diverted from the purposes of the trust and converted into other property. In such case a court of equity will follow the trust fund into the property into which it has been converted, and appropriate it for the indemnity of the beneficiary. It is immaterial in what way the change has been made, whether money has been laid out in land, or land has been turned into money, or how the legal title to the converted property may be placed. Equity only stops the pursuit when the means of ascertainment fail, or the rights of bona fide purchasers for value without notice of the trust, have intervened. The relief will be moulded and adapted to the circumstances of the case, so as to protect the interests and rights of the true owner. *Lane v. Dighton*, Amb. 409; *Mansell v. Mansell*, 2 P. Wms. 679; *Lench v. Lench*, 10 Ves. 511; *Lewis v. Madocks*, 17 Ves. 56; *Perry, Trusts*, § 829; *Story, Eq. Jur.* § 1258.

It is insisted by the counsel for the defendants that the doctrine which subjects property acquired by the fraudulent misuse of trust moneys by a trustee to the influence of the trust, and converts it into trust property and the wrong-doer into a trustee at the election of the beneficiary, has no application to a case where money or property acquired by felony has been converted into other property. There is, it is said, in such cases, no trust relation between the owner of the stolen property and the thief, and the law will not imply one for the purpose of subjecting the avails of the stolen property to the claim of the owner. It would seem to be an anomaly in the law if the owner who has been deprived of his property by a larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it, or the property into which it had been converted, than one who by an abuse of trust has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. The law in such a case will raise a trust in invitum out of the transaction, for the very purpose of subjecting the substituted property to the purposes of indemnity and recompense. "One of the most common cases," remarks Judge Story, "in which a court of equity acts upon the ground of implied trusts in invitum, is when a party receives money which he cannot conscientiously withhold from another party." *Story, Eq. Jur.* § 1255. And he states it to be a general principle that "whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or the cestui que trust." *Id.* § 1258. See, also, *Hill, Trustees*, p. 222.

We are of opinion that the absence of the conventional relation of trustee and cestui que trust between the plaintiff and the War-

ners is no obstacle to giving the plaintiff the benefit of the notes and mortgage, or the proceeds in part of the stolen bonds. See *Bank of America v. Pollock*, 4 Edw. Ch. 215.

It is however strenuously insisted that the defendants had no notice when they received the securities that they were the avails or proceeds of the bonds. That if they had notice they would stand in the position of their assignors, and that the property in their hands would be affected by the same equities as if no transfer had been made, is not denied. *Murray v. Ballou*, 1 Johns. Ch. 566; *Hill, Trustees*, p. 259. The learned judge at special term found as has been stated, that the defendants had notice of the larceny of the bonds, and the use made of the money arising from their sale, at the time they received the notes and mortgage. The duty of this court upon the question of notice is limited to the examination of the case, with a view of ascertaining whether there was evidence to support the finding of fact. If such evidence exists, the finding of the trial judge is conclusive.

We have examined with much care the voluminous record before us, and are of opinion that the finding is sustained by the evidence. The testimony was conflicting. The circumstances under which the defendants took the transfer of the securities were certainly unusual, and the facts then known by the defendants were calculated to create a strong presumption that the notes and mortgage came from investments of the stolen property. It was for the trial court to weigh the testimony, and in the light of all the facts developed on the trial, to determine the question of notice. It would be a useless labor to collate the testimony on this subject, and we content ourselves with stating our conclusion, that the finding was warranted by the evidence.

The objection to the evidence, under a commission issued to William Jessup of Montrose, Pennsylvania, and which was executed by William H. Jessup as commissioner was, we think, properly overruled. In support of the objection, one of the defendants testified that he resided at Montrose in 1858, and that at that time two attorneys resided there, named respectively William and William H. Jessup, and an offer was made to prove that the judge who granted the order for the commission consulted a register of at-

torneys in which both names appeared, and selected the name of William Jessup, and inserted it in the order. The commission was executed two years and a half before the trial. It does not appear at what time it was returned to the clerk, but the presumption is that it was returned within a reasonable time after its execution. The objection that the commission was not executed by the person intended was not made until the evidence taken under it was offered on the trial. That the defendants were apprised of the facts upon which the objection was founded before the trial is quite evident.

Prima facie a commission directed to a person, omitting any mention of a middle name, and returned executed by a person of the same name, with the addition of a middle name, is executed by the person named in the order. *Franklin v. Talmadge*, 5 Johns. 84. The ruling of the judge, in respect to the objection made to the commission, was clearly in furtherance of justice. The defendant had ample opportunity to raise the objection to the commission before the trial by a motion to suppress, and it should not be permitted that a party may lie by, and spring an objection of this kind on the trial for the first time, when the other party may be unable to meet it by proof, and when there is no opportunity to issue a new commission, or send it back to be executed by the proper person. It is we think a wholesome rule that objections to the execution of a commission where the party has an opportunity to make them before the trial, should be raised by motion, and if not raised in that way when such opportunity exists, they should be deemed to have been waived. Whether such objection is to formal defects merely, or as in this case goes to the right of the person who executed the commission to act as commissioner, makes, we think, no difference in the application of the rule, if the fact of disqualification is known to the party who seeks to exclude the evidence a sufficient time before the trial, to enable him to make his motion. See *Kimball v. Davis*, 19 Wend. 438; *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77; *Drury v. Foster*, 2 Wall. 33; *Sheldon v. Wood*, 2 Bosw. 267; *Zellweger v. Caffé*, 5 Duer, 100.

The judgment should be affirmed.

All concur.

Judgment affirmed.

MITCHELL v. READ.

(61 N. Y. 123.)

Court of Appeals of New York. May 21, 1874.

Appeal from judgment of the general term of the supreme court in the First judicial department, affirming a judgment in favor of defendant, entered upon decision of the court at special term. Reported below, 61 Barb. 310.

This action was brought to have certain leases, obtained by the defendant during the existence of a copartnership between him and plaintiff, for terms to commence at its termination, of premises leased and occupied by the firm, declared to have been taken for **the partnership**, and to have it adjudged that the defendant held them as trustee for the partnership. The facts found were substantially as follows:

The plaintiffs were copartners, conducting and carrying on the Hoffman House, in the city of New York. The copartnership, by its terms, expired May 1, 1871; it owned various leases of premises which were used for the partnership business. All of the leases expired at the same time with the copartnership. The firm had spent large sums of money in making valuable improvements and in fitting up the leasehold premises so that they could be beneficially used in connection, and also in fixtures and furnishing, and by their joint efforts had built up a profitable business, and largely enhanced the rental value of the premises. In 1869 the defendant, without any notice of his intent to apply therefor, and without the knowledge of plaintiff, procured renewal leases, in his own name, of the premises, for terms commencing at the termination of the partnership leases and of the partnership, which, upon discovery thereof having been made by plaintiff, defendant claimed were his property exclusively, and refused to recognize or acknowledge that the partnership or plaintiff had any right or interest therein. Other facts appear in the opinion.

The court found as conclusions of law that the defendant Read was the sole owner of the leases executed to him as aforesaid, and that the plaintiff had no right, title, nor interest in or to them, or either of them, and that the defendants have judgment accordingly, to which plaintiff duly excepted. Judgment was rendered accordingly.

The plaintiff commenced this action soon after he ascertained that the defendant had taken the new leases, to wit, in March, 1870, and the cause was brought to trial in February, 1871.

A. J. Vanderpoel and J. E. Burrill, for appellant. John K. Porter and Willard O. Bartlett, for respondents.

EARL, C. The relation of partners with each other is one of trust and confidence. Each is the general agent of the firm, and is

bound to act in entire good faith to the other. The functions, rights and duties of partners in a great measure comprehend those both of trustees and agents, and the general rules of law applicable to such characters are applicable to them. Neither partner can, in the business and affairs of the firm, clandestinely stipulate for a private advantage to himself; he can neither sell to nor buy from the firm at a concealed profit to himself. Every advantage which he can obtain in the business of the firm must inure to the benefit of the firm. These principles are elementary, and are not contested. Story, Partn. §§ 174, 175; Colly. Partn. 181, 182. It has been frequently held that when one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm as to the renewed lease. It is conceded that this is the rule where the partnership is for a limited term, and either partner takes a lease commencing within the term; but the contention is that the rule does not apply where the lease thus taken is for a term to commence after the expiration of the partnership by its own limitation, and whether this contention is well founded is one of the grave questions to be determined upon this appeal.

It is not necessary, in maintaining the right of the plaintiff in this case to hold that in all cases a lease thus taken shall inure to the benefit of the firm, but whether, upon the facts of this case, these leases ought to inure to the benefit of this firm I will briefly allude to some of the prominent features of this case. These parties had been partners for some years; they were equal in dignity, although their interests differed. The plaintiff was not a mere subordinate in the firm, but so far as appears, just as important and efficient in its affairs as the defendant. They procured the exclusive control of the leases of the property, to terminate May 1, 1871, and their partnership was to terminate on the same day. They expended many thousand dollars in fitting up the premises, a portion thereof after the new leases were obtained, and they expended a very large sum in furnishing them. By their joint skill and influence they built up a very large and profitable business, which largely enhanced the rental value of the premises. More than two years before the expiration of their leases and of their partnership, the defendant secretly procured, at an increased rent, in his own name, the new leases, which are of great value. Although the plaintiff was in daily intercourse with the defendant, he knew nothing of these leases for about a year after they had been obtained. There is no proof that the lessors would not have leased to the firm as readily as to the defendant alone. The permanent fixtures, by the terms of the leases at their expiration, belonged to the lessors. But the movable

fixtures and furniture were worth vastly more to be kept and used in the hotel than to be removed elsewhere. Upon these facts I can entertain no doubt, both upon principle and authority, that these leases should be held to inure to the benefit of the firm. If the defendant can hold these leases, he could have held them if he had secretly obtained them immediately after the partnership commenced, and had concealed the fact from the plaintiff during the whole term. There would thus have been, during the whole term, in making permanent improvements and in furnishing the hotel, a conflict between his duty to the firm and to his self-interest. Large investments and extensive furnishing would add to the value of his lease, and defendant would be under constant temptation to make them. While he might not yield to the temptation, and while proof might show that he had not yielded, the law will not allow a trustee thus situated to be thus tempted, and therefore disables him from making a contract for his own benefit. *Terwilliger v. Brown*, 44 N. Y. 237, and cases cited. It matters not that the court at special term found upon the evidence that the improvements were judicious and prudent for the purposes of the old term. The plaintiff was entitled to the unbiased judgment of the defendant as to such improvements, uninfluenced by his private and separate interest. But, further, the parties owned together a large amount of hotel property in the form of furniture and supplies, considerably exceeding, as I infer, \$100,000 in value. Assuming that the partnership was not to be continued after the 1st day of May, 1871, this property was to be sold, or in some way disposed of for the benefit of the firm, and each partner owed a duty to the firm to dispose of it to the best advantage. Neither could, without the violation of his duty to the firm, place the property in such a situation that it would be sacrificed, or that he could purchase it for his separate benefit, at a great profit. Much of this property, such as mirrors, carpets, etc., was fitted for use in this hotel, and it is quite manifest that all of it would sell better with a lease of the hotel, than it would be removed therefrom. It is clear that one or both of these parties could obtain advantageous leases of the hotel for a term of years, and hence, if the parties had determined to dissolve their partnership, it would have been a measure of ordinary prudence to have obtained the leases and transferred the property with the leases as the only mode of realizing its value. This was defeated by the act of the defendant, if he is allowed to hold these leases, and thus place himself in a position where the property must be largely sacrificed or purchased by himself at a great advantage. This the law will not tolerate. The language of Lord Eldon, in *Featherstonhaugh v. Fenwick*, 17 Ves. 311, a case in many respects resembling this, is quite in point. He says: "If they [the defendants] can hold this lease

and the partnership stock is not brought to sale, they are by no means on equal terms. The stock cannot be of equal value to the plaintiff, who was to carry it away and seek some place in which to put it, as to the defendants who were to continue it in the place where the trade was already established, and if the stock was sold the same construction would give them an advantage over the bidders. In effect they would have secured the good-will of the trade to themselves in exclusion of their partner." For these reasons, independently of the consideration that the leases themselves had a value to which the firm was entitled upon other grounds and upon authorities to be hereafter cited, the plaintiff, who commenced his suit about one year before the term of the partnership expired, was upon undisputed principles and authorities applicable to all trustees and persons holding a fiduciary relation to others, entitled to the relief he prayed for.

It has long been settled by adjudications, that generally when one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm, in the renewed lease, and when the rule is otherwise applicable, it matters not that the new lease is upon different terms from the old one, or for a larger rent, or that the lessor would not have leased to the firm. The law recognizes the renewal of a lease as a reasonable expectancy of the tenants in possession, and in many cases protects this expectancy as a thing of value. I will briefly notice a few of the cases upon this subject. In *Holridge v. Gillespie*, 2 Johns. Ch. 30, Chancellor Kent says: "It is a general principle pervading the cases, that if a mortgagee, executor, trustee, tenant for life, etc., who has a limited interest, gets an advantage by being in possession, 'or behind the back' of the party interested in the subject, or by some contrivance or fraud, he shall not retain the same for his own benefit, but hold it in trust." That was a case where a lease was assigned as security, and the assignees surrendered it to the lessor and took a new lease for an extended term of years. In *Phyfe v. Wardell*, 5 Paige, 268, Chancellor Walworth lays down the general rule: "That if a person who has a particular or special interest in a lease obtains a renewal thereof from the circumstance of his being in possession as tenant, or from having such particular interest, the renewed lease is in equity considered as a mere continuance of the original lease, subject to the additional charges upon the renewal, for the purpose of protecting the equitable rights of all parties who had any interest, either legal or equitable, in the old lease." That case was followed in *Gibbes v. Jenkins*, 3 Sandf. Ch. 131, where it was held that one purchasing a leasehold which was subject to a mortgage and contained no covenant of renewal, could not escape the lien of the mortgage by suffering the lease to expire and afterward obtaining a new lease of

the premises; that the new lease in such case, though not a renewal, was a continuance of the original lease for the purpose of protecting the rights of the parties interested in the original lease, both legal and equitable. In these two cases church leases were involved, and some stress was laid upon that fact, as the continuance of such leases was expected as a matter of course, without any covenant of renewal. But the fact that they were church leases could make no real difference in the principle upon which the decisions were based. The fact that a renewal or continuance of a lease is more or less certain can make no difference with the principle; that springs from the fact that the party obtained a new lease from the position he occupied, being in possession and having the good-will which accompanies that, or being connected with the old lease in some way, and thus enabled to take an inequitable advantage of other parties also interested, to whom he owed some duty.

In *Struthers v. Pearce*, 51 N. Y. 357, it was held that when during the existence of a continuing copartnership of undetermined duration, three or four copartners, without the knowledge of the other, obtained a new lease in their own names, of premises leased and used by the firm, the same became partnership property, and upon dissolution the other partner was entitled to his proportion of the value. In that case the defendants intended to dissolve the copartnership as early as August, and gave written notice on the 18th day of September, 1865, for the dissolution on the 31st day of December following. On the 11th day of September, the defendants secretly obtained a new lease, in their own names, of the same premises, for a term of five years, to commence May 1, 1866. I think that case is fairly decisive of this. It is true that a period for a dissolution of the partnership had not been fixed when the new lease was taken, but negotiations were pending for its dissolution, and a few days after the new lease was taken, a time for its dissolution was fixed by a written notice. But it can make no difference that the partnership might have been continued by the parties until after the new term commenced. So it might here, if the parties had so willed. There they had the right to dissolve it at any time. The principle which lies at the foundation of the decision of that and all similar cases must be the one above stated, that the defendants in possession took advantage of their position to procure the new lease, and thus deprived the plaintiff of a benefit to which he, with them, was equally entitled. In a note to *Moody v. Matthews*, 17 Ves. (Sumn. Ed.) 185, the learned editor says, as a deduction from adjudged cases, that "with a possible exception in favor of a bona fide purchaser, it seems to be an universal rule that no one who is in possession of a lease or a particular interest in a lease, which lease is affected with any sort of equity in behalf of third persons, can renew

the same for his own use only; but such renewal must be construed as a graft upon the old stock." In *Clements v. Hall*, 2 De Gex & J. 173, where one partner in a mining partnership died in 1847, and the surviving partner thereafter worked the mine without a new lease thereof, claiming to do so for his own benefit, until 1850, when the lessor gave him notice to quit in March, 1851, when he entered into new negotiations with the lessor for a new lease, and obtained one of the greater part of the mine, on terms much more burdensome than those of the old tenancy, it was held that those who claimed under the will of the deceased partner were entitled to a share of the benefit of the new lease. In *Clegg v. Fishwick*, 1 Macn. & G. 294, one of several partners working a mine under a lease died, and the firm business was thereafter carried on for several years between the surviving partners and the plaintiff, widow of the deceased partner. Finally the old lease expired, and some of the partners took a new lease of the mine without the privity of the plaintiff. It was held that the estate of the deceased partner was interested in the new lease. The lord chancellor says: "The old lease was the foundation of the new lease, and the tenant's right of renewal arising out of the old lease giving the partners the benefit of this new lease; at least, the law assumes it to be so. Without saying at all what circumstances there may be to interfere with that ordinary right, we know that the rule of equity is that parties interested jointly with others in a lease cannot take to themselves the benefit of a renewal to the exclusion of the other parties interested with them." In *Clegg v. Edmondson*, 8 De Gex, M. & G. 787, the managing partners of a mining partnership at will gave notice of dissolution to the rest, and intimated their intention, after the dissolution, to apply for a new lease for their own exclusive benefit, and did so and obtained a lease, and it was held to inure to the benefit of the partnership. See, also, the leading cases of *Featherstonhaugh v. Fenwick*, 17 Ves. 298, and *Keech v. Sandford*, 2 Eq. Cas. Abr. 741, and notes to the latter case in 1 Lead. Cas. Eq. 32, where the whole doctrine is discussed, and conclusion reached in harmony with the views above expressed. I therefore conclude that it makes no difference that these leases were obtained for a term to commence after the partnership, by its own limitation, was to terminate. I can find no authority holding that it does, and there is no principle sustaining the distinction claimed. The defendant was in possession as a member of the firm, and the firm held the good-will for a renewal, which ordinarily attaches to the possession. By his occupancy, and the payment of the rent, he was brought into intimate relations with the lessors; he became well acquainted with the value of the premises, and he took advantage of his position, during the partnership, secretly to obtain the new leases. He must hold them for the firm.

I am therefore of opinion that the judgment should be reversed, and new trial granted, costs to abide the event.

DWIGHT, C. The question at issue in this case is, whether a member of a commercial partnership, during its continuance, and without the consent or knowledge of his associate, can take a renewal of a lease of property used in the business, in his own name and for his own benefit, the partnership having a definite termination, and the renewal lease commencing at its expiration.

The general power of a partner to take a lease of such property for his own benefit must be considered as settled in this court by the decision in *Struthers v. Pearce*, 51 N. Y. 357. In that case the lease was taken during the existence of the partnership, which was of indefinite duration. No notice had been given of its termination when this lease was taken. The facts presented the case of a lease taken during the existence of the partnership, and to begin in enjoyment during that time. The court expressly distinguished it from the present case, which had then been decided in the supreme court. Page 362.

The only point now open for discussion is, whether the fact that when Read took the renewal of the lease the partnership had a precise limit, and was to terminate before the lease commenced, is material. Before considering that point, it may fairly be claimed that this case comes within the precise decision in *Struthers v. Pearce*, on a ground not mentioned in the argument. Read, though his lease was not to commence in possession until after the expiration of the original lease, acquired an immediate interest by way of an *interesse termini*. This precise point was decided in *Smith v. Day*, 2 Mees. & W. 684, 699; 2 Platt, Leas. 60. This, it is true, is not an estate, but a right. Still it is the subject of grant before entry. 1 Steph. Comm. 268; Burt. Real Prop. 18, pl. 61; 2 Crabb, Real Prop. 227. If the partnership had acquired this *interesse termini*, it might, as the facts of the case show, have been disposed of for a large sum of money. If the doctrine of *Struthers v. Pearce* establishes that the partner cannot acquire a lease in his own behalf, to commence while the partnership lasts, by parity of reasoning he cannot obtain an *interesse termini* under the same circumstances.

If however this view is not correct, the main question must be disposed of. Can a partner take a lease for himself, to commence in possession after the partnership has expired? In order to settle this point it is essential to give the subject a more full examination than was requisite in *Struthers v. Pearce*, and to consider more at large the principles on which this branch of the law rests. It grows out of the relation of trust and confidence between partners, and is a branch of the rule that a trustee cannot profit from the estate for which he acts. It largely has its

roots in a principle of public policy, as shown in one of the early decisions. *Keech v. Sandford*, Sel. Cas. Ch. 61; *Griffin v. Griffin*, 1 Schoales & L. 352, per Lord Redesdale. The general rule is so well settled that it would be a waste of time to refer to authorities. The text-writers on the law of partnership, without exception, assert the applicability of this rule of law to partnership transactions. Lindl. Partn. 495; Story, Partn. §§ 174, 175; Parsons, Partn. §§ 224-226; Colly, Partn. §§ 281, 282.

The special rule that a trustee cannot take, for his own benefit, a renewal of a lease which he holds in trust, is enforced in a great number of cases. The principle on which it rests is nowhere more fully or clearly stated than in the argument of Sir Francis Hargrave in *Lee v. Vernon*, 5 Brown, Parl. Cas. (10th Eng. Ed.) 1803. Although the passage is somewhat long, it is quoted as shedding much light on a subject, the principle of which has in course of time, become somewhat obscure. He said: "It has long been an established practice to consider those who are in possession of lands under leases for lives or years as having an interest beyond the subsisting term, and this interest is usually termed the tenant right of renewal, which though according to language and ideas strictly legal, is not any certain or even contingent estate; but only a chance, there being no means of compelling a renewal, yet is so adverted to in all transactions relative to leasehold property, that it influences the price in sales, and is often an inducement to accept of it in mortgages and settlements. This observation is more especially applicable to leases from the crown, the church, colleges or other corporations, and indeed from private persons, where the tenure is of ancient date. * * * This 'tenant right' of renewal as it is termed, however imperfect or contingent in its nature, being still a thing of value, ought to be protected by the courts of justice, and when those who are entitled to its incidental advantages, whether by purchase or other derivation, are disappointed of them by fraud, imposition, misrepresentation, or unfair practice of any kind, it is fit and reasonable that this injury should have redress. Accordingly courts of equity have so far recognized the tenant right of renewal as frequently to interpose in its favor by decreeing that new or reversionary leases gained by means or supposition of the tenant right of renewal should be for the benefit of the same persons as were interested in the ancient lease, and those who procured such new leases and were legally possessed of them, should be trustees for that purpose. There is a great variety of authorities on this head, but the cases which have hitherto occurred have been principally of two kinds, some being cases of persons not having any beneficial interest in the old lease, as guardians and executors, and others being cases of persons having only partial and limited interests, as tenants for life, mort-

gagees and mortgagors, and in cases of both descriptions those who have procured a new lease in such situations have been uniformly declared trustees for the persons beneficially interested in the ancient lease, either wholly or in part, according to the particular circumstances, the court ever presuming that the new lease was obtained by means of a connection with and a reference to the interest in the ancient one, without in the least regarding whether the persons renewing intended to act as trustees, or for their own emolument."

From this exposition so luminous and judicial in its tone, which is fully sustained by the authorities, it is clear that the rule under consideration is not confined to crown, church or college leases, but embraces those of every kind. The *cestui que* trust has a right to the chance of renewal. Though this is termed a "tenant right" as between the lessee and the landlord, that is a mere phrase. It is a hope, an expectation, rather than a right. Such as it is the trustee shall not take it to himself, but if it results in any substantial benefit he shall hold it for his beneficiary. *Phyfe v. Wardell*, 5 Paige, 268; *Bennett v. Van Syckel*, 4 Duer, 162; *Gibbes v. Jenkins*, 3 Sandf. Ch. 130; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Armour v. Alexander*, 10 Paige, 572; *Dickinson v. Codwise*, 1 Sandf. Ch. 226. Some of these were instances of church or other corporation leases, and others were not. In no case has it been held that the rule is confined to these, as it certainly cannot be on principle.

The whole doctrine is extended to the case of partners in *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Clegg v. Edmondson*, 8 De Gex, M. & G. 787; *Clements v. Hall*, 2 De Gex & J. 173; *Clegg v. Fishwick*, 1 Macn. & G. 294; *Struthers v. Pearce*, supra.

The principle cannot depend on the fact whether the lease is made to begin during the continuance of the partnership or at its close. Once admit the general principle, and it must result in this. While the relation lasts, one partner cannot clandestinely and exclusively profit by the trust relation. There may perhaps be cases where the act is openly done by the trustee and acquiesced in by the beneficiary that would admit of different considerations. It is not now necessary to decide that in no case can a partner take a lease for his own benefit. What is now to be decided is, whether he can do so behind the back of his associate and without his consent. The bad consequences of making any such distinction as the defendant seeks to maintain in the present case is easily shown by a reference to the relation of a guardian and his ward. A guardian, we may suppose, holds a lease in his official character which is to expire at his ward's majority. While the relation of guardian and ward exists, he takes a lease to himself to commence at the termination of the ex-

isting lease. Could that be sustained? Has he not profited by the trust relation? When he takes a lease to himself, can a tenable distinction be taken between one commencing immediately and one beginning at a future day, even though that day be postponed until the trust relation expires? The sound rule is that he cannot make any profit to himself from a secret transaction initiated while the relation of trustee and *cestui que* trust exists, no matter when it springs into active operation. It must never be forgotten that on general principles of the law of contracts his right to the lease, as between him and his landlord, commences as soon as he has made his agreement for it. This is an immediate subject of sale, and if the trustee can hold it he will be allowed to profit by the trust relation which, as has been shown, he cannot do. The *cestui que* trust may accordingly say: "All the value of this lease you hold in trust for me. Grant that it is not yet an estate but only a right—make it over to me in the condition in which you hold it." While no case has been found presenting the precise facts in the case at bar, the principles which should govern it may be derived from the result in *Featherstonhaugh v. Fenwick*, supra, *Clegg v. Edmondson*, and *Clegg v. Fishwick*, supra.

In the first of these cases the partnership was for an indefinite period, and might be dissolved at the pleasure of either party, on notice. It was dissolved November 22, 1804, the day on which the lease expired. Two of the partners, without communication with the plaintiff, had applied for a renewal of the lease, and obtained it before giving notice of the dissolution of the partnership. The new lease was to run for eight years from the expiration of the old one. On October 19 they gave notice to dissolve the partnership. The court held that the new lease belonged to the partnership and was assets of the firm. Much stress was laid on the fact that the transaction was a clandestine one, and the court thought if notice had been given the case might have admitted of different consideration. The case is not in all respects parallel in its facts with the case at bar, for at the time the lease was taken the period for the termination of the partnership had not been fixed, and only became subsequently ascertained by notice.

In the case of *Clegg v. Edmondson*, which was also an instance of a partnership to be dissolved at the pleasure of the parties, the effect of a notice to dissolve, preceding the execution of the renewal lease, came before the court. In that case five managing partners had determined to dissolve their partnership, and had communicated their intent in June, 1846, and their determination to take a renewal to themselves. To this two other partners objected, claiming that the renewal should be for the benefit of all. Formal notice of dissolution was given in July, to take effect on September 30. On the suc-

ceeding 11th of December a new lease was executed for twenty-one years to the managing partners, to take effect from September 29, 1846. The defendants endeavored to distinguish this case from that of *Featherstonhaugh v. Fenwick*, on the ground of the openness and fairness of the transaction. The court however held that the mere communication of an intent on the part of the managing partners to apply for a lease for their own benefit was not sufficient to give them an exclusive right to it. This case, on the point of time, is stronger than the case at bar, for the new lease was taken after the partnership was dissolved, though some stress was laid upon a point which does not appear here, that the act was that of managing partners.

On principle, in many cases, it is of but little consequence whether the partnership is dissolved or not before the renewal, since, if the former partners become tenants in common, the result is the same. *Clements v. Hall*, 2 De Gex & J. 173; *Van Horne v. Fonda*, 5 Johns. Ch. 388; *Baker v. Whiting*, 3 Sumn. 475, Fed. Cas. No. 787. The case of *Clegg v. Fishwick* is still nearer to the one under consideration. In this instance, the renewal lease was obtained during the existence of the partnership, and the lease commenced at its expiration. This lease was declared to be held in trust for the firm.

Without further collation of authorities, the fair deductions from the principles on which they rest may be summed up as follows:

1. A trustee holding a lease, whether corporate or individual, holds the renewal as a trustee, and as he held the original lease.

2. This does not depend upon any right which the cestui que trust has to the renewal, but upon the theory that the new lease is, in technical terms, a "graft" upon the old one; and that the trustee "had a facility," by means of his relation to the estate, for obtaining the renewal, from which he shall not personally profit.

3. This doctrine extends to commercial partnerships, and one of several partners cannot, while a partnership continues, take a renewal lease clandestinely, or "behind the backs" of his associates, for his own benefit. It is not material that the landlord would not have granted the new lease to the other partners, or to the firm.

4. It is of no consequence whether the partnership is for a definite or an indefinite period. The disability to take the lease for individual profit grows out of the partnership relation. While that lasts, the renewal cannot be taken for individual purposes, even though the lease does not commence until after the expiration of the partnership.

5. It cannot necessarily be assumed that the renewal can be taken by an individual member of the firm, even after dissolution. The former partners may still be tenants in common; or there may be other reasons, of

a fiduciary nature, why the transaction cannot be entered into.

The authorities cited on behalf of the defendant do not disprove these conclusions.

In *Lee v. Vernon*, supra, there was no trust. The question arose between a stranger to the lease and the claimant. The point made by the plaintiff was that the "tenant right" of renewal had become strictly a right, so that even a stranger could not take a renewal and hold it for his own benefit. It was an extraordinary claim, having no foundation in principle, and was rejected.

In *Van Dyke v. Jackson*, 1 E. D. Smith, 419, the party had made a special contract with his partner to abandon the place where the business was carried on. The case turned on the special contract to leave the business in the hands of the other party.

Musselman's Appeal, 62 Pa. St. 81, does not raise the question. It was not sought there to charge a partner with the value of a renewal lease which he had taken to himself during the existence of the partnership, but rather with that of the good-will as it existed after the partnership was dissolved. In fact the place where the business was carried on was sold for the benefit of the firm, and it was held, in substance, that the good-will had been realized in the enhanced value of the property sold.

It is said, in the present case, that Read was not authorized, by the articles of partnership, to contract for Mitchell after the expiration of the firm; and that therefore Mitchell cannot take advantage from the renewal lease. The answer is that he made the contract while the firm was in existence, and Mitchell may adopt and ratify it. The objection also proves too much, as it applies to all the cases in which the partner, acting clandestinely, has been declared a trustee.

In *Phillips v. Reeder*, 18 N. J. Eq. 95, one of the partners, R., prior to the partnership, owned the lease, exclusively, of certain stone quarries. He entered into a partnership with P. for three years, and so much longer as R. should continue lessee of the quarries. In the lease, there was a covenant of renewal at the option of R. He having declined to renew, it was held that the partnership expired; or, in other words, that R. was under no obligation to renew, and thus to continue the partnership. There could be no pretense in this case that the doctrine under the review applied, since the original lease did not itself belong to the firm. It was the private property of one of the partners, which he was under no obligation to preserve for the firm's benefit.

In *Achenson v. Fair*, 3 Dru. & War. 512, the point decided was, that the doctrine was not to be extended to additional lands purchased by trustee; in other words, the rule was fully recognized, but nothing was to be governed by it except that which could be fairly regarded as a graft on the former lease.

In *Nesbitt v. Tredennick*, 1 Ball & B. 29, 48, a mortgagee, not in possession, obtained a renewal, the original lease having been forfeited, both in law and equity, for nonpayment of rent. Here there was no violation of trust. The rule under discussion was fully recognized, but its application to the existing case denied. The court said: "In all the cases upon this subject, either the party, by being in possession, obtained the renewal, or it was done behind the back, or by some contrivance in fraud of those who were interested in the old lease; and there was either a remnant of the old lease, or a tenant right of renewal, on which a new lease could be engrafted." There could be no plainer recognition of the general principle maintained by the plaintiff.

In *Munsell v. O'Brien*, 1 Jones, Ir. 184, the facts were, that there was an under-tenant who took a new lease from the original landlord without advising his own immediate landlord. The court held that there was no fiduciary relation between these parties. The principle was fully admitted, but the facts did not raise a case for its application. Joy, C. B., said: "It is admitted that there is no authority which can be produced where such a lease as the present has been declared to be a trust; and that we are now called upon to go further than any decision has ever gone before, and to make an authority for future decisions. We are called upon to do this on what are called the principles of a court of equity; namely, that where a person is clothed with a fiduciary character, and in that character becomes possessed of an interest in land, held under a determinable lease, any acquisition by him of a new interest in those lands is a continuation of the old lease, and a 'graft' upon it. This however is the first time that I have heard it asserted that if an under-tenant obtains a lease of his lands from the head landlord without consulting his own immediate landlord that lease is a trust for his immediate landlord, because that person had a tenant right of renewal. But there is no fiduciary character imposed on an under-tenant, in reference to his landlord, by the creation of the relation of landlord and tenant, which would entitle the plaintiff to the relief he seeks, on the ground of his having a tenant right of renewal. A cestui que trust is entitled to the benefit of a new lease, obtained by a trustee by means of a tenant right of renewal, which the latter became entitled to as trustee, but there is no such person in the present case." This language plainly shows that the court was but following in the wake of *Lee v. Vernon*; and holding that the doctrine of tenant right of renewal, and that the new lease is a graft on the old stock, are not to be extended to strangers, but confined to persons acting in a fiduciary character.

The only other case that will be noticed is *Anderson v. Lemon*, 8 N. Y. 236, which holds, that one partner may in good faith purchase

and hold, for his own use, the reversion of real estate occupied by the copartnership, under a lease for years, with the qualification that if he secretly makes such purchase in his own name while the other partner with his concurrence is negotiating with the owner to obtain the property for the use of the firm, the purchaser will be declared a trustee.

This decision carefully admits the general doctrine, but considers it not applicable to the case where one of the partners purchases in good faith the landlord's interest as distinguished from taking a new lease. It is simply a case of an exception to a general rule. It can scarcely be considered as a decision in favor of a partner's right to purchase, since he was, under the circumstances, a trustee. Should the question be distinctly presented, it will deserve consideration whether the view in *Anderson v. Lemon*, that one partner may even in good faith buy the reversion for himself, is correct. There is a great cogency in the remarks of Sir William Grant, that the partner may in this way intercept and cut off the chance of future renewals and consequently make use of his situation to prejudice the interests of his associates. *Randall v. Russell*, 3 Mer. 190, 197. There appears to be no direct decision allowing the partner thus to purchase, and the right to do so is treated as doubtful by approved text-writers. 1 Lead. Cas. Eq. (3d. Am. Ed.) 43, 44, marg. paging.

The application of the principles discussed in this opinion to the case at bar is obvious.

The plaintiff and defendant were owners, as partners, of a lease of premises in the city of New York, on which a hotel business was carried on, yielding a large profit. These consisted of Nos. 1111, 1113, 1115 Broadway and Nos. 1 and 3 West Twenty-fourth street. The leases of the Twenty-fourth street property were made directly to them, November 17, 1866. The Broadway property, through a series of transactions not necessary to be detailed, became vested, according to the fair construction of the various agreements respecting it, in the partnership. The leases expired on the same day, May 1, 1871, when the partnership terminated. While the partnership continued, both parties thought it necessary to provide a place for a bar-room, and with this view the premises No. 3 West Twenty-Fourth street were connected with the rear of the premises fronting on Broadway, known as the "Hoffman House," and the first story fitted up and used for that purpose. A considerable expenditure was made with this view, and large profits were realized, as the course taken was judicious. While all of the leases owned by the firm were still in existence, viz. April 20, 1869, and on January 21, 1869, the owners of the hotel property made leases to the defendant, to commence from May 1, 1871, and to continue as to part of the property for five years, and as to another portion for ten years from that date, at specified rents. The leases

were obtained by Read without notice to the plaintiff, and he now claims that they are his exclusive property. They are of great value, and the hotel at the commencement of the action, March, 1870, was still in operation. The furniture, fixtures, stock, etc., were valuable, and the business carried on was profitable.

The case has in it every element of the equity which has been already considered. The partnership is undisputed; the leases were in existence when the renewal was made. The act of renewal was clandestine, or occurred "behind the back" of the plaintiff. It took place while the partnership was in force. The right to renewal was immediate and vested in Read during the partnership's continuance. The property belonging to the firm, and which will be prejudiced by the prospect of disposing of it at a sacrifice at the close of the existing lease, is large and valuable.

Common justice and a due regard to rules

of public policy demand that the renewal lease should be declared to belong to the firm, and that the defendant should be required to account to the plaintiff for his portion of its value. The clauses in the leases to Read that there shall be no assignment without the consent of the landlord do not stand in the way of the plaintiff's relief. This does not consist in an assignment in the ordinary sense of that term. On the contrary, the ground of relief is that the defendant acted inequitably when he entered into the contract; that he must therefore be considered as a trustee, while the assignment to the firm simply follows as an incident to the giving complete effect to the trust relation declared by the court to exist between the parties. *Featherstonhaugh v. Fenwick*, *supra*.

The judgment must be reversed, and a new trial ordered.

All concur; REYNOLDS, C., not sitting.
Judgment reversed.

RYAN v. DOX.

(34 N. Y. 307.)

Court of Appeals of New York. Jan., 1866.

Henry R. Selden, for appellants. Alexander S. Johnson, for respondent.

DAVIES, C. J. This action was tried by a referee who held as matter of law, that unless the agreement set out in the complaint in relation to the purchase by the defendant at the master's sale of the premises in question, or some note or memorandum thereof, expressing the consideration be in writing, the same was void, and created no interest in the plaintiffs in said premises, and could not be enforced against said defendant in law or equity. And he further reported, as matter of fact, that no proof was made or offered on said trial by or in behalf of the plaintiff of any such agreement in writing, or of any note or memorandum in writing of such an agreement, or of any deed, conveyance or instrument in writing subscribed by the defendant or his lawful agent, creating or declaring any trust or interest in said premises in favor of said plaintiffs, and that no proof was made or testimony or evidence offered on the part of the defendant. The judgment entered for the defendant upon the report of the referee was affirmed at the general term, and the plaintiffs now appeal to this court.

We are at liberty to assume from this finding, that the agreement set out in the complaint was proven on the trial before the referee. To ascertain what that agreement was, we must have reference to the complaint and the offer made by the plaintiffs on the trial. The plaintiffs averred in the complaint that the plaintiff Michael Ryan, being seized of certain lands in the town of Seneca, made and executed a mortgage thereon in the year 1839, to secure the sum of \$800, part of the purchase-money thereof, and that in the month of October, 1841, said plaintiff Ryan conveyed to the said Nevins, the other plaintiff, an equal undivided half of the said premises; that plaintiffs being unable to pay the installments on said mortgage as they became due, the said mortgage was foreclosed, and said plaintiffs procured of one Lewis the sum of \$300, which was paid on account of said judgment of foreclosure, and a portion thereof, to the extent of \$300, was assigned to said Lewis as his security for such advance; that said Lewis becoming importunate for his money, and the plaintiffs being unable to raise the same for him, Lewis proceeded to advertise said premises for sale on the 12th day of October, 1843, for the purpose of raising said sum of about \$300, while said premises were worth the sum of \$4,000. The complaint further averred that while said premises were thus advertised for sale, and before the day of sale had arrived, the plaintiffs being men of limited means, and unable to raise

the money which would be needed to stop the said sale, and to pay up the amount due on the said decree for the debt and the costs which had accrued, applied to the defendant Dox, reported to be a man of ready money, and who had always professed to be interested in their behalf, and asked him to assist them, and aid them to raise the money to pay the amount due on said decree and save the said premises from being sold away from them, and from being sacrificed for the small amount, compared with their value, which was claimed upon said decree. That said Dox did then profess and declare a willingness to help said plaintiffs for such purpose, and did then and there agree with the said plaintiffs that on the day of said sale, he, the said Dox, would attend the same and bid off and purchase the said premises at such sale, upon the express agreement and understanding, between the plaintiffs and said Dox, that such bidding and purchase, if made by the said Dox, should be for the benefit and advantage of these plaintiffs, and the plaintiffs upon such agreement and understanding agreed that they would not find any other one to go their friend at the said sale, and to bid in and purchase the said premises for them; and that it was expressly understood and agreed between the plaintiffs and said Dox, that if he became the purchaser of said premises at said sale he should take the deed of the same from the said master in his own name, but only by way of and as security to himself for what money he should have to advance and pay on such purchase, and with the agreement, promise and undertaking between said Dox and these plaintiffs, that whenever these plaintiffs should repay him the amount which he should pay to procure and effect such purchase and to get the deed therefor, with the interest thereon, and a reasonable compensation for his services therein, he, the said Dox, should convey the said premises to these plaintiffs and again vest the title thereto in them, and should in the mean time hold the said premises in his own name as security only for the said moneys, and always subject to the above agreement and defeasance. That in pursuance of said agreement, said Dox attended said sale and bid off the same for the sum of \$100, he being the only bidder at said sale, and the same was struck off to him and he received the deed therefor. That at said sale it was talked about and understood by those present thereat, that said Dox was bidding for the benefit of these plaintiffs, and that said premises were struck off to him only as security to him for the repayment to him by these plaintiffs of the moneys he should advance and pay for the same and interest thereon, and his reasonable charges for his attention thereto. And the plaintiffs averred that such was the fact, and that in truth said Dox did bid off and purchase the said premises for these plain-

tiffs, and to save the same for them, and took the deed in his own name, only as such security as aforesaid, and that in consequence of such understanding other persons abstained from bidding on said premises, and the same was struck off to said Dox without any opposing bid, although the plaintiffs aver that the same were then worth \$4,000 and upwards. And the plaintiffs also averred that if they had not relied upon said agreement, promise and undertaking of said Dox, they would not have allowed the said premises to have been struck off for the said sum of \$100, but would have found other persons to have purchased the said premises, and saved the same from sacrifice, but that as said agreement was made more than a month before said sale, these plaintiffs relied upon it and made no other effort to procure the money, or the assistance of friends to save and buy said premises.

That at the time of said sale these plaintiffs were in the possession of said premises, and continued in possession thereof and made payments on account of the incumbrances thereon until some time in the year 1849, with the knowledge, privity and consent of said Dox. And that during all that time said Dox never exercised any acts of ownership over said premises, or interfered with the ownership, use, occupation or possession thereof by the plaintiffs, and that during all that time the assessments and taxes thereon were paid by the plaintiffs, with the knowledge, privity and assent of said Dox. That in the year 1849, the said plaintiffs were induced by said Dox to surrender the possession of said premises to him, and in the year 1851 he refused to come to a settlement with the plaintiffs, and denied that he held the said premises for their benefit, or that they had any interest therein. The referee excluded such evidence, and decided that he would not receive any parol evidence to establish, or tending to establish, the said agreement, and that upon the case made by the pleadings, assuming there was no agreement in writing as stated in the answer, there can be no recovery by the plaintiffs. To this decision and ruling, the plaintiffs' counsel duly excepted.

This exception presents the main question for consideration and decision upon this appeal, and the referee in his report states the ground or reason of his decision to be that unless the agreement mentioned, or some note or memorandum thereof expressing the consideration be in writing the same was void, and could not be enforced against the defendant. If the referee was right in this conclusion, then the plaintiffs were properly nonsuited, and the judgment for the defendant should be affirmed. If in error then it follows that there must be a reversal and a new trial. The Revised Statutes declare that no estate or interest in lands, nor any trust or power over or concerning lands, or in any manner relating thereto, shall be created,

granted or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting or declaring the same. 1 Rev. St. p. 134, § 6. It is manifest that the referee had this provision before him, and that his decision was based upon the assumption of its applicability to the case in hand. In arriving at this conclusion he entirely ignored all consideration of fraud or of part performance, as elements of the transaction. Section 10 of the same title declares that "nothing in this title contained shall be construed to abridge the powers of a court of equity to compel the specific performance of agreements in cases of part performance of such agreements." 1 Rev. St. p. 135, § 10. It is well settled that courts of equity will enforce a specific performance of a contract within the statute when the parol agreement has been partly carried into execution. 2 Story, Eq. Jur. § 759. And the distinct ground upon which courts of equity interfere in cases of this sort is, that otherwise one party would be enabled to practice a fraud upon the other, and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. Indeed fraud in all cases constitutes an answer to the most solemn acts and conveyances, and the objects of the statutes are promoted instead of being obstructed by such a jurisdiction for discovery and relief. And when one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious that if the latter should refuse it would be a fraud upon the former to suffer his refusal to work to his prejudice.

In Fonblanque's Equity it is said: "If the contract be carried into execution by one of the parties, as by delivering possession, and such execution be accepted by the other, he that accepts it must perform his part, for when there is a performance the evidence of the bargain does not lie merely upon the words but the facts performed, and it is unconscionable that the party that received the advantage should be admitted to say that such contract was never made." Fonbl. bk. 1, p. 181, c. 338. And the universal rule is correctly enunciated by Brown on Frauds, when he says: "The correct view appears to be that equity will at all times lend its aid to defeat a fraud, notwithstanding the statute of frauds." Brown, St. Frauds, § 438. In the present case we are to assume that the agreement was made as set out in the complaint, and performed on the part of the plaintiffs as therein stated. We then have a distinct and unequivocal agreement established, and performance by one party of all that was to be done in pursuance of it on his part. We find the other party, by reason of the acts and omissions of this party, obtaining the possession and title to a large amount of real estate for a trifling sum compared to its actual value, and refusing

to fulfill the agreement on his part. He interposes the statute of frauds as a shield, thus using a statute designed to prevent frauds as an instrument whereby one can be perpetrated with impunity. This a court of equity cannot tolerate. *Wetmore v. White*, 2 Caines, Cas. 87, was an action brought in chancery to compel the specific performance of a contract by parol relating to lands. The chancellor dismissed the bill, but the court of errors unanimously reversed his decree. *Thompson, J.*, in delivering the opinion of the court, says: "The appellant's claim resting altogether upon parol contract, it becomes necessary to examine whether any obstacle to relief is interposed by the statute for the prevention of fraud. I think there is not. It is an established rule in equity that a parol agreement in part performed is not within the provisions of the statute. Citing 1 Fonbl. Eq. 182, and cases there noted. To allow a statute having for its object the prevention of frauds to be interposed in bar of the performance of a parol agreement in part performed, would evidently encourage the mischief the legislature intended to prevent. * * * Possession delivered in pursuance of an agreement is such a decree of performance as to take a contract out of the statute." The same doctrine was reaffirmed in *Parkhurst v. Van Cortlandt*, 14 Johns. 15, 35, 36. In *Lowry v. Tew*, 3 Barb. Ch. 407, 413, the chancellor said the principle upon which courts of equity hold that a part performance of a parol agreement is sufficient to take a case out of the statute of frauds is, that a party who has permitted another to perform acts on the faith of an agreement shall not be allowed to insist that the agreement is invalid, because it was not in writing, and that he is entitled to treat those acts as if the agreement, in compliance with which they were performed, had not been made. In other words, upon the ground of fraud in refusing to execute the parol agreement after a part performance thereof by the other party, and when he cannot be placed in the same situation that he was before such part performance by him." See, also, *Phillips v. Thompson*, 1 Johns. Ch. 131; *Murray v. Jayne*, 8 Barb. 612.

In *Hodges v. Tennessee Marine & Fire Ins. Co.*, 8 N. Y. 416, this court held that in equity parol evidence was admissible to show that a deed absolute on its face was in fact a mortgage, and so intended by the parties thereto. And in *Despard v. Walbridge*, 15 N. Y. 374, this court also held that an assignment of a lease, absolute on its face, was in fact made for the purpose of securing a debt, and that such debt had been fully paid; and that under the Code of Procedure, parol evidence is admissible to show that such assignment, though absolute in its terms, was intended as a mortgage.

The case of *Brown v. Lynch*, 1 Paige, 147, is so like to that now under consideration that it may be profitable to refer to it at

length. A mortgage upon a farm was foreclosed in chancery and advertised for sale by a master. Before the sale, Brown, the defendant, made an arrangement with the plaintiffs, the Lynches, whereby he agreed to purchase the farm in for their benefit, for which he was to receive a stipulated compensation. The mortgagee, in order to favor the Lynches, agreed with Brown that he might bid off the property for about half the amount of the mortgage. Brown, at the sale, prevented others bidding by representing that he intended to buy for the Lynches, and he purchased the farm at the master's sale for \$1,500, about \$1,000 below its value. Afterward Brown refused to convey the farm to the Lynches, or to account to them for the value, although they tendered to him the amount of his bid, with interest, and the sum agreed for his services. And it was held by the court of chancery that Brown was a trustee for the Lynches, and had no other interest in the farm than that of mortgagee to secure the repayment of the purchase-money, and of the payment of the sum agreed to be allowed him for his services. And that the court of chancery would relieve against a fraud by converting the person guilty of it into a trustee for those who have been injured thereby. *Emott*, vice chancellor, decreed for the plaintiffs, holding the defendant had committed a fraud upon the plaintiffs by agreeing to purchase for their benefit, when, in truth, he meant to purchase for himself, and that he had committed a fraud upon the plaintiffs, by his acts and representations, in preventing bidding at the sale. And he proceeds to show, by the citation of numerous authorities, that a court of equity can provide adequate relief by declaring the purchaser a trustee for the person defrauded. And he quotes with approbation the remarks of Lord Eldon, in *Mestaer v. Gillespie*, 11 Ves. 626, where he says:

"Upon the statute of frauds, though declaring that interest shall not be barred except by writing, cases in this court are perfectly familiar, deciding that a fraudulent use shall not be made of that statute; when this court has interfered against a party meaning to make it an instrument of fraud, and said he should not take advantage of his own fraud, even though the statute has declared that in case these circumstances do not exist, the instrument shall be absolutely void." The chancellor affirmed the decree, and observed, that the Lynches had an interest in the premises which they had a right to protect and preserve, and it would have been a gross fraud for any one to hold out to them, under such circumstances, that he was bidding off the property for their benefit, when he in fact intended to appropriate it to his own use. If the appellant did in fact bid it off for them, under the agreement, he held it in trust for them, and had no

other interest in it than that of a mortgagee, to secure the repayment of the purchase-money and the \$60 agreed to be paid him for his trouble. But if he had no such intention, and did not in fact bid off the property in trust for them, he was guilty of a fraud which the court will relieve against. The cases referred to by the circuit judge (vice-chancellor), fully establish the principle that this court has power to relieve against such fraud, and the means to be employed is to convert the person who has gained an advantage by means of his fraudulent act, into a trustee for those who have been injured thereby." This case was cited with approbation in *Anderson v. Lemon*, 8 N. Y. 239, and the principle of it adopted by this court in that case.

Its principle was also adopted and approved of in *Sandford v. Norris*, decided at special term of supreme court in May, 1859, and affirmed at general term in the First district in June, 1861. 4 Abb. Dec. 144. In that case, certain premises were owned by the plaintiff's husband, and he made an assignment thereof, and his assignees advertised the same for sale. The plaintiff was anxious to purchase them in at the sale, and made an arrangement with the defendant, *Norris*, by which he agreed to attend the sale and bid them off in his name for the plaintiff, and on payment of the sum bid convey the same to the plaintiff. In consequence of this arrangement, the plaintiff refrained from bidding at the sale, and the premises were struck off to the defendant for the sum of \$20, subject to the prior incumbrances. The defendant subsequently sold the premises so purchased for the sum of \$2,000, of which the plaintiff had received one-half, and the action was brought to recover the residue. It was held that the plaintiff was entitled to recover, and that the defense of the statute of frauds, interposed by the defendant, was no bar to the relief sought by the plaintiff; that the agreement was established beyond controversy, and the defendant was bound as well by sound morals as established principles of law to the performance of it. On the hearing of that case, the opinion of Mr. Justice Emott, in the case of *Bergen v. Nelson* (not reported), was read, distinctly affirming the doctrine of *Brown v. Lynch*, supra. The case of *Osborn v. Mason*, before the vice-chancellor of the first circuit (not reported), also affirming the doctrine of that case, was also cited.

Mason in that case agreed with Osborn to attend a sale of certain premises, Osborn being either owner or a subsequent incumbrancer, Mason also having a claim upon the premises as an incumbrancer. Mason agreed to bid in the premises at the sale, and then to let Osborn have them for the amount at which they stood him in, including his own incumbrance. Mason bid off the premises and then refused to fulfill his agree-

ment which was by parol. The vice-chancellor held that the statute of frauds was no bar to the suit for a specific performance of the agreement which was decreed, and on appeal to the chancellor the same was affirmed. *Voorhies v. St. John* was argued and decided in this court in December, 1863. It was an action brought to recover moneys received by the defendant on a sale of a house and lot in the city of New York, and a leasehold estate in two buildings on other lots therein, and for an account of the rents and profits received therefrom. The property had formerly belonged to the husband of the plaintiff, and consisted of three parcels, and upon a sale thereof by his assignees, the plaintiff requested two of her friends to attend the sale and bid off two of said parcels for her benefit. They subsequently, at her request, transferred their bids to the defendant, *St. John*, and he took the conveyance therefor to himself, and paid the assignee for the same, declaring at the time that the plaintiff wished him to buy that property for her. At the sale of the other parcel, *St. John* attended the assignee's sale and bid off the same himself, and the assignments of the two bids and the titles to all the three pieces of property made out to him together in his own name. All these acts were done by *St. John* for *Mrs. Voorhies*, at her request and for her benefit. The referee reported in favor of the plaintiff, and the judgment thereon was affirmed at the general term of the First district, on the authority of *Sandford v. Norris*, supra. On appeal to this court, that judgment was affirmed in December, 1863, and distinctly on the ground that the statute of frauds was no bar to the performance of the agreement. We must hold this case as decisive of that now under consideration. The same doctrine has frequently been affirmed in other cases.

In *Cox v. Cox*, 5 Rich. Eq. 365, the owner of land, in danger of being summarily dispossessed by a sheriff's sale, agreed with his brother, the defendant, that the latter should bid off the land and pay the bid and make a reconveyance on repayment. This agreement was declared to the bystanders at the sale, and competition being thus prevented, the land was bought by the brother for one-tenth of its actual value. The whole transaction was alleged to be "a fraudulent contrivance on the part of the defendant to obtain his brother's land for one-tenth of its value." The court enjoined the defendant from proceeding at law under the title thus fraudulently obtained, saying: "This court has often repeated that the statute of frauds should never be perverted to an instrument of fraud. Thus, in a case of an agreement such as the statute plainly declares void, if not reduced to writing, yet if this was omitted by fraud, the defendant would not be permitted to avail himself of the statute. In *Whitchurch v. Bevis*, 2 Brown Ch. 565,

Lord Thurlow says, if you interpose the medium of fraud, by which the agreement is prevented from being put in writing, I agree the statute is inapplicable. See *Keith v. Purvis*, 4 Desaus. Eq. 114."

In the case cited of *Keith v. Purvis*, a creditor induced his debtor's agent not to bid at a sale of his debtor's land by promising to give the debtor time to pay the debt, and then to reconvey the land. This agreement was disclosed at the sale, and prevented other bids, whereby the creditor bought the land at one-third of its value, but afterward refusing to reconvey, the debtor brought his bill for relief. To this it was objected that the agreement was void by the statute of frauds; but the court held, "that if the agreement was void, the creditor must surrender up his advantage under it and be liable to make good the loss sustained by the adverse party from his conduct." "Can it be tolerated," says the court at page 121, "that a creditor shall, at a sale of his debtor's property, lull him to sleep and keep off other purchasers by an agreement under which he buys in the land for a small sum much below the value, and then that he should declare that the agreement was void under the statute of frauds, and that the other party should have no benefit from the agreement, whilst he reaped all the fruits? Surely not. Courts of justice would be blind indeed if they could permit such a state of things."

In *Peebles v. Reading*, 8 Serg. & R. 492, the supreme court of Pennsylvania said: "If by the artifice of the purchaser declaring he was to buy for the owner, others were prevented from bidding, and the land was sold at a great undervalue, this would make him a trustee." And in *Trapnall v. Brown*, 19 Ark. 49, property of the value of \$5,000 was, by agreement similar to the one in the present case, bought in for \$176, other persons declining to bid on being informed of the object of the agreement. "Under these circumstances," the court said, "we think it would be a fraud in the purchaser to keep the property in violation of the agreement.

That the statute which was designed to prevent fraud would be used as a shield and in the commission of fraud, which the courts of equity will not tolerate. We think therefore that the court below did not err in treating the purchaser as a trustee." These observations, made in these cases, are as pertinent to that now under consideration, as they were in them. Many of these cases are identical in all important particulars with this, and there is no good reason why the same rules of law and morals enunciated in them should not govern and control the decision in this case. The fact that an agreement is void, under the statute of frauds, does not entitle either party to relief in equity, but other facts may; and when they do, it is no answer to the claim for relief, that the void agreement was one of the instrumentalities through which the fraud was effected. *Ormond v. Anderson*, 2 Ball & B. 369. Where one of the parties to a contract, void by the statute of frauds, avails himself of its invalidity but unconscientiously appropriates what he has acquired under it, equity will compel restitution; and it constitutes no objection to the claim, that the opposite party may happen to secure the same practical benefit, through the process of restitution, which would have resulted from the observance of the void agreement. *Floyd v. Buckland*, 2 Freem. Ch. 263; *Oldham v. Litchford*, Id. 284; *Devonish v. Baines*, Finch, Prec. 3; *Thynn v. Thynn*, 1 Vern. 296; *Reech v. Kennegal*, 1 Ves. Sr. 125; *Davis v. Walsh*, 2 Har. & J. 329; *Wilcox v. Morris*, 1 Murph. 116; *Stoddard v. Hart*, 23 N. Y. 560.

It is very clear to my mind, both upon principle and authority, that the referee erred in excluding the evidence offered, and that the judgment must be reversed and a new trial ordered, with costs to abide the event.

PORTER, WRIGHT, LEONARD, and MORGAN, JJ., concurred. HUNT, J., dissented.

Judgment reversed, and new trial ordered.

EDWARDS v. CULBERTSON.

(16 S. E. 233, 111 N. C. 342.)

Supreme Court of North Carolina. Nov. 22, 1892.

Appeal from superior court, Chatham county; Whitaker, Judge.

Action by Samson Edwards against Jennie Culbertson for money paid and for a lien on land purchased therewith. Judgment for plaintiff for amount paid without a lien. Plaintiff appeals. Modified.

T. B. Womack, for appellant. John Manning, for appellee.

SHEPHERD, C. J. According to the finding of the jury the defendant fraudulently obtained of the plaintiff the sum of \$275.25, for the purpose of purchasing the land described in the complaint, and that the fraud consisted in "falsely and fraudulently promising and pretending that, if the plaintiff would let her have the said sum of money for said purpose, she would marry him in a very short time, and that the land to be purchased with the said money should be in lieu of her right of dower which she would acquire" by the said marriage. Upon this verdict, his honor rendered a judgment in favor of the plaintiff for the recovery of the amount so fraudulently obtained, but refused to declare it a charge upon the land purchased by the defendant with the said money, the land still remaining in her hands. Were there nothing more than a mere promise to marry, it is plain that a violation of it would not entitle the plaintiff to any equitable relief, but we must infer from the verdict that the defendant did not intend to perform the promise at the time it was made, and that she intended it, as well as the additional agreement to hold the land in lieu of dower, simply as a trick or contrivance by which to cheat and defraud the plaintiff of his money. By submitting to the verdict and judgment, the defendant (even if she could successfully do so) is precluded from denying that she obtained the money under circumstances which the law denounces as fraudulent, and, this being so, it cannot be doubted that if the specific money had been retained by her and could have been identified, the plaintiff, in a proper action, could have recovered it. If this be true, why may not the money be traced into the land and declared to be a charge thereupon? This is a somewhat novel question in this state, but in view of well-settled equitable principles, as well as authorities in other jurisdictions, it is believed to be unattended with any very serious difficulty.

The only decision of this court to which we have been referred as bearing upon the question is that of *Campbell v. Drake*, 4 Ired. Eq. 94. The plaintiff filed a bill in equity against the heirs at law of one Farrow, praying that they be declared trustees of certain land purchased by their ancestor

with money stolen by him of the plaintiff while in the employment of the latter as his clerk. The court said that it was "not at all like the cases of dealings with trust funds by trustees, executors, guardians, factors, and the like, in which the owner of the fund may elect to take either the money or that in which it was invested;" and it was accordingly held that the plaintiff was not entitled to the particular relief asked for. It was strongly intimated, however, by Ruffin, C. J., in delivering the opinion, that the plaintiff might "have the land declared liable as a security for the money laid out for it." It was not stated upon what principle this could be done, but we apprehend that it was based upon the general proposition that, whenever a person has obtained the property of another by fraud, he is a trustee *ex maleficio* for the person so defrauded, for the purpose of recompense or indemnity. "One of the most common cases," remarks Judge Story, "in which a court of equity acts upon the ground of implied trusts in invitum, is when a party receives money which he cannot conscientiously withhold from another party." Story, Eq. Jur. § 1255. And he states it to be a general principle that "whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or *cestui que trust*." Id. § 1258; Hill, Trustees, 222; Whitley v. Foy, 6 Jones, Eq. 34; Taylor v. Plumer, 3 Maule & S. 562; Knatchbull v. Hallett, 13 Ch. Div. 696; People v. City Bank, 96 N. Y. 32; National Bank v. Insurance Co., 104 U. S. 54. Mr. Pomeroy says: "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, or through any other circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity imposes a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein, and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer or in the hands of any subsequent holder, until a purchaser in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed '*ex maleficio*' or '*ex delicto*,' are practically without limit. The principle is applied whenever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer." Pom. Eq. Jur. 1053. A confidential relation is not necessary to establish such trust, and there is no good reason why the owner of property taken and converted by one who has no right to its possession should be less favorably situated in

a court of equity. in respect to his remedy, (at least for the purpose of "recompense or indemnity,") than one who by an abuse of trust has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. "The beautiful character—pervading excellence, if one may say so—of equity jurisprudence," says Judge Story, "is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes." The trusts of which we are speaking are not what is known as "technical trusts," and the ground of relief in such cases is, strictly speaking, fraud, and not trust. Equity declares the trust in order that it may lay its hand upon the thing and wrest it from the possession of the wrongdoer. This principle is distinctly recognized by our leading text writers, and it is said by Mr. Bispham (Bisp. Eq. 92) that "equity makes use of the machinery of a trust for the purpose of affording redress in cases of fraud." The principles above stated are illustrated by many decisions to be found in the reports of other states, and as our case may easily be assimilated to those in which money or other property has been stolen and converted, such cases must be recognized as pertinent authority in the present investigation. In *Newton v. Porter*, 69 N. Y. 133, it was held that the owner of negotiable securities, stolen and afterwards sold by the thief, may follow and claim the proceeds in the hands of the felonious taker or of his assignee with notice; and that this right continues and attaches to any securities or property in which the proceeds are invested, so long as they can be traced and identified. The law, it was said,

"will raise a trust in invitum out of the transaction, in order that the substituted property may be subjected to the purposes of indemnity and recompense." Andrews, J., said that "equity only stops the pursuit when the means of ascertainment fails, or the rights of bona fide purchasers for value, without notice of the trust, have intervened. The relief will be molded and adapted to the circumstances of the cases, so as to protect the rights of the true owner." *Lane v. Dighton*, Amb. 409; *Mansell v. Mansell*, 2 P. Wms. 679; *Lench v. Lench*, 10 Ves. 511; *Perry, Trusts*, § 829; *Story, Eq. Jur.* § 1258. In *Bank v. Barry*, 125 Mass. 20, it was held that equity will charge land, paid for in part with the proceeds of stolen property, with a trust in favor of the owner of the property for the amount so used. In *Humphreys v. Butler*, 51 Ark. 351, 11 S. W. Rep. 479, the defendant, in paying for a house and lot purchased by him for \$400, wrongfully used \$149.52 belonging to the plaintiff, and of which he had obtained possession without her authority, knowledge, or consent. The court declared the defendant a trustee to the extent of the money of the plaintiff used by him, and charged the same upon the property, and in default of its payment by a certain time decreed that the same be sold to satisfy the said lien. These and other authorities that could be cited abundantly sustain the intimation of Chief Justice Ruffin, to which we have referred, and we are therefore of the opinion that the money fraudulently obtained of the plaintiff may be followed into the land described in the complaint, and that the judgment of his honor should be so modified as to declare it to be a charge upon the same. Modified.

In re O'HARA.

(95 N. Y. 403.)

Court of Appeals of New York. 1884.

Appeal from surrogate court, Kings county.

The facts of the case are stated in the opinion of the court.

Geo. H. Starr and Samuel D. Morris, for appellants. William N. Dykman, for respondents.

FINCH, J. The testatrix gave to three persons, who were her lawyer, her doctor and her priest, absolutely, but as joint tenants, the bulk of her estate. Practically she disinherited her relatives in favor of strangers, who had no claim upon her bounty, except such as originated in their professional characters, and the confidence and friendship thus engendered. For this reason probate of the will was resisted. While the testatrix was shown to have been superstitious, whimsical, blindly devoted to her church and its ecclesiastics, habitually under the influence of stimulants, and seriously dependent upon the advice of those who became her residuary legatees, it is yet certain that there was no want of testamentary capacity. But although the attack failed upon that ground, the charge of undue influence was somewhat supported by the evidence relating to her character and surroundings, which made possible and tended to render probable the existence of an outside power capable of moulding her wishes to its own. The exigency demanded of the proponents some adequate and reasonable explanation of a diversion of the estate to strangers holding the power and influence derived from confidential relations, consistent with the free action and untrammelled exercise of the testamentary intention. The explanation came. A letter of instruction, addressed to the residuary legatees, contemporaneous with the will, and dictating the purpose as well as explaining the reason of the absolute legacy, was produced upon the hearing. These written instructions demonstrated that the residuary clause was not intended by the testatrix to pass to the legatees any beneficial interest. The absolute devise, on its face difficult of explanation except upon a theory of undue influence, thereby lost its suspicious character and put the legatees in more of a disinterested attitude. It appeared that the testatrix did not at all desire or intend to bestow her estate upon those to whom she gave it; that her real intention was to devote it to certain charitable purposes; that these, she was advised, could not effectively be accomplished by her will, except through an absolute devise to individuals, in whose honorable action she could confide; and,

therefore, and for that reason, and to effect that ulterior purpose, she gave her estate in form to the professional friends, not meaning any beneficial legacy to them or for their use. With this development of the defense the attack took on a new phase. The heirs at law and next of kin began an action in equity to set aside and annul the residuary devise and bequest, or to establish a trust, which, failing as to the intended beneficiaries, should result to those who would otherwise have taken by descent or distribution. Both cases are now before us, and it is convenient to consider them together, since our conclusion in one may tend seriously to affect the result in the other.

The proof is uncontradicted that the testatrix made the residuary devise and bequest in its absolute and unconditional form in reliance upon a promise of the legatees to apply the fund faithfully and honorably to the charitable uses dictated in the letter of instructions. It does not disprove this statement to assert that no express promise to that effect was made, or that it was the pledge of Judge McCue alone. One of the legatees, Father McGuire, is dead, and the title is in the two survivors, and it is with them only that we need to deal. The trial judge did, indeed, find as a fact that Dr. Dudley did not know until after testatrix's death that the unattested letter of instructions existed, but he certainly did know before the will was made the character of the intended disposition; that he was selected as one of the executors; that the relatives by blood were to take but a trifle, and that the bulk of the estate was to be applied to charitable purposes by the executors; and with this knowledge he accepted the proposed trust. The trial judge further finds that Judge McCue "made no promise to obtain the bequest or devise and practiced no fraud." This finding is assailed, but unsuccessfully so far as it frees the legatees from a charge of actual fraud. In that respect we agree that there was no evil or selfish intention on their part. But the finding that Judge McCue "made no promise to obtain the bequest or devise" cannot be sustained. If anything is rendered certain by the evidence it is that the testatrix made the absolute devise and bequest upon the suggestion of a necessity therefor by Judge McCue, and upon the understanding that he and his associates would faithfully and honorably carry out her expressed intentions. If we say that McCue made no such promise, that he came under no such honorable obligation, then we must say that the testatrix was misled into a false belief, upon which, as true, she unmistakably acted. For it is not possible to doubt that if the legatees had said—we will not promise; we will do as we please; we will not be even honorably bound not to

take this money for ourselves—the absolute bequest would never have been made. It matters little that McCue did not make in words a formal and express promise. Everything that he said and everything that he did was full of that interpretation. When the testatrix was told that the legal effect of the will was such that the legatees could divert the fund to their own use, which was a statement of their power, she was told also that she would only have their honor and conscience on which to rely, and answered that she could trust them; which was an assertion of their duty. Where in such case the legatee, even by silent acquiescence, encourages the testatrix to make a bequest to him to be by him applied for the benefit of others, it has all the force and effect of an express promise. *Wallgrave v. Tebbs*, 2 Kay & J. 321; *Schultz's Appeal*, 80 Pa. St. 405. If he does not mean to act in accord with the declared expectation which underlies and induces the devise, he is bound to say so, for his silent acquiescence is otherwise a fraud. *Russell v. Jackson*, 10 Hare, 204.

So far then as McCue is concerned he stands in the attitude of having procured and induced the testatrix to make a devise or bequest to himself and his associates, by asserting its necessity and promising faithfully to carry out the charitable purposes for which it was made, and whether his associates knew or promised, or did not, makes no difference where the devise is to them as joint tenants, and all must get their rights through the result accomplished by one. *Rowbotham v. Dunnett*, 8 Ch. Div. 430; *Hooker v. Oxford*, 33 Mich. 453; *Russell v. Jackson*, 10 Hare, 206. If, therefore, in her letter of instructions, the testatrix had named some certain and definite beneficiary, capable of taking the provision intended, the law would fasten upon the legatee a trust for such beneficiary and enforce it, if needed, on the ground of fraud. Equity acts in such case not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest, is to perpetrate a fraud upon the deviser which equity will not endure. The authorities on this point are numerous. *Thynn v. Thynn*, 1 Vern. 296; *Oldham v. Litchford*, 2 Freem. 284; *Reech v. Kennegal*, 1 Ves. Sr. 124; *Podmore v. Gunning*, 5 Sim. 485; *Muckleston v. Brown*, 6 Ves. 52; *Hoge v. Hoge*, 1 Watts, 163; *McKee v. Jones*, 6 Pa. St. 425; *Dowd v. Tucker*, 41 Conn. 197; *Hooker v. Oxford*, 33 Mich. 454; *Williams v. Vreeland*, 32 N. J. Eq. 135. The circumstances in these cases were varied and sometimes peculiar, but all of them either recognize or enforce the general doctrine. It has been twice applied in our own state. *Brown v. Lynch*, 1 Paige, 147; *Williams v. Fitch*, 18

N. Y. 546. In the last of these cases the making of a bequest to the plaintiff was prevented by an agreement of the father, who was next of kin, to hold in trust for the plaintiff; and the English cases were cited with approval and the trust enforced. All along the line of discussion it was steadily claimed that a plain and unambiguous devise in a will could not be modified or cut down by extrinsic matter lying in parol, or unattested papers, and that the statute of frauds and that of wills excluded the evidence; and all along the line it was steadily answered that the devise was untouched, that it was not at all modified, that the property passed under it, but the law dealt with the holder for his fraud, and out of the facts raised a trust, *ex maleficio*, instead of resting upon one as created by the testator. The character of the fraud which justifies the equitable interference is well described in *Glass v. Hubert*, 102 Mass. 40. It was said to consist "in the attempt to take advantage of that which has been done in performance or upon the faith of the agreement while repudiating its obligation under cover of the statute."

Yet that is not the position of the defendants here. By their answer they deny any promise, whatever, made by them; any trust accompanying the request; any agreement to hold for the benefit of others; and insist that the property is theirs "for their own use and disposal."

Yet this is evidently intended merely as an assertion of what they insist is their legal position, and is not meant as a repudiation of their promise or its honorable obligation, and no beneficiary claiming any such violation of duty, or even as threatened or intended, is before us.

But it may happen, as it does happen here, that all of the charitable uses enjoined are for the benefit of those incapable of taking, or of a character in direct violation of the law of the state. What then becomes the duty of a court of equity? A fraud remains, except that it takes on graver proportions, and becomes more certain and inevitable. The agreement which induced the absolute devise, and the fraud of a beneficial holding secured by a contrary promise, still confront us. And what is worse, it does not need that the absolute legatees repudiate their promise, for if ever so honorably willing to perform it, they cannot do so without setting at defiance and secretly evading the law and general policy of the state. The alternative is plain, and offers no chance of escape. If the legatees repudiate their obligations, that is a fraud upon the dead woman, who acted upon the faith of their promise. If they are willing to perform they cannot perform, except by a fraud upon the law to which they and the testatrix are equally parties.

In such a case the fraud remains and ex-

ists, identical in its character as to the testatrix, but an injury to the heir at law and next of kin instead of an identified and capable beneficiary. And it becomes not only a fraud against them, but a fraud upon the law, since it is a declared and admitted effort to accomplish by a secret trust what could not on the face of the will be done at all. If, on the ground of fraud, equity, as it has often done, and will always do, fastens a trust *ex maleficio* upon the fraudulent legatee or devisee for the protection of a named and definite beneficiary, no reason can be given why it should not do the same thing when the fraud attempted assumes a more serious character, because aimed at an evasion of the law, and seeking the shelter of unauthorized purposes. In such event, if equity withholds its power, one of two things is accomplished; either the legatee holds the estate beneficially, which is a fraud upon the testatrix and the intended objects of her bounty, or the fund is devoted to unauthorized purposes, in fraud of the law, and of the heirs and next of kin. If a trust *ex maleficio* may be fastened upon the property in the hands of the fraudulent legatee in the one case, why not also in the other? If in the one the fraud grows out of a refusal to perform, which would be the voluntary act of the legatee repudiating his promise, and so an actual fraud; in the other it grows out of the impossibility of performance, except in defiance of the public law, which is legally a fraud. In neither event can the legatee honestly hold. In both, either fraud triumphs, or equity defeats it through the operation of a trust, and protects those justly entitled. And so are the cases. In *Jones v. Badley*, L. R. 3 Eq. Cas. 635, the suit was by the co-heiresses and next of kin to make the defendants trustees for them, on the ground that a devise made to them of a residue absolute on its face was, in fact, for charitable purposes in violation of the mortmain act, and made on the faith of an agreement by the legatees that they would make such application. One of them was the confidential medical adviser of the testatrix; the devise to the two was in joint tenancy; no purposed or intentional dishonesty was charged against them; instead of wholly repudiating their duty, they alleged in their answer a design to carry out the charitable purposes; and yet the court did not hesitate on the ground of fraud to fasten a trust upon the property in their hands for the benefit of the heir and next of kin. *Wallgrave v. Tebbs*, 2 Kay & J. 313, 321, and *Russell v. Jackson*, 10 Hare, 207, were cited with approval. The latter case was a bill filed by the next of kin, alleging that the absolute devise of a residue was upon a secret trust either for charitable or illegal purposes. The court so held as to the proceeds of the freehold and leasehold estates, and because the dispositions "could

not by law take effect," declared the devisees trustees for the heir and next of kin. In *Muckleston v. Brown*, 6 Ves. 63, 65, Lord Eldon intimated that where the devisees took under an agreement to hold upon such trusts as the testator should declare, but he omitted to declare any, there would be a trust to the heir which equity would decree; and added, as to a case of evasion of the statute, the pointed inquiry: "Is the court to feel for individuals, and not to feel for the whole of its own system, and compel a discovery of frauds that go to the root of its whole system?" In *Schultz's Appeal*, 80 Pa. St. 405, the plaintiff failed solely for want of proof of an agreement by the legatee inducing the devise; and the same difficulty existed in *Rowbotham v. Dunnett*, 8 Ch. Div. 430; and as to three of the four tenants in common in *Tee v. Ferris*, 2 Kay & J. 367; but all confirm the general doctrine asserted.

It is needed now that we consider the character of the charitable uses upon which these legatees agreed to hold the residuary estate. The testatrix began her letter of instructions by saying: "I am desirous of accomplishing certain purposes, some of which at least cannot be legally carried out by express provisions of my will; and, therefore, in order more certainly to effect my purposes I have constituted you such residuary devisees and legatees." The first purpose indicated is to "set apart" the income of \$20,000 to the ecclesiastical education of poor young men for the Roman Catholic priesthood. She directed that this provision be made "a permanent one" and that the legatees make such arrangements that after their death the income should continue so to be appropriated. This purpose contemplated and required that the principal of the fund should be held inalienable and without an absolute power of disposition during the three lives of the legatees and for an indefinite period beyond. During this period the legal title to both the real and personal property would remain in the trustees and they pay over the income, and after the death of two the survivor was directed in some undefined manner to provide for the continuance of such income in the future. The plan violated the statute against perpetuities both as to real and personal estate, and the active trust was unlimited in its duration. *Schettler v. Smith*, 41 N. Y. 334; *Adams v. Perry*, 43 N. Y. 497; *Garvey v. McDevitt*, 72 N. Y. 561. What the respondent replies is that "the legatees may hand over the designated sum to an incorporated college" engaged in educating that class of young men. But the testatrix neither authorized nor contemplated any such thing. She chose her trustees for three lives, and no other was to be substituted till the death of the third, and then there might be another will, with an absolute bequest of the \$20,000 to three other trustees, all honorable men, acting under a

letter of instructions, and so the process goes on in evasion and defiance of the law. If, indeed, the testatrix intended a gift to a college corporation, that could have been done by her will. She could have made the devise or bequest without the risk of depending on some one's honor that the fund would not be diverted to private use, so that, in so far as this devise or bequest was represented to require an absolute devise or bequest to individuals, she was either misled or deceived, or else did not intend a gift to a college corporation. The legatees, therefore, cannot perform their promise as they made it and as the testatrix understood it without violating the law of the state against perpetuities.

The letter of instruction then proceeds: "I desire \$3,000 set apart, the income whereof shall be applied to the purchase of shoes for poor children attending the parochial schools of St. Paul's R. C. Church, Brooklyn." This provision offends in the same way with the first as to the duration of the trust with also the difficulty that the beneficiaries are indeterminate. *Levy v. Levy*, 33 N. Y. 99. Again the respondent answers, both as to this clause and the one following which requires "\$3,000 set apart for the St. Vincent de Paul Society connected with St. Paul's Church," that the church is incorporated, "and will receive \$6,000 with a request from the residuary legatees to use one-half the income to purchase shoes for poor children attending the parochial school." The request would bind nobody. What the testatrix directed was not a gift to the church, but an application by her own chosen trustees of income to the two specified purposes. And if she intended the disposition now suggested, once more it is true that she could have given \$6,000 to the church corporation with a request as to the supply of shoes quite as well as her legatees can do it, and there was no need of the absolute devise and bequest represented to exist.

Then follow these provisions, viz.: "The sum of \$3,000 for the benefit of the Home of the Good Shepherd, and the sum of \$5,000 for the Little Sisters of the Poor, both in Brooklyn." It is said that these two societies are incorporated, but they may not be entitled to the principal, if the trustees refuse it, for the latter are authorized to "limit the use of said bequests to the income thereof." And again the observation recurs that a bequest to these corporations could easily have been made in the will if that had been understood to be the real intention.

Finally the letter prescribes that any residue of the fund remaining should be applied "in aid" of the charities and purposes named in the will or in the letter, "or in any other charity which you or a majority of you may prefer." The respondent says that just such a provision as this in the body of a will has been upheld. *Power v. Cassidy*, 79 N. Y.

602. That is not true. On the contrary this court has very recently declined to carry the doctrine of that case beyond its own essential limits, and is not likely to agree that a devise may become the mere equivalent of a general power of attorney. *Prichard v. Thompson*, 95 N. Y. 76.

All through this letter the duty of the legatees is denominated a "trust," the gifts provided are sometimes called "bequests," and at its close, after charging the legatees to impose upon her beneficiaries "as far as you can" the "obligation" of "the offering of the holy sacrifice of the mass" in her own behalf and that of certain named relatives, she expresses her own sense of the force and character of her letter in the concluding sentence, "I desire to give to these instructions all the force and solemnity of a last will and testament."

This letter of instructions clearly and unmistakably shows the real nature of the transaction. The writer leaves almost nothing to the discretion of the trustees. She selects out her own objects of charity in the main, describes them in detail, fixes the amounts to be given and impresses upon her directions the "solemnity of a last will and testament." It is not at all the case of a devise to one absolutely to be expended at his discretion, but a definite and distinct trust having in view specific purposes and contemplating their precise performance.

If we construed this document to mean such dispositions as are now asserted, we should be driven to the inevitable inference that every one of them could have been easily, and safely, and perfectly made in the will itself, and that when told to the contrary by Judge McCue the testatrix was told what was utterly untrue, and what a jury might easily believe was known to be untrue, and so that the testatrix was led, by deception and fraud, to incur the danger and peril of an absolute devise and bequest—a conclusion which would destroy the will as the product of fraud. We do not believe that. Justice to two honorable men, of character and standing, forbids any such theory. Nothing about the case calls upon us for a conclusion so harsh and needless. On the contrary, we think Judge McCue told the truth to the testatrix, and that truth was that she could not tie up her estate in the hands of individuals perpetually, they distributing only the income, without violating the law of the state, and that she must either give up the purpose or depend for its accomplishment upon an absolute devise accompanied by a secret trust.

We have thus an important question squarely presented. If equity will not touch this devise by putting a trust for the heirs at law and next of kin upon the fund in the hands of these legatees, the road to an evasion of our statutes, and to the temptations of necessity or greed, will be left wide

open. While in such cases it has been well said that the court should act with caution and only upon the clearest proof of the fraud (*Collins v. Hope*, 20 Ohio, 501), yet when, as here, the facts are proved beyond reasonable question, we ought not to hesitate. The testatrix did intend an absolute devise to these legatees on the face of the will; but she did not intend that they should have the resultant beneficial interest, and relied upon their promise to carry its fruits elsewhere. They do not refuse to perform. Although they deny the promise, it is quite possible that they mean to keep it. We are not authorized to say or suspect that they will not, but if they do, they must inevitably carry out a planned and purposed evasion of our statutes against perpetuities.

It is said, however, and that brings us to the decisive point in the case; that the English authorities turned upon the fact that because of the statutes of mortmain the lands devised upon an honorable promise by the absolute devisee to dispense them in charity, could not by any process or in any mode be carried to that destination without violating the law, while in this case the charity is not prohibited, but only certain modes of its operation. Let us test this suggestion.

The statutes of mortmain were numerous, and followed each other in a succession as rapid as the devices and evasions of the ecclesiastics which they were framed to overthrow, until by the Act 9 Geo. II. c. 36, it was ordained that no lands or tenements, or money to be laid out thereon, should be given for or charged with any charitable uses whatsoever, unless by deed intended, executed in the presence of two witnesses and made at least one year before the death of the party and registered in a prescribed manner. While under this statute a devise of land was forbidden to charitable uses, it could be so devoted by a deed *inter vivos*, and in each of the cases we have cited, the absolute devisee, acting as owner, could by indenture have transferred to charity the land he had taken as devisee. But that did not serve to ward off a trust *ex maleficio* in any single instance. The result was plainly apparent that the property of the testator, by the artifice of an absolute devise coupled with a secret agreement, had been carried to a charity in defiance of the public law and in fraud of the mortmain acts. These acts did not, therefore, absolutely and totally forbid gifts of land to charitable uses. They put their prohibition not on the gift, but on the manner of it. They forbade it by will or devise. It is a similar prohibition upon the manner of gifts or transfers which our law imposes. While it is true, as was said at special term in the very able opinion contained in the record, that our statute does not forbid charitable devises and bequests, it does forbid expressly and imperatively a certain manner of making them. Gifts or

transfers made in that manner are prohibited and made void. The principal legatee in this case knew it, and it was distinctly planned between him and the testatrix that her understood and declared purpose, which could not be lawfully carried out by a devise on the face of the will, should be effected by an absolute devise coupled with his honorable obligation to hold and appropriate the property to forbidden uses. An evasion of the law was the very occasion and object of the absolute devise. Without that it could not have been suggested without a fraud upon the testatrix, for if there was no need of it, if no statute was to be avoided or flanked, the very suggestion of an absolute devise was fraudulent.

The question here is the character of the legatees' agreement and precisely that and nothing else must serve as a test. They agreed for three lives, under the pretense of ownership, to dole out the income of this fund to indeterminate persons of their selection; at the end of three lives in some manner to continue that process, making it permanent; and to dispense a possible surplus to any charities they might choose. That precise agreement, the one which they made, on the faith of which the testatrix acted, they must honorably and explicitly carry out or else they have defrauded her; and if they do carry it out as they agreed and as she understood it, they tie the property up for three lives and an uncertain period beyond, and so violate and defy the law.

We are not ready to concede that our statute against perpetuities is any the less sacred than the English acts of mortmain, or may be evaded with impunity. It may possibly be that the evils of such evasion are greater in the one case than in the other, but that will not justify us in shutting our eyes to the process, or holding that equity stands helpless in presence of the fraud. The learned presiding judge at the general term, while affirming this judgment formally that it might more swiftly come to our bar, sent with it a very wise and prudent caution. He said: "It seems clear to us that the law ought not to encourage arrangements for the disposition of property by testators, such as this case discloses." In *Wallgrave v. Tebbs*, *supra*, the vice-chancellor said that "the duty of a devisee under the circumstances stated was to throw up the property." Any devise or bequest of this character is dangerous and indefensible. It exposes testators to the suggestion of unnecessary difficulties as inducements to the artifice of an absolute devise concealing an illegal trust. It exposes the devisee to temptation and even when he acts honestly, to severe and unrelenting criticism. It subserves no good or useful purpose. If we sustain it we admit that any statute may be thus evaded, and that equity cannot redress the wrong.

We are not satisfied that the will was made through undue influence and therefore affirm the judgment of the general term which affirmed the decree of the surrogate, with costs.

But in the equity action we reverse the judgment of the general term and of the

special term, with costs of both parties on the appeal to this court, payable out of the fund, and order a new trial.

All concur as to the first appeal. All concur as to the second, except RAPALLO, J., not voting.

Judgments accordingly.

CURDY v. BERTON. (No. 11,949.)

(21 Pac. 858, 79 Cal. 420.)

Supreme Court of California. June 4, 1889.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by Frank Curdy against G. A. Berton, executor of Francis Berton, deceased, to declare a trust, and for an accounting. Judgment for defendant, and plaintiff appeals.

D. M. Delmas, for appellant. *D. W. Douthitt and Smith, Wright & Pomeroy*, for respondent.

McFARLAND, J. Madeline Curdy died February 9, 1877, in Alameda county, Cal. She left a will duly executed, in which, after bequests to several persons, including the plaintiff herein, there occurs the following: "I give in trust to Francis Berton, now Swiss consul in San Francisco, all the moneys I possess in France, and principally my share of the Italian *rentes* deposited in the banking-house of Messrs. Hentsch, Lutscher & Co., of Paris, to be distributed according to the private instructions I give him." Berton was present when the will was made, and wrote it for the testatrix at her request; and at the time of the making of the will she verbally instructed him to distribute said property or its proceeds to certain relations and others in France, other than the plaintiff herein, and gave him an order for said property. The facts in proof show that he at least impliedly agreed to accept the trust. After her death, and before the commencement of this action, said Berton faithfully distributed said property in accordance with the said instructions of said testatrix. This action is brought by plaintiff, a brother of the deceased, and one of her heirs-at-law, to have it decreed that Berton held the legal title to said property in trust for the heirs of said deceased, for an accounting, and for the payment to him of his proportionate share of said property, with interest, profits, etc. Francis Berton died during the pendency of the action, and his executor, George A. Berton, was substituted as defendant. The court gave judgment for defendant, and plaintiff appeals from the judgment, and from an order denying a new trial.

Upon the main point in the case the position of appellant is, in brief, that, as the statute law of this state requires a will to be in writing, therefore, "where a testator devises property in trust to be applied to such uses as the testator has verbally specified to the devisee, the trust attempted to be created by parol fails, and the devisee takes the property in trust for the heirs of the testator." The contention of respondent is, in brief, that, independent of the statute of wills, where a testator bequeaths property in trust to a legatee without specifying in the will the purposes of the trust, and at the same time communicates those purposes to the lega-

tee orally, or by unattested writings, and the legatee, either expressly or by silent acquiescence, promises to perform the trust, and the trust itself is not unlawful, there a court of equity will raise a constructive trust in favor of the beneficiaries intended by the testator, and will charge the legatee as a constructive trustee for them, upon the ground that the legatee will not be countenanced in perpetrating a fraud by encouraging the testator to make a bequest which would not otherwise have been made, and then refusing to execute his promise. We think that respondent's view of the law, as above stated, is correct. There are some cases which support the proposition of appellant, notably, the case of *Olliffe v. Wells*, 130 Mass. 221; but the weight of authority and the better reason are the other way.

Obviously, the clear intention of the testatrix, as expressed in the written will, was that the property in question should not go to plaintiff. He, however, says, in effect: "True, the property was not to come to me. It was given to Berton upon the understanding, between him and the testatrix, that it was to go to the benefit of certain other persons; but, as they cannot establish their rights as beneficiaries, according to the statute of wills, Berton must be held to be my trustee, against the intention of the testatrix. I stand upon what I claim to be the dry law." Evidently, in a doubtful case, no just impulse would move a court to lean towards a proposition involving such consequences; and, as the question is an open one in this state, we are at liberty to follow those authorities, and that line of reasoning which appear to us to be most in consonance with the true principles of equity and justice.

We find in the Case of *O'Hara*, 95 N. Y. 403, a very full statement of the considerations which, in our opinion ought to govern the decision of the case at bar. In that case the testatrix, by her will, practically disinherited her relations in favor of strangers, giving the bulk of her estate to three legatees, who were her lawyer, her doctor, and her priest. The will was attacked by the heirs, on the ground of want of testamentary capacity and undue influence. As there was considerable evidence to support these charges, the legatees finally, to establish some reasonable explanation of a diversion of the estate to strangers having influence from confidential relations, showed that they were not to have any beneficial interest in the estate, but were to devote it entirely to certain charitable uses, according to instructions given them by the testatrix at the time the will was made. It appeared, however, that these charitable uses were in direct violation of the statute law of the state. The heirs at law then began an action in equity to establish a trust, which, failing as to the intended beneficiaries on account of illegality, should result to them. The legatees then, although intending to carry out the wishes of the testatrix, stood upon their rights under the

terms of the will, which upon its face gave them the property absolutely; denied that they had accepted any trust, or that any could be proven by extrinsic matter lying outside the will; and insisted that the property was theirs absolutely. The question thus presented was, in substance, the one presented here. The only difference is that in the O'Hara Case the instructions were in writing, while in the case at bar they were oral. But neither in the argument of counsel, nor in the opinion of the court, was there any distinction made between written and oral instructions or promises. The principles announced applied equally to both. There was no claim that the letter of instructions came within the rule that an extraneous paper may be incorporated into a validly executed will by a direct reference to it in the will itself. There was no reference whatever in the will to the letter. The court in the O'Hara Case, after stating that "the proof is uncontradicted that the testatrix made the residuary devise and bequest in its absolute and unconditional form in reliance upon a promise of the legatees to apply the fund faithfully and honorably to the charitable uses dictated in the letter of instructions," proceeds to discuss the question whether or not one of the legatees, McCue, expressly promised to accept the trust. After reviewing the evidence (which was somewhat contradictory) on that point, the court says; "Where, in such case, the legatee, even by silent acquiescence, encourages the testatrix to make a bequest to him, to be applied by him to the benefit of others, it has all the force and effect of an express promise. *Wallgrave v. Tebbis*, 2 Kay & J. 321; *Schultz' Appeal*, 80 Pa. St. 405. If he does not mean to act in accord with the declared expectation which underlies and induces the devise, he is bound to say so, for his silent acquiescence is otherwise a fraud. *Russell v. Jackson*, 10 Hare, 204." The court then proceeds to state the principles which should determine the main question under discussion, as follows: "If, therefore, in her letter of instruction the testatrix had named some certain and definite beneficiary, capable of taking the provision intended, the law would fasten upon the legatee a trust for such beneficiary, and enforce it, if needed, on the ground of fraud. Equity acts, in such case, not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest is to perpetrate a fraud upon the deviser, which equity will not endure. The authorities on this point are numerous." (Here follows a long list of cases.) "The circumstances in these cases were varied and sometimes peculiar, but all of them either recognize or enforce the general doctrine. It has been twice applied in our own state. *Brown v. Lynch*, 1 Paige, 147; *Williams v. Fitch*, 18 N. Y. 546. In the last of these cases the making of a bequest to the plaintiff

was prevented by an agreement of the father, who was next of kin, to hold in trust for the plaintiff; and the English cases were cited with approval, and the trust enforced. All along the line of discussion it was steadily claimed that a plain and unambiguous devise in a will could not be modified or cut down by extrinsic matter lying in parol, or unattested papers, and that the statute of frauds and that of wills excluded the evidence; and all along the line it was steadily answered that the devise was untouched; that it was not at all modified; that the property passed under it, but the law dealt with the holder for his fraud, and out of the facts raised a trust *ex maleficio*, instead of resting upon one as created by the testator. The character of the fraud which justifies the equitable interference is well described in *Glass v. Hulbert*, 102 Mass. 40. It was said to consist 'in the attempt to take advantage of that which has been done in performance or upon the faith of the agreement, while repudiating its obligation under cover of the statute.'" The other parts of the opinion discuss the question whether, as the charitable uses could not be enforced, because forbidden by the statute, the legatees could be held as trustees for the heirs, but that question does not arise in the case at bar.

We have thus referred at length to the O'Hara Case because it contains a lucid statement of the principles which apply to the case at bar, and for the additional reason that in the opinion of the court and the briefs of counsel nearly all the authorities bearing upon the question are cited. We also refer especially to the case of *Williams v. Vreeland*, 32 N. J. Eq. 135, which declares the doctrine above stated; and in the notes to which are collated extracts from about 40 different cases, all of which are confirmatory of said doctrine. See, also, *Hooker v. Axford*, 33 Mich. 453; *In re Fleetwood*, L. R. 15 Ch. Div. 594; *In re Boyes*, L. R. 26 Ch. Div. 531; and *Riordan v. Banon*, 10 Ir. Eq. 469. The cases cited will show that it is immaterial whether the instructions given by a testator are oral or in writing. Indeed, in the opinion of the court in the O'Hara Case, (above quoted,) where the phrase "lying in parol, or unattested papers" is employed, the word "parol" is evidently used in its usual meaning, as synonymous with "verbal" or "oral," and not in its broader meaning of "not under seal." The California cases of *De Laurencel v. De Boom*, 48 Cal. 581; *Estate of Shillaber*, 74 Cal. 144, 15 Pac. Rep. 453; and *Estate of Brooks*, 54 Cal. 475,—while in harmony with the principles above stated,—are not directly to the point involved in the case at bar. Our conclusion is that the court below correctly decided that Francis Berton, deceased, properly distributed the property in France, in accordance with the instructions given him by the testatrix when the will was made, and which instructions he, at that time, agreed to carry out. Of course, the case must be distinguished from one where a testator,

intending to give certain property directly to a certain person, for that person's sole benefit, fails to designate in the will either the property or the person. In such a case no question of trust could arise. These views make it unnecessary to determine the other two points made by respondent: (1) That the order for the property in France, given

by the testatrix to Berton at the time the will was made, constituted a transfer of the property *in presenti*; and (2) that the action was barred by the statute of limitations. The judgment and order are affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

In re WEALL.

ANDREWS v. WEALL.

(42 Ch. Div. 674.)

Supreme Court of Judicature. July 12, 13, 20, 1889.

Benjamin Weall, who died in 1868, bequeathed his residuary personal estate, including leaseholds, to John Weall the elder, William Weall the elder, and William Lightfoot, upon trust thereout to raise certain sums, and as to the ultimate residue upon trust to pay the income thereof to Margaret Andrews (therein called Margaret Weall) during her life and after her death upon the trusts therein mentioned. And the testator devised the residue of his real estate to the same trustees upon trust (subject to certain payments) to pay the residue of the rents and profits to Margaret Andrews during her life, and after her decease upon the trusts therein mentioned. William Weall the elder died in 1874, and John Weall the elder died in 1879; and the defendants William Weall and John Weall were appointed trustees in their places. The defendants William Weall and John Weall and William Lightfoot for several years prior to 1884 employed Sydney P. Weall as solicitor to the estate and to collect the rents, allowing him a commission of 5 per cent. on the rents. They also paid, or allowed him to retain out of the rents, certain sums of money for costs, part of which, as Margaret Andrews alleged, and as the court held on the evidence were unnecessary, and part ought to have been charged to corpus and not to income. William Lightfoot died in 1886.

Margaret Andrews brought this action against the defendants William Weall and John Weall and against the executors of W. Lightfoot claiming that the defendants William Weall and John Weall and the estate of William Lightfoot were jointly and severally liable to make good to her the losses she had incurred as aforesaid; and claiming all necessary accounts as to the estate of the testator and the costs of the action.

The principal defense was that the plaintiff was aware of and assented to what was done, and that some of the costs were incurred by her desire.

This was the trial of the action.

Warmington, Q. C., and MacSwinney, for plaintiff. Barber, Q. C., and Bardswell, for defendants.

Soames, Edwards & Jones, for plaintiff. E. W. Reeves, for defendant Sedguirck & Co.

KEKWICH, J. The only point argued on the further consideration of the case and now requiring decision is by whom the costs of the action are to be borne. The short result of the proceedings is that none of the costs which are mentioned in the statement of claim and which gave rise to the litigation

are payable out of income as distinguished from corpus, and that, almost precisely to the extent contended for by the plaintiff, they are not chargeable against the trust estate at all. Therefore, speaking generally, the plaintiff has succeeded, and the defendants, the present trustees and representatives of a deceased trustee, have failed in the action, and the questions occur, why is not the plaintiff entitled to her costs, and why should the defendants not be held liable to pay them?

On behalf of the defendants it was argued by Mr. Barber with his accustomed force that they had been proved to be in the wrong only as regards matters of account, and that trustees do not pay costs occasioned by errors in accounts, and, indeed, are allowed them out of the trust estate unless misconduct has been proved; and he relied on the cases of *Turner v. Hancock*, 20 Ch. Div. 303, and *Stott v. Milne*, 25 Ch. Div. 710. Those cases, of course, are binding on me and must be followed; but I venture to add that in my judgment they express in apt language what has ever been the rule of the court. They express what is termed the contract between trustee and cestui que trust, and also that tenderness which the court is anxious to exhibit towards trustees honestly exercising discretion in discharge of their duties, often difficult and still more often thankless.

This, however, does not dispose of the case before me. There is another and somewhat different question which must all the more be considered because, as pointed out by Mr. Warmington in reply, this is not really an action for administration of a trust, but it was commenced and brought to trial for the purpose of challenging the claim of the trustees to charge particular items of expenditure against the trust estate.

Consider for a moment the position of that special agent called a trustee as regards the employment of subagents. He certainly has the right to appoint them, if and so far as the work of the trust reasonably requires; for instance, he may appoint a broker to make or realize investments, or a solicitor to do legal business, and the power of employment involves that of remuneration at the cost of the trust estate. The limit of the power of employment is, as pointed out in the well-known case of *Speight v. Gaunt*, 22 Ch. Div. 727, 9 App. Cas. 1, reasonableness, and whether there happens to be a standard to which appeal can be made by taxation or otherwise or not, reasonableness must also, I think, be the limit of the power of remuneration. A trustee is bound to exercise discretion in the choice of his agents, but so long as he selects persons properly qualified he cannot be made responsible for their intelligence or their honesty. He does not in any sense guaranty the performance of their duties. It does not, however, follow that he can intrust his agents with any duties which they are willing to undertake, or pay them or agree to pay them any remuneration which

they see fit to demand. The trustee must consider these matters for himself, and the court would be disposed to support any conclusion at which he arrives, however erroneous, provided it really is his conclusion,—that is, the outcome of such consideration as might reasonably be expected to be given to a like matter by a man of ordinary prudence guided by such rules and arguments as generally guide such a man in his own affairs. If trustees fail to exercise their discretion, or purporting to exercise it do so in such a manner that the court is bound to infer that they have not done so honestly, their costs of any proceedings challenging their accounts are taken out of the rules laid down in *Turner v. Hancock*, 20 Ch. Div. 303, and *Stott v. Milne*, 25 Ch. Div. 710; and the court is at liberty, and under certain circumstances may be bound, for the protection of cestuis que trustent, to disallow the trustees' costs, or even make them pay those of others.

One other general remark before applying these principles to the particular case. Trustees deserve and receive the upmost consideration at the hands of the court. They gratuitously undertake duties for the benefit of others, and as regards costs and otherwise they are entitled to generous treatment. But cestuis que trustent also have their rights,—their claim to consideration. The trust property is theirs, managed for their benefit, and on the trial of a question between them and their trustees, by whom costs are to be borne, they may fairly require something more to be proved than absence of dishonesty. They must not complain of mistakes or errors in judgment, but reasonable prudence is not too much for them to require, and by reasonable prudence I mean that which is defined in the judgment in the case of *Speight v. Gaunt*, 22 Ch. Div. 727, 9 App. Cas. 1, already mentioned.

I have intended throughout the above remarks to follow the principles of that case and of subsequent cases commenting on it. A decision of the house of lords requires no sanction, but the language used by other judges in adopting and expounding that particular decision has assisted to make it a most instructive and useful statement of the extent and limit of trustees' authority and consequent liability. Now, to apply these principles to the case in hand. Of the three trustees of Benjamin Weall's will in office during the period of the transactions to which this litigation relates John Weall was undoubtedly the foremost. He was the acting trustee, and by him William Weall, who, as far as I can see, did nothing, was content to be guided. William Lightfoot, the third trustee (now dead), also did little, but he had views of his own, which, according to the correspondence, he asserted with some vigor. They were peculiar views and open to criticism, but he has not had an opportunity of explaining himself, and I therefore refrain from further comment. Suffice it to

say that, as regards the particular matter which gave rise to this action, he certainly did not differ from his colleague John Weall, in the sense of urging the adoption of a course more agreeable to the plaintiff's requirements. These trustees had employed as their solicitor for trust purposes Mr. Sydney F. Weall, and, besides giving him ordinary legal business, they had allowed him to receive the rents of the trust estate and to retain a commission of 5 per cent. for his trouble. This does not commend itself to me, but the plaintiff's claim to be reimbursed this commission was abandoned at the trial, and although it was stipulated that the proper influence, whatever that might be, on the subject of costs should not thereby be lost, yet, not having had an opportunity of fully discussing the matter, I prefer to lay it aside. Observe, however, that this receipt of rents has really been the moving cause of the litigation, for it is clear that, if Sydney F. Weall had not had the means of paying himself the charges objected to, he would never have been paid at all, and this action would not have been necessary. Mr. Sydney F. Weall, without instructions or any sufficient reason, prepared an abstract of the title to the testator's residuary estate, and charged for it nearly £100. To this charge the plaintiff objected. Having read through the correspondence, the position taken by her is plain, as is also the manner in which she was treated by the trustees. She from first to last objected to the charge on principle, and asserted that it must be wholly disallowed. They, on the other hand, never went further than a suggestion that the bill should be taxed, and though perhaps taxation might have solved the difficulty, it would have been one under special order and not such as was suggested or was likely to be assented to by the solicitor. It is due to the defendant John Weall to say that he knew and admitted that the charge was altogether wrong, and my conclusion from the correspondence, without further explanation, is that with but little encouragement he would have taken a bolder course than, unfortunately for himself and his colleagues, he in fact did. I again call attention to the fact that Sydney F. Weall's receipt of rents had enabled him to pay himself, and this placed the trustees in a position of great difficulty.

Failing to obtain redress, the plaintiff commenced this action, and, passing over the statement of claim (in which the facts are stated plainly and with due moderation), I must say a word on the defense. The trustees had claimed to charge the particular costs already mentioned against the plaintiff's income to the exoneration of the corpus of the trust estate. For this there was no justification, but they pleaded the plaintiff's wish to that effect, and that she had acquiesced in their dealings with the income. At the trial they were forced to admit this view to be erroneous, and to account to the plaintiff for

income accordingly. They further pleaded that the particular costs had been incurred in compliance with the plaintiff's express desire, of which they were unable to tender any evidence. And, the plaintiff alleging that none of the costs were chargeable against income, but that some were chargeable against corpus, and the rest not chargeable against the trust estate at all, the trustees justified all the costs, including those admitted by John Weall to have been improperly incurred, as properly chargeable against corpus. This question has been investigated in a most complete and satisfactory manner, with the result already noticed. It has been determined that out of £175. 4s. 8d., the total amount of costs, £84. 7s. 8d., or less than 50 per cent., is properly chargeable against corpus, and that, as regards the sum of £90. 17s., there is no charge whatever, or, in other words, that sum has been improperly paid to or allowed to be retained by the solicitor. I am not sure how far the conclusion from this ought to be affected by any offer made on behalf of the plaintiff, but it is worthy of notice that an offer was made which would have given almost exactly this result without the pain and expense of litigation. Why it was declined I do not understand. It would, I think, be an

unwarranted departure from the principles which I have endeavored to expound not to make the trustees pay the costs which have been occasioned by their disregard of those principles and their unjustifiable defense. To accede to the argument of counsel for the trustees that I ought not in any event to do more than deprive them of their costs would be to cast on the trust estate an undue burden by reason of litigation which is the direct consequence of the trustees' default. It is right to add that, having gone carefully through the pleadings and the other papers to see whether I could relieve them of any part of the costs as being in respect of matters capable of being brought under the general rules in favor of trustees, I regret to say that I can find no reason for distinction. The trustees seem to me to have been wholly wrong from first to last.

The form of order may require consideration, but, as regards the only point argued, my judgment is that the defendants, the trustees, and the representatives of the deceased trustee must pay the costs of the action, including the costs of the remaindermen who were added as defendants in order to try the liability of the corpus on which the trustees insisted.

HUN v. CARY.

(82 N. Y. 65.)

Court of Appeals of New York. 1880.

E. Ellery Anderson, for appellants. Francis C. Barlow, for respondent.

EARL, J. This action was brought by the receiver of the Central Savings Bank of the city of New York against the defendants, who were trustees of the bank, to recover damages which, it is alleged, they caused the bank by their misconduct as such trustees.

The first question to be considered is the measure of fidelity, care and diligence which such trustees owe to such a bank and its depositors. The relation existing between the corporation and its trustees is mainly that of principal and agent, and the relation between the trustees and the depositors is similar to that of trustee and cestui que trust. The trustees are bound to observe the limits placed upon their powers in the charter, and if they transcend such limits and cause damage, they incur liability. If they act fraudulently or do a willful wrong, it is not doubted that they may be held for all the damage they cause to the bank or its depositors. But if they act in good faith within the limits of powers conferred, using proper prudence and diligence, they are not responsible for mere mistakes or errors of judgment. That the trustees of such corporations are bound to use some diligence in the discharge of their duties cannot be disputed. All the authorities hold so. What degree of care and diligence are they bound to exercise? Not the highest degree, not such as a very vigilant or extremely careful person would exercise. If such were required, it would be difficult to find trustees who would incur the responsibility of such trust positions. It would not be proper to answer the question by saying the lowest degree. Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects and has the right to expect that the trustees or directors who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence, and it is a gross breach of duty—*crassa negligentia*—not to bestow them.

It is impossible to give the measure of culpable negligence for all cases, as the degree of care required depends upon the subjects to which it is to be applied. *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278. What would be slight neglect in the care of a quantity of iron might be gross neglect in the care of a jewel. What would be slight neglect in the care exercised in the affairs of a turnpike corporation or even of a manufacturing corporation, might be gross neglect in the care exercised in the management of a savings bank intrusted with the savings of a multitude of poor people, depending for its life upon credit and liable to be wrecked by the breath of suspicion. There is a classification of negligence to be found in the books, not always of practical value and yet sometimes serviceable, into slight negligence, gross negligence, and that degree of negligence intermediate the two, attributed to the absence of ordinary care; and the claim on behalf of these trustees is that they can only be held responsible in this action in consequence of gross negligence, according to this classification. If gross negligence be taken according to its ordinary meaning—as something nearly approaching fraud or bad faith—I cannot yield to this claim; and if there are any authorities upholding the claim, I emphatically dissent from them.

It seems to me that it would be a monstrous proposition to hold that trustees, intrusted with the management of the property, interests and business of other people who divest themselves of the management and confide in them, are bound to give only slight care to the duties of their trust, and are liable only in case of gross inattention and negligence; and I have found no authority fully upholding such a proposition. It is true that authorities are found which hold that trustees are liable only for *crassa negligentia*, which literally means gross negligence; but that phrase has been defined to mean the absence of ordinary care and diligence adequate to the particular case. In *Scott v. De Peyster*, 1 Edw. 513, 543—a case much cited—the learned vice-chancellor said: "I think the question in all such cases should and must necessarily be, whether they (directors) have omitted that care which men of common prudence take of their own concerns. To require more, would be adopting too rigid a rule and rendering them liable for slight neglect; while to require less, would be relaxing too much the obligation which binds them to vigilance and attention in regard to the interests of those confided to their care, and expose them to liability for gross neglect only—which is very little short of fraud itself." In *Spering's Appeal*, 71 Pa. St. 11, Judge Sharswood said: "They [directors] can only be regarded as mandataries—persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more." In *Hodges v. New England Screw Co.*, 1 R.

I. 312, Jenckes, J., said: "The sole question is, whether the directors have or have not bestowed proper diligence. They are liable only for ordinary care; such care as prudent men take in their own affairs." And in the same case, Ames, J., said: "They should not therefore be liable for innocent mistakes, unintentional negligence, honest errors of judgment, but only for willful fraud or neglect, and want of ordinary knowledge and care." The same case came again under consideration in 3 R. I. 9, and Green, C. J., said: "We think a board of directors, acting in good faith and with reasonable care and diligence, who nevertheless fall into a mistake, either as to law or fact, are not liable for the consequences of such mistake." In the case of *Liquidators of Western Bank v. Douglas*, 11 Sess. Cas. (Scot.) 112, it is said: "Whatever the duties (of directors) are, they must be discharged with fidelity and conscience, and with ordinary and reasonable care. It is not necessary that I should attempt to define where excusable remissness ends and gross negligence begins. That must depend to a large extent on the circumstances. It is enough to say that gross negligence in the performance of such a duty, the want of reasonable and ordinary fidelity and care, will impose liability for loss thereby occasioned." In *Charitable Corp. v. Sutton*, 2 Atk. 405, Lord Chancellor Hardwicke said, that a person who accepted the office of director of a corporation "is obliged to execute it with fidelity and reasonable diligence," although he acts without compensation. In *Litchfield v. White*, 3 Sandf. 545, Sandford, J., said: "In general a trustee is bound to manage and employ the trust property for the benefit of the cestui que trust with the care and diligence of a provident owner. Consequently he is liable for every loss sustained by reason of his negligence, want of caution or mistake, as well as positive misconduct."

In *Spering's Appeal*, Judge Sharswood said that directors "are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they were honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body." As I understand this language, I cannot assent to it as properly defining to any extent the nature of a director's responsibility. Like a mandatary, to whom he has been likened, he is bound not only to exercise proper care and diligence, but ordinary skill and judgment. As he is bound to exercise ordinary skill and judgment, he cannot set up that he did not possess them. When damage is caused by his want of judgment, he cannot excuse himself by alleging his gross ignorance. One who voluntarily takes the position of director, and invites confidence in that relation, undertakes, like a mandatary, with those whom he represents or for whom he acts, that he possesses at least ordinary knowledge and skill, and that he will bring them to bear in the

discharge of his duties. *Story, Ballm. § 182.* Such is the rule applicable to public officers, to professional men and to mechanics, and such is the rule which must be applicable to every person who undertakes to act for another in a situation or employment requiring skill and knowledge; and it matters not that the service is to be rendered gratuitously. These defendants voluntarily took the position of trustees of the bank. They invited depositors to confide to them their savings, and to intrust the safe-keeping and management of them to their skill and prudence. They undertook not only that they would discharge their duties with proper care, but that they would exercise the ordinary skill and judgment requisite for the discharge of their delicate trust.

Enough has now been said to show what measure of diligence, skill, and prudence the law exacts from managers and directors of corporations; and we are now prepared to examine the facts of this case, for the purpose of seeing if these trustees fell short of this measure in the matters alleged in the complaint.

This bank was incorporated by the act chapter 467 of the Laws of 1867, and it commenced business in the spring of that year, in a hired building on the east side of Third avenue, in the city of New York. It remained there for several years, and then removed to the west side of the avenue, between Forty-Fifth and Forty-Sixth streets, where it occupied hired rooms until near the time of its failure in the fall of 1875. During the whole time the deposits averaged only about \$70,000. In 1867, the income of the bank was \$942.12, and the expenses, including amounts paid for safe, fixtures, charter, current expenses and interest to depositors, were \$5,571.34. In 1868, the income was \$5,471.43, and the expenses including interest to depositors, \$5,719.43. In 1869, the income was \$3,918.27, and the expenses and interest paid, \$5,346.05. In 1870 the income was \$5,784.09, and expenses and interest, \$7,040.22. In 1871 the income was \$13,551.14; which included a bonus of \$4,000, or \$6,000 obtained upon the purchase of a mortgage of \$40,000, which mortgage was again sold in 1874 at a discount of \$2,000, and the expenses, including interest paid, were \$9,124.05. In 1872 the income was \$5,100.51, and the expenses, including interest paid, were \$7,212.49. Down to the 1st day of January, 1873, therefore, the total expenses, including interest paid, were \$5,046 more than the income. To this sum should be added \$2,000, deducted on the sale of the large mortgage in 1874, which was purchased at the large discount in 1871, as above mentioned, and yet entered in the assets at its face. From this apparent deficiency should be deducted the value of the safe and furniture of the bank, from which the receiver subsequently realized \$500. At the same date the amount due to over one thousand depositors was about \$70,000, and the

assets of the bank consisted of about \$13,000 in cash and the balance mostly of mortgages upon real estate.

While the bank was in this condition, with a lease of the rooms then occupied by it expiring May 1, 1874, the project of purchasing a lot and erecting a banking-house thereon began to be talked of among the trustees. The only reason put on record in the minutes of the meetings held by the trustees for procuring a new banking-house was to better the financial condition of the bank. In February, 1873, at a meeting of the trustees a committee was appointed "on site for new building;" and in March the committee entered into contract for the purchase of a plot of land, consisting of four lots, on the corner of Forty-Eighth street and Third avenue, for the sum of \$74,500; of which \$1,000 was to be paid down, \$9,000 on the 1st day of May then next, and \$64,000 to be secured by a mortgage, payable on or before May 1, 1875, with interest from May 1, 1873, at seven per cent.; and there was an agreement that payment of the principal sum secured by the mortgage might be extended to May 1, 1877, provided a building should, without unavoidable delay, be erected upon the corner lot, worth not less than \$25,000. This contract was reported by the committee to the trustees, at a meeting held April 7. On the 1st day of May, 1873, the real estate was conveyed and the cash payment was made, and four separate mortgages were executed to secure the balance, one upon each lot. The mortgage upon the lot upon which the bank building was afterward erected was for \$30,500. At the same time the bank became obligated to build upon that lot a building covering its whole front, twenty-five feet, and sixty feet deep, and not less than five stories high, and have the same inclosed by the 1st day of November then next. Upon that lot the bank proceeded, in the spring of 1875, to erect a building covering the whole front, and seventy-six feet deep, and five stories high, at an expense of about \$27,000. And the building was nearly completed when the receiver of the bank was appointed in November of that year. The three lots not needed for the building were disposed of, as we may assume, without any loss, leaving the corner lot used for the building to cost the bank \$29,250; and we may assume that that was then the fair value of the lot. This case may then be treated as if the trustees had purchased the corner lot at \$29,250, and bound themselves to erect thereon a building costing \$27,000. When the receiver was appointed that lot and building, and other assets which produced less than \$1,000, constituted the whole property of the bank; and subsequently the lot and building were swept away by a mortgage foreclosure, and this action was brought to recover the damages caused to the bank by the alleged improper investment of its funds, as above stated, in the lot upon which the building was erected.

At the time of the purchase of the lot the bank was substantially insolvent. If it had gone into liquidation, its assets would have fallen several thousand dollars short of discharging its liabilities, and this state of things was known to the trustees. It had been in existence about six years, doing a losing business. The amount of its deposits, which its managers had not been able to increase, shows that the enterprise was an abortion from the beginning, either because it lacked public confidence, or was not needed in the place where it was located. It had changed its location once without any benefit. It had on hand but about \$13,000 in cash, of which \$10,000 were taken to make the first payments. The balance of its assets was mostly in mortgages not readily convertible. One was a mortgage for \$40,000, which had been purchased at a large discount, and we may infer that it was not very salable, as the trustees resolved to sell it as early as May, 1873, and in August, 1873, authorized it to be sold at a discount of not more than \$2,500, and yet it was not sold until 1874. In this condition of things the trustees made the purchase complained of, under an obligation to place on the lot an expensive banking-house. Whether under the circumstances the purchase was such as the trustees, in the exercise of ordinary prudence, skill and care, could make; or whether the act of purchase was reckless, rash, extravagant, showing a want of ordinary prudence, skill and care, were questions for the jury. It is not disputed that, under the charter of this bank, as amended in 1868 (chapter 294), it had the power to purchase a lot for a banking-house "requisite for the transaction of its business." That was a power, like every other possessed by the bank, to be exercised with prudence and care. Situated as this moribund institution was, was it a prudent and reasonable thing to do, to invest nearly half of all the trust funds in this expensive lot, with an obligation to take most of the balance to erect thereon an extravagant building? The trustees were urged on by no real necessity. They had hired rooms where they could have remained; or if those rooms were not adequate for their small business, we may assume that others could have been hired. They put forward the claim upon the trial that the rooms they then occupied were not safe. That may have been a good reason for making them more secure, or for getting other rooms, but not for the extravagance in which they indulged. It is inferable however that the principal motive which influenced the trustees to make the change of location was to improve the financial condition of the bank by increasing its deposits. Their project was to buy this corner lot and erect thereon an imposing edifice, to inspire confidence, attract attention, and thus draw deposits. It was intended as a sort of advertisement of the bank, a very expensive

one indeed. Savings banks are not organized as business enterprises. They have no stockholders, and are not to engage in speculations or money-making in a business sense. They are simply to take the deposits, usually small, which are offered, aggregate them, and keep and invest them safely, paying such interest to the depositors as is thus made, after deducting expenses, and paying the principal upon demand. It is not legitimate for the trustees of such a bank to seek deposits at the expense of present depositors. It is their business to take deposits when offered. It was not proper for these trustees—or at least the jury may have found that it was not—to take the money then on deposit and invest in a banking-house, merely for the purpose of drawing other deposits. In making this investment the interests of the depositors whose money was taken, can scarcely be said to have been consulted.

It matters not that the trustees purchased this lot for no more than a fair value, and that the loss was occasioned by the subsequent general decline in the value of real estate. They had no right to expose their bank to the hazard of such a decline. If the purchase was an improper one when made, it matters not that the loss came from the unavoidable fall in the value of the real estate purchased. The jury may have found that it was grossly careless for the trustees to lock up the funds in their charge in such an investment, where they could not be reached in any emergency which was likely to arise in the affairs of the crippled bank.

We conclude therefore that the evidence justified a finding by the jury that this was not a case of mere error or mistake of judgment on the part of the trustees, but that it was a case of improvidence, of reckless, unreasonable extravagance, in which the trustees failed in that measure of reasonable prudence, care and skill which the law requires.

This case was moved for trial at a circuit court, and before the jury was impaneled the defendants claimed that the case was improperly in the circuit, and that it should be tried at special term; and the court ordered that the trial proceed, and at the close of the evidence the defendants moved that the complaint be dismissed, on the ground that the action was not a proper one to be tried before a jury, and should be tried before the equity branch of the court. The motion was denied, and these rulings are now alleged for error. The receiver in this case represents

the bank, and may maintain any action the bank could have maintained. The trustees may be treated as agents of the bank. In *re German Min. Co.*, 27 Eng. Law & Eq. 158; *Belknap v. Davis*, 19 Me. 455; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Butts v. Wood*, 38 Barb. 181; *Austen v. Daniels*, 4 Denio, 299; *Ohio & M. R. Co. v. McPherson*, 35 Mo. 13. And for any misfeasance or non-feasance, causing damage to the bank, they were responsible to it, upon the same principle that any agent is for like cause responsible to his principal. It has never been doubted that a principal may sue his agent in an action at law for any damages caused by culpable misfeasance or non-feasance in the business of the agency. The only relief claimed in this complaint was a money judgment, and we think it was properly tried as an action at law. No equitable rights were to be adjusted, and there was no occasion to appeal to an equitable forum.

Treating this therefore as an action at law, it follows also that the objection taken that other trustees should have been joined as defendants cannot prevail. In actions *ex delicto* the plaintiff may sue one, some or all of the wrong-doers. *Liquidators of Western Bank v. Douglas*, 22 Sess. Cas. (Scot.) 475; *Barb. Parties*, 203.

The defendants Hoffman and Gearty filed petitions for their discharge in bankruptcy after the commencement of this action, and were discharged before judgment, and they alleged such discharge as a defense to the action. The trial judge and the general term held that the discharge furnished no defense, and we are of the same opinion. This claim was purely for unliquidated damages occasioned by a tort. Such a claim was not provable in bankruptcy, and therefore was not discharged. *Rev. St. U. S. (2d Ed.)* §§ 5115, 5119, 5067-5071; *Zinn v. Ritterman*, 2 Abb. Prac. (N. S.) 261; *Kellogg v. Schuyler*, 2 Denio, 73; *Crouch v. Gridley*, 6 Hill, 250; *In re Wiggers*, 2 Biss. 71, Fed. Cas. No. 17,623; *In re Clough*, 2 Ben. 508, Fed. Cas. No. 2,905; *In re Sidle*, 2 N. B. R. 77, Fed. Cas. No. 12,844.

I conclude therefore that the judgment appealed from should be affirmed.

The appeal by the plaintiff from the order of the general term, granting a new trial as to defendant Smith, must, for reasons stated on the argument, be dismissed, with costs.

All concur.

Judgment affirmed, and appeal from order dismissed.

KING v. TALBOT.

(40 N. Y. 76.)¹

Court of Appeals of New York. 1869.

This was an action for an accounting against the defendants, as the surviving executors of the will of the father of the plaintiffs. By the will the executors were directed to invest \$15,000 for each of the plaintiffs, and the executors made these investments in certain railroad bonds and stock, and in some bank stock. The value of these securities having depreciated, the investment was repudiated by the plaintiffs, and this action brought. The further facts appear in the opinion of the court.

Stephen P. Nash, for appellants. George M. Titus, for respondents.

WOODRUFF, J. It is conceded that in England the rule is, and has long been settled, that a trustee, holding funds to invest for the benefit of his cestui que trust, is bound to make such investment in the public debt, for the safety whereof the faith of their government is pledged; or in loans, for which real estate is pledged as security. And that although the terms of the trust commit the investment, in general terms, to the discretion of the trustee, that discretion is controlled by the above rule, and is to be exercised within the very narrow limits, which it prescribes.

As a purely arbitrary rule, resting upon any special policy of that country, or on any peculiarity in its condition, it has no application to this country. It is not of the common law. It had no applicability to the condition of this country, while a colony of Great Britain, and cannot be said to have been incorporated in our law.

So far, and so far only, as it can be said to rest upon fundamental principles of equity, commending themselves to the conscience, and suited to the condition of our affairs, so far it is true, that it has appropriate application and force, as a guide to the administration of a trust here, as well as in England.

I do not therefore deem it material to inquire through the multitude of English cases, and the abundant texts of the law-writers, into the origin of the rule in England, or the date of its early promulgation. Nor in this particular case do I deem it necessary to determine whether it should, by precise analogy, be deemed to prohibit here investments in any other public debt than that of the state of New York.

Neither, in my judgment, are we at liberty, in the decision of this case, to propound any new rule of conduct, by which to judge of the liability of trustees, now subjected to examination. Under trusts heretofore created, the managers thereof per-

formed their duty with the aid of rules for the exercise of their discretion, which were the utterance of equity and good conscience, intelligible to their understanding, and available for their information; otherwise, trusts heretofore existing have been traps and pitfalls to catch the faithful, prudent and diligent trustee, without the power to avoid them.

But it is not true that there is no underlying principle or rule of conduct in the administration of a trust, which calls for obedience. Whether it has been declared by the courts or not, whether it has been enacted in statutes or not, whether it is in familiar recognition in the affairs of life, there appertains to the relation of trustee and cestui que trust, a duty to be faithful, to be diligent, to be prudent in an administration intrusted to the former, in confidence in his fidelity, diligence and prudence.

To this general statement of the duty of trustees, there is no want of promulgation or sanction, nor want of sources of information for their guidance. In the whole history of trusts, in decisions of courts for a century in England, in all the utterances of the courts of this and the other states of this country, and not less in the conscious good sense of all intelligent minds, its recognition is uniform.

The real inquiry therefore is, in my judgment, in the case before us, and in all like cases: Has the administration of the trust, created by the will of Charles W. King, for the benefit of the plaintiff, been governed by fidelity, diligence and prudence? If it has, the defendants are not liable for losses which nevertheless have happened.

This however aids but little in the examination of the defendants' conduct, unless the terms of definition are made more precise. What are fidelity, diligence and discretion? and what is the measure thereof, which trustees are bound to possess and exercise?

It is hardly necessary to say that fidelity imports sincere and single intention to administer the trust for the best interest of the parties beneficially interested, and according to the duty which the trust imposes. And this is but a paraphrase of "good faith."

The meaning and measure of the required prudence and diligence has been repeatedly discussed, and with a difference of opinion. In extreme rigor, it has sometimes been said that they must be such and as great as that possessed and exercised by the court of chancery itself. And again, it has been said that they are to be such as the trustee exercises in the conduct of his own affairs, of like nature, and between these is the declaration that they are to be the highest prudence and vigilance, or they will not exonerate.

My own judgment, after an examination of the subject, and bearing in mind the nature of the office, its importance and the

¹ Irrelevant parts omitted.

considerations which alone induce men of suitable experience, capacity and responsibility to accept its usually thankless burden, is that the just and true rule is that the trustee is bound to employ such diligence and such prudence in the care and management as in general prudent men of discretion and intelligence in such matters employ in their own like affairs.

This necessarily excludes all speculation, all investments for an uncertain and doubtful rise in the market, and of course every thing that does not take into view the nature and object of the trust, and the consequences of a mistake in the selection of the investment to be made.

It therefore does not follow that because prudent men may, and often do, conduct their own affairs with the hope of growing rich, and therein take the hazard of adventures which they deem hopeful, trustees may do the same; the preservation of the fund and the procurement of a just income therefrom are primary objects of the creation of the trust itself, and are to be primarily regarded.

If it be said that trustees are selected by the testator or donor of the trust, from his own knowledge of their capacity, and without any expectation that they will do more than, in good faith, exercise the discretion and judgment they possess, the answer is: First, the rule properly assumes the capacity of trustees to exercise the prudence and diligence of prudent men in general; and second, it imposes the duty to observe and know or learn what such prudence dictates in the matter in hand.

And once more the terms of the trust, and its particular object and purpose, are in no case to be lost sight of in its administration.

Lewin, in his treatise on the law of Trusts, etc., (page 332), states, as the result of the several cases, and as the true rule, that "a trustee is bound to exert precisely the same care and solicitude in behalf of his cestui que trust as he would do for himself; but greater measure than this a court of equity will not exact." In general this is true; but if it imports that if he do what men of ordinary prudence would not do, in their own affairs, of a like nature, he will be excused, on showing that he dealt with his own property with like want of discretion, it cannot be sustained as a safe or just rule toward cestuis que trust; nor is it required by reasonable indulgence to the trustee; it would be laying the duty to be prudent out of view entirely, and I cannot think the writer intended it should be so understood.

The Massachusetts cases (*Harvard College v. Amory*, 9 Pick. 446; *Lovell v. Minot*, 20 Pick. 116) cited by the counsel for the defendants, are in better conformity with the rule as I have stated it.

To apply these general views to the case before us, and with the deductions which necessarily flow from their recognition: The

testator gave to each of his children \$15,000, the interest on the same, so far as required, to be applied to their maintenance and education, and the principal, with any accumulations thereon, to be paid to them severally on their majority; appointed the defendant, Talbot, and his partner, Mr. Olyphant, executors, "intrusting to their discretion the settlement of my affairs and the investment of my estate for the benefit of my heirs."

If I am correct in my views of the duty of trustees, this last clause neither added to, nor in any wise affected the duty or responsibility of these executors; without it they were clothed with discretion; with it their discretion was to be exercised with all the care and prudence belonging to their trust relation to the beneficiaries. Such is the distinct doctrine of the cases very largely cited by the counsel for the parties, and is, I think, the necessary conclusion from the just rule of duty I have stated.

What then was the office of the trustees, as indicated by the terms and nature of the trust? If its literal reading be followed, it directed that "\$15,000" in money be placed at "interest." The nature of the trust, according to the manifest intent of the testator, required that in order to the maintenance and support of infant children, whose need, in that regard, would be constant and unremitting, that interest should flow in with regularity and without exposure to the uncertainties or fluctuations of adventures of any kind. And then the fund should continue, with any excess of such interest accumulated for their benefit, so as to be delivered at the expiration of their minority.

Palpably then the first and obvious duty was to place that \$15,000 in a state of security; second, to see to it that it was productive of interest; and third, so to keep the fund that it should always be subject to future recall for the benefit of the cestui que trust.

I do not attach controlling importance to the word "interest" used by the testator, but I do regard it as some guide to the trustees, as an expression of the testator, that he did not contemplate any adventure with the fund, with a view to profits as such.

But apart from the inference from the use of that word, I think it should be said, that whenever money is held upon a trust of this description, it is not according to its nature, nor within any just idea of prudence to place the principal of the fund in a condition in which it is necessarily exposed to the hazard of loss or gain, according to the success or failure of the enterprise in which it is embarked, and in which by the very terms of the investment, the principal is not to be returned at all.

It is not denied that the employment of the fund, as capital in trade, would be a clear departure from the duty of trustees. If it cannot be so employed under the management of a copartnership, I see no reason

for saying that the incorporation of the partners tends, in any degree, to justify it.

The moment the fund is invested in bank, or insurance, or railroad stock, it has left the control of the trustees; its safety and the hazard, or risk of loss, is no longer dependent upon their skill, care or discretion in its custody or management, and the terms of the investment do not contemplate that it ever will be returned to the trustees.

If it be said that at any time the trustees may sell the stock (which is but another name for their interest in the property and business of the corporation), and so repossess themselves of the original capital, I reply that is necessarily contingent and uncertain; and so the fund has been voluntarily placed in a condition of uncertainty, dependent upon two contingencies: First, the practicability of making the business profitable; and, second, the judgment, skill and fidelity of those who have the management of it for that purpose.

If it be said that men of the highest prudence do in fact invest their funds in such stocks, becoming subscribers and contributors thereto in the very formation thereof, and before the business is developed, and in the exercise of their judgment on the probability of its safety and productiveness, the answer is, so do just such men, looking to the hope of profitable returns, invest money in trade and adventures of various kinds. In their private affairs they do, and they lawfully may put their principal funds at hazard; in the affairs of a trust they may not. The very nature of their relation to it forbids it.

If it be said that this reasoning assumes that it is certainly practicable so to keep the fund that it shall be productive, and yet safe against any contingency of loss; whereas in fact if loaned upon bond and mortgage, or upon securities of any description, losses from insolvency and depreciation may and often do happen, notwithstanding due and proper care and caution is observed in their selection. Not at all. It assumes and insists that the trustees shall not place the fund where its safety and due return to their hands will depend upon the success of the business in which it is adventured, or the skill and honesty of other parties intrusted with its conduct; and it is in the selection of the securities for its safety and actual return that there is scope for discretion and prudence, which if exercised in good faith, constitute due performance of the duty of the trustees.

My conclusion is therefore that the defendants were not at liberty to invest the fund bequeathed to the plaintiff in stock of the Delaware and Hudson Canal Company; of the New York and Harlem Railroad Company; of the New York and New Haven Railroad Company; of the Bank of Commerce; or of the Saratoga and Washington Railroad Company; and that the plaintiff

was not bound to accept these stocks as and for his legacy, or the investment thereof.

In regard to the bonds of the Hudson River Railroad Company and of the Delaware and Hudson Canal Company, it appears by schedule B, given in evidence, that the former were mortgage bonds; but what was the extent or sufficiency of the security afforded by such mortgage, or what property was embraced in it does not appear, nor does it appear whether there was any security whatever for the payment of the canal company's bond.

It is not necessary for the decision of this case; and I am not prepared to say that an investment in the bonds of a railroad or other corporation, the payment whereof is secured by a mortgage upon real estate, is not suitable and proper under any circumstances.

If the real estate is ample to insure the payment of the bonds, I do not at present perceive that it is necessarily to be regarded as inferior to the bond of an individual secured by mortgage; it would of course be open to all the inquiries which prudence would suggest if the bond and mortgage were that of an individual. The nature, the location and the sufficiency of the security and the terms of the mortgage, and its availability for the protection and ultimate realization of the fund, must of course enter into the consideration.

But it is not necessary to pursue that subject. The plaintiff in his complaint rejects the entire investment. The court below held that it was equitable that the plaintiff should be held to receive the whole or none of the stocks and bonds, and to that ruling neither the plaintiff nor the defendant have excepted; and therefore the question whether the judgment below was correct in that respect is not before us.

It is proper however to say that I do not clearly apprehend the propriety of that ruling, unless it be on the ground that the plaintiff in his complaint did so elect.

The rule is perfectly well settled that a cestui que trust is at liberty to elect to approve an unauthorized investment and enjoy its profits, or to reject it at his option; and I perceive no reason for saying that where the trustee has divided the fund into parts and made separate investments, the cestui que trust is not at liberty, on equitable as well as legal grounds, to approve and adopt such as he thinks it for his interest to approve. The money invested is his money; and in respect to each and every dollar, it seems to me he has an unqualified right to follow it, and claim the fruits of its investment, and that the trustee cannot deny it. The fact that the trustee has made other investments of other parts of the fund, which the cestui que trust is not bound to approve, and disaffirms, cannot, I think, affect the power. For example, suppose in the present case the cestui que trust, on de-

livery to him of all the securities and bonds in which his legacy had appeared invested, had declared: Although these investments are improperly made, not in accordance with the intent of the testator, nor in the due performance of your duty, I waive all objection on that account, except as to the stock of the	Saratoga and Washington Railroad Company. That I reject and return to you. Is it doubtful that his position must be sustained? The result is, that the main features of the judgment herein must be affirmed. * * * * *
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LAMAR v. MICOU.

(5 Sup. Ct. 221, 112 U. S. 452.)

Supreme Court of the United States. Dec. 1, 1884.

Appeal from the circuit court of the United States for the Southern district of New York.

E. N. Dickerson, for appellant. S. P. Nash and Geo. C. Holt, for appellee.

GRAY, J. This is an appeal by the executor of a guardian from a decree against him upon a bill in equity filed by the administratrix of his ward. The original bill, filed on July 1, 1875, by Ann C. Sims, a citizen of Alabama, as administratrix of Martha M. Sims, in the supreme court of the state of New York, alleged that on December 11, 1855, the defendant's testator, Gazaway B. Lamar, was duly appointed, by the surrogate of the county of Richmond, in that state, guardian of the person and estate of Martha M. Sims, an infant of six years of age, then a resident of that county, and gave bond as such, and took into his possession and control all her property, being more than \$5,000; that on October 5, 1874, he died in New York, and on November 10, 1874, his will was there admitted to probate, and the defendant, a citizen of New York, was appointed his executor; and that he and his executor had neglected to render any account of his guardianship to the surrogate of Richmond county, or to any court having cognizance thereof, or to the ward or her administratrix; and prayed for an account, and for judgment for the amount found to be due.

The defendant removed the case into the circuit court of the United States for the Southern district of New York, and there filed an answer, averring that in 1855, when Lamar was appointed guardian of Martha M. Sims, he was a citizen of Georgia, and she was a citizen of Alabama, having a temporary residence in the city of New York; that in the spring of 1861 the states of Georgia and Alabama declared themselves to have seceded from the United States, and to constitute members of the so-called Confederate states of America, whereupon a state of war arose between the United States and the Confederate states, which continued to be flagrant for more than four years after; that Lamar and Martha M. Sims were in the spring of 1861 citizens and residents of the states of Georgia and Alabama, respectively, and citizens of the Confederate states, and were engaged in aiding and abetting the state of Georgia and the so-called Confederate states in their rebellion against the United States, and she continued to aid and abet until the time of her death, and he continued to aid and abet till January, 1865; that the United States,

by various public acts, declared all his and her property, of any kind, to be liable to seizure and confiscation by the United States, and they both were, by the various acts of congress of the United States, outlawed and debarred of any access to any court of the United States, whereby it was impossible for Lamar to appear in the surrogate's court of Richmond county to settle and close his accounts there, and to be discharged from his liability as guardian, in consequence whereof the relation of guardian and ward, so far as it depended upon the orders of that court, ceased and determined; that, for the purpose of saving the ward's property from seizure and confiscation by the United States, Lamar, at the request of the ward and of her natural guardians, all citizens of the state of Alabama, withdrew the funds belonging to her from the city of New York, and invested them for her benefit and account in such securities as by the laws of the states of Alabama and Georgia and of the Confederate states he might lawfully do; that in 1864, upon the death of Martha M. Sims, all her property vested in her sister, Ann C. Sims, as her next of kin, and any accounting of Lamar for that property was to be made to her; that on March 15, 1867, at the written request of Ann C. Sims and of her natural guardians, Benjamin H. Micou was appointed her legal guardian by the probate court of Montgomery county, in the state of Alabama, which was at that time her residence, and Lamar thereupon accounted for and paid over all property with which he was chargeable as guardian of Martha M. Sims, to Micou as her guardian, and received from him a full release therefor; and that Ann C. Sims, when she became of age, ratified and confirmed the same. To that answer the plaintiff filed a general replication.

The case was set down for hearing in the circuit court upon the bill, answer and replication, and a statement of facts agreed by the parties, in substance as follows: On November 23, 1850, William W. Sims, a citizen of Georgia, died at Savannah, in that state, leaving a widow, who was appointed his administratrix, and two infant daughters, Martha M. Sims, born at Savannah on September 8, 1849, and Ann C. Sims, born in Florida on June 1, 1851. In 1853 the widow married the Rev. Richard M. Abercrombie, of Clifton, in the county of Richmond and state of New York. On December 11, 1855, on the petition of Mrs. Abercrombie, Gazaway B. Lamar, an uncle of Mr. Sims, and then residing at Brooklyn, in the state of New York, was appointed by the surrogate of Richmond county guardian of the person and estate of each child "until she shall arrive at the age of fourteen years, and until another guardian shall be appointed," and gave bond to her, with sureties, "to faithfully in all things discharge the

duty of a guardian to the said minor according to law, and render a true and just account of all moneys and other property received by him, and of the application thereof, and of his guardianship in all respects, to any court having cognizance thereof;" and he immediately received from Mrs. Abercrombie in money \$5,166.89 belonging to each ward, and invested part of it, in January and April, 1856, in stock of the Bank of the Republic, at New York, and part of it, in March and July, 1857, in stock of the Bank of Commerce, at Savannah, each of which was then paying, and continued to pay until April, 1861, good dividends annually, the one of 10 and the other of 8 per cent.

In 1856, several months after Lamar's appointment as guardian, Mr. and Mrs. Abercrombie removed from Clifton, in the state of New York, to Hartford, in the state of Connecticut, and there resided till her death, in the spring of 1859. The children lived with Mr. and Mrs. Abercrombie, Lamar as guardian paying Mr. Abercrombie for their board, at Clifton and at Hartford, from the marriage until her death; and were then removed to Augusta, in the state of Georgia, and there lived with their paternal grandmother and her unmarried daughter and only living child, their aunt; Lamar as guardian continuing to pay their board. After 1856 neither of the children ever resided in the state of New York. On January 18, 1860, their aunt was married to Benjamin H. Micou, of Montgomery, in the state of Alabama, and the children and their grandmother thereafter lived with Mr. and Mrs. Micou at Montgomery, and the children were educated and supported at Mr. Micou's expense. From 1855 to 1859 Lamar resided partly in Georgia and partly in New York. In the spring of 1861 he had a temporary residence in the city of New York, and upon the breaking out of the war of the rebellion, and after removing all his own property, left New York, and passed through the lines to Savannah, and there resided, sympathizing with the rebellion, and doing what he could to accomplish its success, until January, 1865, and continued to have his residence in Savannah until 1872 or 1873, when he went to New York again, and afterwards lived there. Mr. and Mrs. Micou also sympathized with the rebellion and desired its success, and each of them, as well as Lamar, failed during the rebellion to bear true allegiance to the United States.

At the time of Lamar's appointment as guardian, 10 shares in the stock of the Mechanics' Bank of Augusta, in the state of Georgia, which had belonged to William W. Sims in his life-time, stood on the books of the bank in the name of Mrs. Abercrombie as his administratrix, of which one-third belonged to her as his widow, and one-third to each of the infants. In January, 1856,

the bank refused a request of Lamar to transfer one-third of that stock to him as guardian of each infant, but afterwards paid to him as guardian, from time to time, two-thirds of the dividends during the life of Mrs. Abercrombie, and all the dividends after her death until 1865. During the period last named, he also received as guardian the dividends on some other bank stock in Savannah, which Mrs. Abercrombie owned, and to which, on her death, her husband became entitled. Certain facts, relied on as showing that he, immediately after his wife's death, made a surrender of her interest in the bank shares to Lamar, as guardian of her children, are not material to the understanding of the decision of this court, but are recapitulated in the opinion of the circuit court. 7 Fed. 180-185. In the winter of 1861-62, Lamar, fearing that the stock in the Bank of the Republic at New York, held by him as guardian, would be confiscated by the United States, had it sold by a friend in New York; the proceeds of the sale, which were about 20 per cent. less than the par value of the stock, invested at New York in guaranteed bonds of the cities of New Orleans, Memphis, and Mobile, and of the East Tennessee & Georgia Railroad Company; and those bonds deposited in a bank in Canada. Lamar from time to time invested the property of his wards, that was within the so-called Confederate states, in whatever seemed to him to be the most secure and safe—some in Confederate state bonds, some in the bonds of the individual states which composed the confederacy, and some in bonds of cities, and of railroad corporations, and stock of banks within those states. On the money of his wards, accruing from dividends on bank stock, and remaining in his hands, he charged himself with interest until the summer of 1862, when, with the advice and aid of Mr. Micou, he invested \$7,000 of such money in bonds of the Confederate states and of the state of Alabama; and in 1863, with the like advice and aid, sold the Alabama bonds for more than he had paid for them, and invested the proceeds also in Confederate states bonds; charged his wards with the money paid, and credited them with the bonds; and placed the bonds in the hands of their grandmother, who gave him a receipt for them and held them till the end of the rebellion, when they, as well as the stock in the banks at Savannah, became worthless.

Martha M. Sims died on November 2, 1864, at the age of 15 years, unmarried and intestate, leaving her sister Ann C. Sims her next of kin. On January 12, 1867, Lamar, in answer to letters of inquiry from Mr. and Mrs. Micou, wrote to Mrs. Micou that he had saved from the wreck of the property of his niece, Ann C. Sims, surviving her sister, three bonds of the city of Memphis, indorsed by the state of Tennessee, one bond of the

city of Mobile, and one bond of the East Tennessee & Georgia Railroad Company, each for \$1,000, and with some coupons past due and uncollected; and suggested that by reason of his age and failing health, and of the embarrassed state of his own affairs, Mr. Micou should be appointed in Alabama guardian in his stead. Upon the receipt of this letter, Mrs. Micou wrote to Lamar, thanking him for the explicit statement of the niece's affairs, and for the care and trouble he had had with her property; and Ann C. Sims, then nearly 16 years old, signed a request, attested by her grandmother and by Mrs. Micou, that her guardianship might be transferred to Mr. Micou, and that he might be appointed her guardian. And on March 15, 1867, he was appointed guardian of her property by the probate court of the county of Montgomery and state of Alabama, according to the laws of that state, and gave bond as such. On May 14, 1867, Lamar sent to Micou complete and correct statements of his guardianship account with each of his wards, as well as all the securities remaining in his hands as guardian of either, and a check payable to Micou as guardian of Ann C. Sims for a balance in money due her; and Micou, as such guardian, signed and sent to Lamar a schedule of and receipt for the property, describing it specifically, by which it appeared that the bonds of the cities of New Orleans and Memphis, and of the East Tennessee & Georgia Railroad Company, were issued, and the Memphis bonds, as well as the railroad bonds, were indorsed by the state of Tennessee, some years before the breaking out of the rebellion. Micou thenceforth continued to act in all respects as the only guardian of Ann C. Sims until she became of age on June 1, 1872.

No objection or complaint was ever made by either of the wards or their relatives against Lamar's transactions or investments as guardian until July 28, 1874, when Micou wrote to Lamar informing him that Ann C. Sims desired a settlement of his accounts, and that he had been advised that no credits could be allowed for the investments in Confederate states bonds, and that Lamar was responsible for the security of the investments in other bonds and bank stock. Lamar was then sick in New York, and died there on October 5, 1874, without having answered the letter. Before the case was heard in the circuit court, Ann C. Sims died, on May 7, 1878, and on June 20, 1878, Mrs. Micou was appointed, in New York, administratrix de bonis non of Martha M. Sims, and as such filed a bill of revivor in this suit. On October 3, 1878, the defendant filed a cross-bill, repeating the allegations of his answer to the original bill, and further averring that Ann C. Sims left a will which had been admitted to probate in Montgomery county, in the state of Alabama, and afterwards in the county and state of New York,

by which she gave all her property to Mrs. Micou, who was her next of kin, and that Mrs. Micou was entitled to receive for her own benefit whatever might be recovered in the principal suit, and was estopped to deny the lawfulness or propriety of Lamar's acts, because whatever was done by him as guardian of Martha M. Sims in her life-time, or as guardian of the interests of Ann C. Sims as her next of kin, was authorized and approved by Mrs. Micou and her mother and husband as the natural guardians of both children. Mrs. Micou, as plaintiff in the bill of revivor, answered the cross-bill, alleging that Ann succeeded to Martha's property as her administratrix, and not as her next of kin, admitting Ann's will and the probate thereof, denying that Mrs. Micou was a natural guardian of the children, and denying that she approved or ratified Lamar's acts as guardian. A general replication was filed to that answer.

Upon a hearing on the pleadings and the agreed statement of facts, the circuit court dismissed the cross-bill, held all Lamar's investments to have been breaches of trust, and entered a decree referring the case to a master to state an account. The case was afterwards heard on exceptions to the master's report, and a final decree entered for the plaintiff for \$18,705.19, including the value before 1861 of those bank stocks in Georgia of which Lamar had never had possession. The opinion delivered upon the first hearing is reported in 17 Blatchf. 378, and in 1 Fed. 14, and the opinion upon the second hearing in 7 Fed. 180. The defendant appealed to this court.

The authority of the surrogate's court of the county of Richmond and state of New York to appoint Lamar guardian of the persons and property of infants at the time within that county, and the authority of the supreme court of the state of New York, in which this suit was originally brought, being a court of general equity jurisdiction, to take cognizance thereof, are not disputed; and, upon the facts agreed, it is quite clear that none of the defenses set up in the answer afford any ground for dismissing the bill. The war of the rebellion, and the residence of both ward and guardian within the territory controlled by the insurgents, did not discharge the guardian from his responsibility to account. After the war, for property of the wards which had at any time come into his hands, or which he might, by the exercise of due care, have obtained possession of. A state of war does not put an end to pre-existing obligations, or transfer the property of wards to their guardians, or release the latter from the duty to keep it safely, but suspends until the return of peace the right of any one residing in the enemy's country to sue in our courts. *Ward v. Smith*, 7 Wall. 447; *Montgomery v. U. S.*, 15 Wall. 395, 400; *Insurance Co. v. Davis*, 95 U. S.

425, 430; *Kershaw v. Kelsey*, 100 Mass. 561, 563, 564, 570; 3 Phillim. Int. Law (2d Ed.) § 589. The appointment of Micou in 1867 by a court of Alabama to be guardian of the surviving ward, then residing in that state, did not terminate Lamar's liability for property of his wards which he previously had or ought to have taken possession of. The receipt given by Micou was only for the securities and money actually handed over to him by Lamar; and if Micou had any authority to discharge Lamar from liability for past mismanagement of either ward's property, he never assumed to do so. The suggestion in the answer, that the surviving ward, upon coming of age, ratified and approved the acts of Lamar as guardian, finds no support in the facts of the case. The further grounds of defense, set up in the cross-bill, that Micou participated in Lamar's investments, and that Mrs. Micou approved them, are equally unavailing. The acts of Micou, before his own appointment as guardian, could not bind the ward. And admissions in private letters from Mrs. Micou to Lamar could not affect the rights of the ward, or Mrs. Micou's authority, upon being afterwards appointed administratrix of the ward, to maintain this bill as such against Lamar's representative, even if the amount recovered will inure to her own benefit as the ward's next of kin. 1 Greenl. Ev. § 179. The extent of Lamar's liability presents more difficult questions of law, now for the first time brought before this court. The general rule is everywhere recognized, that a guardian or trustee, when investing property in his hands, is bound to act honestly and faithfully, and to exercise a sound discretion, such as men of ordinary prudence and intelligence use in their own affairs. In some jurisdictions no attempt has been made to establish a more definite rule; in others, the discretion has been confined, by the legislature or the courts, within strict limits.

The court of chancery, before the Declaration of Independence, appears to have allowed some latitude to trustees in making investments. The best evidence of this is to be found in the judgments of Lord Hardwicke. He held, indeed, in accordance with the clear weight of authority before and since, that money lent on a mere personal obligation, like a promissory note, without security, was at the risk of the trustee. *Ryder v. Bickerton*, 3 Swanst. 80, note, 1 Eden, 149, note; *Barney v. Saunders*, 16 How. 535, 545; *Perry Trusts*, § 453. But, in so holding, he said: "For it should have been on some such security as binds land, or something to be answerable for it." 3 Swanst. 81, note. Although in one case he held that a trustee, directed by the terms of his trust to invest the trust money in government funds or other good securities, was responsible for a loss caused by his investing it in South Sea stock, and observed that neither South Sea stock nor

bank stock was considered a good security, because it depended upon the management of the governor and directors, and the capital might be wholly lost (*Trafford v. Boehm*, 3 Atk. 440, 444); yet, in another case, he declined to charge a trustee for a loss on South Sea stock, which had fallen in value since the trustee received it, and said that "to compel trustees to make up a deficiency, not owing to their willful default, is the harshest demand that can be made in a court of equity." *Jackson v. Jackson*, 1 Atk. 513, 514, West, Ch. 31, 34. In a later case he said: "Suppose a trustee, having in his hands a considerable sum of money, places it out in the funds, which afterwards sink in their value, or on a security at the time apparently good, which afterwards turns out not to be so, for the benefit of the cestui que trust; was there ever an instance of the trustee's being made to answer the actual sum so placed out? I answer, 'No.' If there is no mala fides, nothing willful in the conduct of the trustee, the court will always favor him; for, as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety, it is an act of great kindness in any one to accept it. To add hazard or risk to that trouble, and subject a trustee to losses which he could not foresee, and, consequently, not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office." That this opinion was not based upon the fact that in England trustees usually receive no compensation is clearly shown by the chancellor's adding that the same doctrine held good in the case of a receiver, an officer of the court, and paid for his trouble; and the point decided was that a receiver, who paid the amount of rents of estates in his charge to a Bristol tradesman of good credit, taking his bills therefor on London, was not responsible for the loss of the money by his becoming bankrupt. *Knight v. Plymouth*, 1 Dick. 120, 126, 127, 3 Atk. 480. And the decision was afterwards cited by Lord Hardwicke himself as showing that when trustees act by other hands, according to the usage of business, they are not answerable for losses. *Ex parte Belchier*, 1 Amb. 218, 219, 1 Kenyon, 38, 47.

In later times, as the amount and variety of English government securities increased, the court of chancery limited trust investments to the public funds, disapproved investments either in bank stock or in mortgages of real estate, and prescribed so strict a rule that parliament interposed; and by the statutes of 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 38, and by general orders in chancery, pursuant to those statutes, trustees have been authorized to invest in stock of the bank of England or of Ireland, or upon mortgage of freehold or copyhold estates, as well as in the public funds. *Lewin, Trusts* (7th Ed.)

282, 283, 287. In a very recent case the court of appeal and the house of lords, following the decisions of Lord Hardwicke in *Knight v. Plymouth* and *Ex parte Belchier*, above cited, held that a trustee investing trust funds, who employed a broker to procure securities authorized by the trust, and paid the purchase money to the broker, if such was the usual and regular course of business of persons acting with reasonable care and prudence on their own account, was not liable for the loss of the money by fraud of the broker. Sir George Jessel, M. R., Lord Justice Bowen, and Lord Blackburn affirmed the general rule that a trustee is only bound to conduct the business of his trust in the same manner that an ordinarily prudent man of business would conduct his own; Lord Blackburn adding the qualification that "a trustee must not choose investments other than those which the terms of his trust permit." *Speight v. Gaunt*, 22 Ch. Div. 727, 739, 762, 9 App. Cas. 1, 19.

In this country there has been a diversity in the laws and usages of the several states upon the subject of trust investments.

In New York, under Chancellor Kent, the rule seems to have been quite undefined. See *Smith v. Smith*, 4 Johns. Ch. 281, 285; *Thompson v. Brown*, Id. 619, 628, 629, where the chancellor quoted the passage above cited from Lord Hardwicke's opinion in *Knight v. Plymouth*. And in *Brown v. Campbell*, Hopk. Ch. 233, where an executor in good faith made an investment, considered at the time to be advantageous, of the amount of two promissory notes, due to his testator from one manufacturing corporation, in the stock of another manufacturing corporation, which afterwards became insolvent, Chancellor Sanford held that there was no reason to charge him with the loss. But by the later decisions in that state investments in bank or railroad stock have been held to be at the risk of the trustee, and it has been intimated that the only investments that a trustee can safely make without an express order of court are in government or real estate securities. *King v. Talbot*, 40 N. Y. 76, affirming 50 Barb. 453; *Ackerman v. Emott*, 4 Barb. 626; *Mills v. Hoffman*, 26 Hun, 594; 2 Kent, Comm. 416, note b. So the decisions in New Jersey and Pennsylvania tend to disallow investments in the stock of banks or other business corporations, or otherwise than in the public funds or in mortgages of real estate. *Gray v. Fox*, 1 N. J. Eq. 259, 268; *Halsted v. Meeker's Ex'rs*, 18 N. J. Eq. 136; *Lathrop v. Smalley's Ex'rs*, 23 N. J. Eq. 192; *Worrell's Appeal*, 9 Pa. 508, and 23 Pa. 44; *Hemphill's Appeal*, 18 Pa. 303; *Ihmsen's Appeal*, 43 Pa. 431. And the New York and Pennsylvania courts have shown a strong disinclination to permit investments in real estate or securities out of their jurisdiction. *Orniston v. Olcott*, 84 N. Y. 339; *Rush's Estate*, 12 Pa. 375, 378.

In New England, and in the southern states,

the rule has been less strict. In Massachusetts, by a usage of more than half a century, approved by a uniform course of judicial decision, it has come to be regarded as too firmly settled to be changed, except by the legislature, that all that can be required of a trustee to invest is that he shall conduct himself faithfully and exercise a sound discretion, such as men of prudence and intelligence exercise in the permanent disposition of their own funds, having regard, not only to the probable income, but also to the probable safety, of the capital; and that a guardian or trustee is not precluded from investing in the stock of banking, insurance, manufacturing, or railroad corporations within or without the state. *Harvard College v. Amory*, 9 Pick. 446, 461; *Lovell v. Minot*, 20 Pick. 116, 119; *Kinmonth v. Brigham*, 5 Allen, 270, 277; *Clark v. Garfield*, 8 Allen, 427; *Brown v. French*, 125 Mass. 410; *Bowker v. Pierce*, 130 Mass. 262. In New Hampshire and in Vermont, investments, honestly and prudently made, in securities of any kind that produce income, appear to be allowed. *Knowlton v. Bradley*, 17 N. H. 458; *Kimball v. Reding*, 11 Fost. 352, 374; *French v. Currier*, 47 N. H. 88, 99; *Barney v. Parsons*, 54 Vt. 623.

In Maryland, good bank stock, as well as government securities and mortgages on real estate, has always been considered a proper investment. *Hammond v. Hammond*, 2 Bland, 306, 413; *Gray v. Lynch*, 8 Gill, 403; *Murray v. Feinour*, 2 Md. Ch. 418. So, in Mississippi, investment in bank stock is allowed. *Smyth v. Burns*, 25 Miss. 422.

In South Carolina, before the war, no more definite rule appears to have been laid down than that guardians and trustees must manage the funds in their hands as prudent men manage their own affairs. *Boggs v. Adger*, 4 Rich. Eq. 408, 411; *Spear v. Spear*, 9 Rich. Eq. 184, 201; *Snelling v. McCreary*, 14 Rich. Eq. 291, 300.

In Georgia the English rule was never adopted; a statute of 1845, which authorized executors, administrators, guardians, and trustees, holding any trust funds, to invest them in securities of the state, was not considered compulsory; and before January 1, 1863 (when that statute was amended by adding a provision that any other investment of trust funds must be made under a judicial order, or else be at the risk of the trustee,) those who lent the fund at interest, on what was at the time considered by prudent men to be good security, were not held liable for a loss without their fault. *Cobb*, Dig. 333; Code 1861, § 2308; *Brown v. Wright*, 39 Ga. 96; *Moses v. Moses*, 50 Ga. 9, 33.

In Alabama the supreme court in *Bryant v. Craig*, 12 Ala. 354, 359, having intimated that a guardian could not safely invest upon either real or personal security without an order of court, the legislature, from 1852, authorized guardians and trustees to invest

on bond and mortgage, or on good personal security, with no other limit than fidelity and prudence might require. Code 1852, § 2024; Code 1867, § 2426; *Foscue v. Lyon*, 55 Ala. 440, 452.

The rules of investment varying so much in the different states, it becomes necessary to consider by what law the management and investment of the ward's property should be governed. As a general rule (with some exceptions not material to the consideration of this case) the law of the domicile governs the status of a person, and the disposition and management of his movable property. The domicile of an infant is universally held to be the fittest place for the appointment of a guardian of his person and estate; although, for the protection of either, a guardian may be appointed in any state where the person or any property of an infant may be found. On the continent of Europe, the guardian appointed in the state of the domicile of the ward is generally recognized as entitled to the control and dominion of the ward and his movable property everywhere, and guardians specially appointed in other states are responsible to the principal guardian. By the law of England and of this country, a guardian appointed by the courts of one state has no authority over the ward's person or property in another state, except so far as allowed by the comity of that state, as expressed through its legislature or its courts; but the tendency of modern statutes and decisions is to defer to the law of the domicile, and to support the authority of the guardian appointed there. *Hoyt v. Sprague*, 103 U. S. 613, 631, and authorities cited; *Morrell v. Dickey*, 1 Johns. Ch. 153; *Woodworth v. Spring*, 4 Allen, 321; *Milliken v. Pratt*, 125 Mass. 374, 377, 378; *Leonard v. Putnam*, 51 N. H. 247; *Com. v. Rhoads*, 37 Pa. 60; *Sims v. Renwick*, 25 Ga. 58; *Dacey, Dom.* 172-176; *Westl. Int. Law* (2d. Ed.) 48-50; *Whart. Conf. Laws* (2d Ed.) §§ 259-268. An infant cannot change his own domicile. As infants have the domicile of their father, he may change their domicile by changing his own; and after his death the mother, while she remains a widow, may likewise, by changing her domicile, change the domicile of the infants; the domicile of the children, in either case, following the independent domicile of their parent. *Kennedy v. Ryall*, 67 N. Y. 379; *Pottinger v. Wightman*, 3 Mer. 67; *Dedham v. Natick*, 16 Mass. 135; *Dacey, Dom.* 97-99. But when the widow, by marrying again, acquires the domicile of a second husband, she does not, by taking her children by the first husband to live with her there, make the domicile which she derives from the second husband their domicile; and they retain the domicile which they had, before her second marriage, acquired from her or from their father. *Cummer v. Milton*, 3 Salk. 259, *Holt*, 578; *Freetown v. Taunton*, 16 Mass. 52; *School Direc-*

tors v. James, 2 Watts & S. 568; *Johnson v. Copeland*, 35 Ala. 521; *Brown v. Lynch*, 2 Bradf. 214; *Mears v. Sinclair*, 1 W. Va. 185; *Pot. Introduction Generale aux Coutumes*, No. 19; 1 Burge, Col. Law, 39; 4 Phillim. Int. Law (2d Ed.) § 97.

The preference due to the law of the ward's domicile, and the importance of a uniform administration of his whole estate, require that, as a general rule, the management and investment of his property should be governed by the law of the state of his domicile, especially when he actually resides there, rather than by the law of any state in which a guardian may have been appointed or may have received some property of the ward. If the duties of the guardian were to be exclusively regulated by the law of the state of his appointment, it would follow that in any case in which the temporary residence of the ward was changed from state to state, from considerations of health, education, pleasure, or convenience, and guardians were appointed in each state, the guardians appointed in the different states, even if the same persons, might be held to diverse rules of accounting for different parts of the ward's property. The form of accounting, so far as concerns the remedy only, must, indeed, be according to the law of the court in which relief is sought; but the general rule by which the guardian is to be held responsible for the investment of the ward's property is the law of the place of the domicile of the ward. *Bar, Int. Law*, § 106 (*Gillespie's translation*) p. 438; *Whart. Conf. Laws*, § 259. It may be suggested that this would enable the guardian, by changing the domicile of his ward, to choose for himself the law by which he should account. Not so. The father, and after his death the widowed mother, being the natural guardian, and the person from whom the ward derives his domicile, may change that domicile. But the ward does not derive a domicile from any other than a natural guardian. A testamentary guardian nominated by the father may have the same control of the ward's domicile that the father had. *Wood v. Wood*, 5 Paige, 596, 605. And any guardian, appointed in the state of the domicile of the ward, has been generally held to have the power of changing the ward's domicile from one county to another within the same state and under the same law. *Cutts v. Haskins*, 9 Mass. 543; *Holyoke v. Haskins*, 5 Pick. 20; *Kirkland v. Whately*, 4 Allen, 462; *Anderson v. Anderson*, 42 Vt. 350; *Ex parte Bartlett*, 4 Bradf. 221; *Reg. v. Whitby*, L. R. 5 Q. B. 325, 331. But it is very doubtful, to say the least, whether even a guardian appointed in the state of the domicile of the ward (not being the natural guardian or a testamentary guardian) can remove the ward's domicile beyond the limits of the state in which the guardian is appointed, and to which his legal

authority is confined. *Douglas v. Douglas*, L. R. 12 Eq. 617, 625; *Daniel v. Hill*, 52 Ala. 430; *Story, Conf. Laws*, § 506, note; *Dacey, Dom.* 100, 132. And it is quite clear that a guardian appointed in a state in which the ward is temporarily residing, cannot change the ward's permanent domicile from one state to another. The case of such a guardian differs from that of an executor of, or a trustee under, a will. In the one case, the title in the property is in the executor or the trustee; in the other, the title in the property is in the ward, and the guardian has only the custody and management of it, with power to change its investment. The executor or trustee is appointed at the domicile of the testator; the guardian is most fitly appointed at the domicile of the ward, and may be appointed in any state in which the person or any property of the ward is found. The general rule which governs the administration of the property in the one case may be the law of the domicile of the testator; in the other case, it is the law of the domicile of the ward.

As the law of the domicile of the ward has no extraterritorial effect, except by the comity of the state where the property is situated, or where the guardian is appointed, it cannot, of course, prevail against a statute of the state in which the question is presented for adjudication, expressly applicable to the estate of a ward domiciled elsewhere. *Hoyt v. Sprague*, 103 U. S. 613. Cases may also arise with facts so peculiar or so complicated as to modify the degree of influence that the court in which the guardian is called to account may allow to the law of the domicile of the ward, consistently with doing justice to the parties before it. And a guardian, who had in good faith conformed to the law of the state in which he was appointed, might, perhaps, be excused for not having complied with stricter rules prevailing at the domicile of the ward. But in a case in which the domicile of the ward has always been in a state whose law leaves much to the discretion of the guardian in the matter of investments, and he has faithfully and prudently exercised that discretion with a view to the pecuniary interests of the ward, it would be inconsistent with the principles of equity to charge him with the amount of the moneys invested, merely because he has not complied with the more rigid rules adopted by the courts of the state in which he was appointed. The domicile of William W. Sims, during his life and at the time of his death in 1850, was in Georgia. This domicile continued to be the domicile of his widow and of their infant children until they acquired new ones. In 1853 the widow, by marrying the Rev. Mr. Amhercrombie, acquired his domicile. But she did not, by taking the infants to the home, at first in New York and afterwards in Connecticut, of her new husband, who was of no kin to the children, was under no legal

obligation to support them, and was, in fact, paid for their board out of their property, make his domicile, or the domicile derived by her from him, the domicile of the children of the first husband. Immediately upon her death in Connecticut, in 1859, these children, both under 10 years of age, were taken back to Georgia to the house of their father's mother and unmarried sister, their own nearest surviving relatives; and they continued to live with their grandmother and aunt in Georgia until the marriage of the aunt in January, 1860, to Mr. Micou, a citizen of Alabama, after which the grandmother and the children resided with Mr. and Mrs. Micou at their domicile in that state.

Upon these facts, the domicile of the children was always in Georgia from their birth until January, 1860, and thenceforth was either in Georgia or in Alabama. As the rules of investment prevailing before 1863 in Georgia and in Alabama did not substantially differ, the question in which of those two states their domicile was is immaterial to the decision of this case; and it is therefore unnecessary to consider whether their grandmother was their natural guardian, and as such had the power to change their domicile from one state to another. See *Hargrave's* note 66 to *Co. Litt.* 88b; *Reeve, Dom. Rel.* 315; 2 *Kent, Comm.* 219; *Code Ga.* 1861, §§ 1754, 2452; *Darden v. Wyatt*, 15 Ga. 414. Whether the domicile of Lamar in December, 1855, when he was appointed in New York guardian of the infants, was in New York or in Georgia, does not distinctly appear, and is not material; because, for the reasons already stated, wherever his domicile was, his duties as guardian in the management and investment of the property of his wards were to be regulated by the law of their domicile.

It remains to apply the test of that law to Lamar's acts or omissions with regard to the various kinds of securities in which the property of the wards was invested.

1. The sum which Lamar received in New York in money from Mrs. Abercrombie he invested in 1856 and 1857 in stock of the Bank of the Republic at New York, and of the Bank of Commerce at Savannah, both of which were then, and continued till the breaking out of the war, in sound condition, paying good dividends. There is nothing to raise a suspicion that Lamar, in making these investments, did not use the highest degree of prudence; and they were such as by the law of Georgia or of Alabama he might properly make. Nor is there any evidence that he was guilty of neglect in not withdrawing the investment in the stock of the Bank of Commerce at Savannah before it became worthless. He should not, therefore, be charged with the loss of that stock. The investment in the stock of the Bank of the Republic of New York being a proper investment by the law of the domicile of the wards, and there being no evidence that the sale of that stock

by Lamar's order in New York, in 1862, was not judicious, or was for less than its fair market price, he was not responsible for the decrease in its value between the times of its purchase and of its sale. He had the authority, as guardian, without any order of court, to sell personal property of his ward in his own possession, and to reinvest the proceeds. *Field v. Schieffelin*, 7 Johns. Ch. 150; *Ellis v. Essex Merrimack Bridge*, 2 Pick. 243. That his motive in selling it was to avoid its being confiscated by the United States, does not appear to us to have any bearing on the rights of these parties. And no statute under which it could have been confiscated has been brought to our notice. The act of July 17, 1862, c. 195, § 6, cited by the appellant, is limited to property of persons engaged in or abetting armed rebellion, which could hardly be predicated of two girls under 13 years of age. 12 St. 591. Whatever liability, criminal or civil, Lamar may have incurred or avoided as towards the United States, there was nothing in his selling this stock, and turning it into money, of which his wards had any right to complain.

As to the sum received from the sale of the stock in the Bank of the Republic, we find nothing in the facts agreed by the parties, upon which the case was heard, to support the argument that Lamar, under color of protecting his wards' interests, allowed the funds to be lent to cities and other corporations which were aiding in the rebellion. On the contrary, it is agreed that that sum was applied to the purchase in New York of guaranteed bonds of the cities of New Orleans, Memphis, and Mobile, and of the East Tennessee & Georgia Railroad Company; and the description of those bonds, in the receipt afterwards given by Micou to Lamar, shows that the bonds of that railroad company, and of the cities of New Orleans and Memphis, at least, were issued some years before the breaking out of the rebellion, and that the bonds of the city of Memphis and of the railroad company were, at the time of their issue, indorsed by the state of Tennessee. The company had its charter from that state, and its road was partly in Tennessee and partly in Georgia. *Tenn. St.* 1848, c. 169. Under the discretion allowed to a guardian or trustee by the law of Georgia and of Alabama, he was not precluded from investing the funds in his hands in bonds of a railroad corporation, indorsed by the state by which it was chartered, or in bonds of a city. As Lamar, in making these investments, appears to have used due care and prudence, having regard to the best pecuniary interests of his wards, the sum so invested should be credited to him in this case, unless, as suggested at the argument, the requisite allowance has already been made in the final decree of the circuit court in the suit brought by the representative of the other ward, an appeal from which

was dismissed by this court for want of jurisdiction in 104 U. S. 465.

2. Other moneys of the wards in Lamar's hands, arising either from dividends which he had received on their behalf, or from interest with which he charged himself upon sums not invested, were used in the purchase of bonds of the Confederate states, and of the state of Alabama. The investment in bonds of the Confederate states was clearly unlawful, and no legislative act or judicial decree or decision of any state could justify it. The so-called Confederate government was in no sense a lawful government, but was a mere government of force, having its origin and foundation in rebellion against the United States. The notes and bonds issued in its name and for its support had no legal value as money or property, except by agreement or acceptance of parties capable of contracting with each other, and can never be regarded by a court sitting under the authority of the United States as securities in which trust funds might be lawfully invested. *Thorington v. Smith*, 8 Wall. 1; *Head v. Starke*, Chase, 312, Fed. Cas. No. 6,293; *Horn v. Lockhart*, 17 Wall. 570; *Confederate Note Case*, 19 Wall. 548; *Sprott v. U. S.*, 20 Wall. 459; *Fretz v. Stover*, 22 Wall. 198; *Alexander v. Bryan*, 110 U. S. 414, 4 Sup. Ct. 107. An infant has no capacity, by contract with his guardian, or by assent to his unlawful acts, to affect his own rights. The case is governed in this particular by the decision in *Horn v. Lockhart*, in which it was held that an executor was not discharged from his liability to legatees by having invested funds, pursuant to a statute of the state, and with the approval of the probate court by which he had been appointed, in bonds of the Confederate states, which became worthless in his hands. Neither the date nor the purpose of the issue of the bonds of the state of Alabama is shown, and it is unnecessary to consider the lawfulness of the investment in those bonds, because Lamar appears to have sold them for as much as he had paid for them, and to have invested the proceeds in additional Confederate states bonds, and for the amount thereby lost to the estate he was accountable.

3. The stock in the Mechanics' Bank of Georgia, which had belonged to William W. Sims in his life-time, and stood on the books of the bank in the name of his administratrix, and of which one-third belonged to her, as his widow, and one-third to each of the infants, never came into Lamar's possession; and upon a request made by him, the very next month after his appointment, the bank refused to transfer to him any part of it. He did receive and account for the dividends; and he could not, under the law of Georgia concerning foreign guardians, have obtained possession of property of his wards within that state without the consent of the ordinary. *Code* 1861, §§ 1834-1839. The at-

tempt to charge him for the value of the principal of the stock must fail for two reasons: First. This very stock had not only belonged to the father of the wards in his lifetime, but it was such stock as a guardian or trustee might properly invest in by the law of Georgia. Second. No reason is shown why this stock, being in Georgia, the domicile of the wards, should have been transferred to a guardian who had been appointed in New York during their temporary residence there. The same reasons are conclusive against

charging him with the value of the bank stock in Georgia, which was owned by Mrs. Abercrombie in her own right, and to which Mr. Abercrombie became entitled upon her death. It is therefore unnecessary to consider whether there is sufficient evidence of an immediate surrender by him of her interest to her children.

The result is that both the decrees of the circuit court in this case must be reversed, and the case remanded for further proceedings in conformity with this opinion.

SIMMONS v. OLIVER et al.

(43 N. W. 561, 74 Wis. 633.)

Supreme Court of Wisconsin. Nov. 5, 1889.

Appeal from circuit court, Fond du Lac county; N. S. GILSON, Judge.

Accounting and petition to be discharged by M. W. Simmons, trustee of the estate of William Oliver, deceased. Elizabeth Oliver and others, beneficiaries, objected to the account, and opposed the petition. From a judgment holding the trustee liable for certain losses, he appeals.

Knowles & Phelps, for appellant. *N. C. Giffin*, for respondents.

COLE, C. J. M. W. Simmons, as trustee, received the funds mentioned in his account from the former trustee, Smith, to invest and to keep invested for the benefit of the beneficiaries named. The income was to be paid to the widow during her life, and \$1,000 was to be paid the children in equal portions when the youngest should arrive at age. No directions were given in the order appointing Simmons as to how the trust funds should be invested. It appears that in 1883 the trustee loaned to the McDonald Manufacturing Company a portion of the fund, taking its indorsed note, which note was taken up in February, 1884, by a new note for the amount of the loan unpaid, such note running one year, which was indorsed by the president and secretary of the company. The company at this time was in good financial standing, and the indorsers were reputed to be perfectly responsible, and men of ample means. In a few months, however, the company failed, and turned over its property to a trustee, and the president, who was supposed to have the most property of either of the indorsers, became unable to pay his debts. The claims against the manufacturing company were finally compromised at 50 cents on the dollar, in cash and notes, and 50 cents in mining stock at \$5 a share. Simmons at first declined to take the mining stock, not considering it of any value, but after a few months, thinking it might turn out to be worth something, decided to take it and pay an assessment of \$50 upon it, for which it was advertised for sale. The testimony clearly shows that the compromise made by the creditors of the manufacturing company was the best that could be realized at the time; and that the mining stock, which proved to be worthless, was considered of some value. The trustee, in his account filed, wishes to be credited and allowed for the mining stock at its face value and interest thereon since June 22, 1888, and the amount paid upon it as an assessment, together with another small item of \$11. The beneficiaries object to the allowance of these items, and the court below decided that the estate of the trustee must make good the loss resulting to the trust-estate by reason of the loan to the manufacturing company.

We think the circuit court was clearly

right in holding the trustee liable for the loss of the trust funds under the circumstances. He made a loan to a manufacturing company upon its note and the personal security of two indorsers. It is true, when the note for the amount of the loan unpaid was given in February, 1884, in addition to the security of the indorsers, the company had assigned to the trustee as collateral for the payment of the note a bond, which was supposed to be a lien upon real estate, but which was afterwards held by this court to be invalid, and not a lien upon its property. So it eventually turned out that the loan was made to a private business corporation upon personal security alone. While there is no evidence that the trustee did not act in good faith in making the loan, doubtless deeming it entirely safe, and amply secured, yet he cannot be protected against the loss. We are disposed, on this subject, to follow the English rule which has been adopted in some of our sister states, and hold that the trustee cannot invest trust funds in personal securities, and that it is not an exercise of sound discretion to so invest them. Says PARKER, V. C., in *Ackerman v. Emott*, 4 Barb. 626-636: "It is a well-settled rule of the English court of chancery that the trustee can only protect himself against risk by investing the trust fund in real estate, or governmental securities. He must either take security on real estate, or invest in a fund approved by the court; and no other fund is there approved by the courts except the public funds." The learned counsel on behalf of the trustee candidly admits that it is the rule of the earlier decisions, and the one which is laid down in some of our elementary works on this subject, which say that the trustee is personally liable in case of any loss from investments in personal securities, no matter how safe they may, at the time, seem to be. The concession is according to the fact, as an examination of the authorities will show. But he insists that this well-established rule shall be changed to meet the conditions and needs of present business and methods of investment. Investments, he says, in personal securities, are deemed quite as safe and reliable, by good business men, as loans upon real estate, which is subject to great changes in value from one cause or another. This remark may be true when applied to new towns or cities where there is more or less speculation in real estate; but as a general rule the commercial world regards loans made upon adequate real estate security as more safe and desirable than upon personal security. Of course it is not practicable for a trustee always to find government securities in which to invest, but he can usually find opportunities to make loans upon safe and adequate real estate securities, and, in view of the hazards of other investments, of which this case furnishes a good illustration, we are disposed to hold that the trustee should not be protected against loss in investing trust funds unless he loans on real estate

security, or invests in some other security approved by the court to which he is accountable for the manner he executes his trust. If this rule shall be found inconvenient, or on the whole not best adapted to the new condition of things, or to the necessities of present business arrangements, the legislature can change it by authorizing the investment of trust funds in shares or stocks, or on the credit of business corporations, or on the personal security of individuals. We prefer to adhere to the well-established rule in relation to the investment of trust funds, and if a change is to be made let the legisla-

ture make it. We do not enter upon a discussion of the doctrine which makes an investment on private or personal security at the risk of the trustee, because the law is elementary. The prevailing rule in the United States and in England is to prefer either public securities or real estate securities to personal security, and this, we think, is a wise and salutary rule to follow. Hill, Trustees, 368 et seq., and cases referred to in the notes; 1 Perry, Trusts, § 453 et seq.; 2 Pom. Eq. Jur. § 1074; Clark v. Garfield, 8 Allen, 427.

It follows from these views that the judgment of the circuit court must be affirmed.

HARVARD COLLEGE et al. v. AMORY.

(9 Pick. 446.)

Supreme Judicial Court of Massachusetts.
Jan. 10, 1831.

S. Hubbard, for appellants. Sullivan & Shaw, for appellee.

PUTNAM, J. The confidence which the testator reposed in his executors, whom he also constituted his trustees, was unbounded. He directed that they, as trustees, should not be required to give any other security than their own bond, without sureties, and that each of them should be accountable "simply for his own acts, doings and defaults as such trustee."

The general question is, whether the trustees have abused the trust.

The testator made provision for the support of his wife mainly from the proceeds of the trust fund. He speaks of the profits, income, dividends, which were to come from it through their hands. They were to loan the 50,000 dollars upon ample and sufficient security, or invest the same in safe and productive stock, either in the public funds, bank shares or other stock, according to their best judgment and discretion.

It is very clear that the testator did not intend to limit the income to the simple interest of the fund; for if he had so intended, he would not have spoken of dividends and profits, but would have given an annuity of three thousand dollars a year.

It has been argued that the testator gave the sum of fifty thousand dollars as the trust fund, and that the trustees could only have demanded that sum of the executors. But we think that no important inference can be drawn from that fact. It would not follow from thence, that there should have been a sale of the personal property or stocks of the testator and a reinvestment. The trustees and the executors were the same persons, and instead of going through the useless formality of a sale and investment, it was clearly competent for them to select from the ample funds of the estate, those stocks which should form the capital of the trust fund. And in making that selection, it is very clear to us, that they should have preferred that stock which would probably give her the most profit, and at the same time preserve the value of the capital sum. It would not for example have been the exercise of a sound discretion, to have appropriated the trust fund in the stock of an incorporated company which gave great dividends for the time being, but which would, according to the terms of its charter, expire as soon as the death of the wife could be calculated to happen. In such a case nothing would be left of the capital for those in remainder. On the other hand, if the investment of the trust fund were in stock which made large dividends, and which had acquired its value

by the prudent management of its proprietors, and might be reasonably calculated upon as a safe and permanent capital, such an investment would seem to be according to the manifest intent of the testator.

It is somewhat remarkable that the testator did not himself appropriate the stock of which the trust fund should consist, but that he should have left the selection to his trustees. But as it would have been necessary to empower them to change, sell out and reinvest, perhaps it was wise in the testator to leave the whole matter, the selection as well as the management, to them. Be that as it may, he has given them that authority.

But it has happened that the value of the capital stock in which the trust fund was invested, has fallen, and those in remainder call upon the trustees to make up the deficiency.

It was said by Lord Hardwicke in *Jackson v. Jackson*, 1 Atk. 514, that "to compel trustees to make up a deficiency not owing to their wilful default, is the harshest demand that can be made in a court of equity." The statute of Geo. I., for the indemnity of guardians and trustees, provides that if there be a diminution of the principal, without the default of the trustees, they shall not be liable. If that were otherwise, who would undertake such hazardous responsibility?

It is argued for the appellants, that the trustees have not loaned the money on good security. The answer is found in the authority which the testator gave to them. They were to loan, or to invest the fund in stocks. They preferred the latter.

But it is argued, that they did not invest in the public funds, bank shares or other stock, within the true intent and meaning of the authority, out in trading companies, and so exposed the capital to great loss. And we are referred to *Trafford v. Boehm*, 3 Atk. 444, to prove the position, that such an investment will not have the support of a court of chancery. The chancellor seems to suppose that funds or other good securities, must be such as have the engagement of the government to pay off their capital. Bank stock, as well as South-Sea stock, which were in the management of directors, &c. were not considered by that court as good security. But no such rule has ever been recognized here. In point of fact, there has been as great fluctuation in the value of the stock which was secured by the promise and faith of the government, as of the stock of banks. And besides, the testator himself considers that bank shares might be a safe object of investment—"safe and productive stock." And yet bank shares may be subject to losses which may sweep away their whole value. Lord Hardwicke considers that South-Sea annuities and bank annuities stand upon different footing, because the directors have nothing to do with the principal, and are only to pay the interest, until the government pay off the capital, and there-

fore that they only are properly good securities.

This reasoning has very little or no application here; for, in the first place, the stocks depending upon the promise of the government, or, as they are called, the public funds, are exceedingly limited in amount, compared with the amount of trust funds to be invested; and, in the second place, it may well be doubted, if more confidence should be reposed in the engagements of the public, than in the promises and conduct of private corporations which are managed by substantial and prudent directors. There is one consideration much in favour of investing in the stock of private corporations. They are amenable to the law. The holder may pursue his legal remedy and compel them or their officers to do justice. But the government can only be supplicated.

It has been argued, that manufacturing and insurance stocks are not safe, because the principal is at hazard. But this objection applies to bank shares, as well as to shares in incorporated manufacturing and insurance companies. To a certain extent, each may be considered as concerned or interested in trade. The bank deals in bills of exchange and notes, and the value of its capital depends upon the solvency of its debtors. It may, for example, very properly discount upon the responsibility of merchants of good credit at the time, but who, before the maturity of their notes, become bankrupts from unavoidable and unforeseen mercantile hazards. In this way a bank becomes indirectly interested in navigation, trade and merchandise, to an extent very little, if any, short of the trade in which manufacturing companies engage. The capital in both cases may be lost by the conduct of those who direct their affairs, notwithstanding the exercise of reasonable prudence and discretion.

In regard to insurance companies or incorporations, the capital seems, at first view, to be exposed to greater risk, but it is believed that there has not been much if any more fluctuation of the capital in those investments, than in incorporated companies for banking or manufacturing purposes. If the insurance be so general as to embrace a fair proportion of all the property at risk, it will generally yield a reasonable profit, and preserve the capital entire.

It will not do to reject those stocks as unsafe, which are in the management of directors, whose well or ill directed measures may involve a total loss. Do what you will, the capital is at hazard. If the public funds are resorted to, what becomes of the capital when the credit of the government shall be so much impaired as it was at the close of the last war?

Investments on mortgage of real estate are not always safe. Its value fluctuates more, perhaps, than the capital of insurance stock.

Again, the title to real estate, after the most

careful investigation, may be involved, and ultimately fail, and so the capital, which was originally supposed to be as firm as the earth itself, will be dissolved.

All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.

But in the case at bar, the testator referred the management of this trust especially to the judgment and discretion of the trustees whom he appointed; one of whom is the brother, and the other was the cousin of his wife, for whose support this provision was made. These trustees are not to be made chargeable but for gross neglect and wilful mismanagement.

The testator expressly authorized the trustees to invest in "other stock" than bank shares or the public funds; so they might as well select other stock as that which the testator named.

There can be no doubt but that shares in manufacturing and insuring incorporations are and were commonly called and known by the name of stock. The investment would therefore be clearly within the letter of the authority.

It has been argued, "that the trustees should have invested in safe and productive stock, at their own and a sound discretion, without being governed by the known opinions of the testator;" "that he was at liberty to speculate, but the trustees were not." If these positions should be granted, the desired inference would not follow. If the testator, for example, had been in the habit of dealing largely in lotteries and games of hazard, it would undoubtedly not have justified the trustees in making such investments, notwithstanding the testator had been the favourite of fortune. But if the testator had invested his funds to remain permanently in any stock, that circumstance might well be taken into consideration by the trustees when called to exercise their own best skill and discretion. They might reasonably and properly inquire and consider what their testator would do in the circumstances in which they were placed. Would he recommend an investment that should give simple interest on a loan, or in stock that would probably give much more, and yet have the principal sum reasonably safe?

The circumstance of the trustees' reposing confidence where the testator had, is one which is always to be considered as tending properly to their discharge. *Thompson v. Brown*, 4 Johns. Ch. 628. The case of *Rowth v. Howell*, 3 Ves. 565, has a strong bearing upon this part of the case. There the testator, having great confidence in his banker, recommended it to his executors not to be in a hur-

ry to withdraw the funds from him. But after the death of the testator, the banker misapplied them, and probably stung by remorse on account of his fraud, he committed suicide. It was urged against the executors, that they might have withdrawn the securities from the banker; and they had time enough to do so; but it was considered that the loss arose from the confidence originally reposed in the banker by the testator, and the executors were not subjected to the loss.

In the case at bar, the testator was a man of extraordinary forecast and discretion, in regard to the management of his property. His vast accumulation could not be ascribed to accidental causes, but to calculation and reflection. The fact that he had within three or four years invested nearly half his property in manufacturing stock, was entitled to great consideration and respect, and would, without any change of circumstances, have a strong tendency to justify the selection of the manufacturing stock as part of the trust fund.

We cannot think with the counsel for the appellants, that the dividend of fourteen per cent arising from the recovery of the claim against the Spanish government, can be considered as part of the capital. It was received in the nature of salvage; which is always divided as profits, and not treated as part of the capital stock.

And we do not think that the negotiations between the Boston Manufacturing Company and the Merrimack Manufacturing Company, in relation to making a large quantity of machinery, and the sale of patents and of patterns for castings, by the Boston Manufacturing Company to the Merrimack Manufacturing Company, should be considered as part of the capital stock. We have seen no evidence that they were ever treated as such by the proprietors. We think the sums arising from those causes were properly considered as the fruits of their industry, and placed to the account of profit and loss of the Boston Manufacturing Company.

It is proved or admitted, that the stock which the trustees selected to constitute the trust fund of 50,000 dollars, was of that value when it was taken by them.

We are of opinion that they had a right to select the stock which they did for that purpose, and that they acted in the premises according to their best skill and discretion. And we have not seen any evidence which would satisfy us, that under all the circumstances of the case, they did not act with a sound discretion in making the selection and investment.

But if we were less clear than we are upon that point, we are of opinion that this whole matter has been settled in the court of probate, where the appellants had notice to attend, and where all objections were raised and considered. The judge thereupon made a decree, from which there has not been any appeal.

We say the whole matter, because the ex-

ecutors and the trustees are the same persons. On February 9, 1824, the executors, after due notice to all persons interested, presented their account with the estate, and appropriated the stock which should constitute the fund of 50,000 dollars selected by them as trustees for Mrs. McLean. The Massachusetts General Hospital was heard in fact, and (as has been said and not denied) the objections were made by the same able and learned counsel who now appears in their behalf. And upon the hearing, the judge of probate allowed the account. There was no appeal from that settlement. By the legal operation of that settlement, the trustees became chargeable with that selected trust fund, and it is not now competent for the appellants to contend that those stocks were not legally appropriated by the executors and received by the trustees, as the fund of 50,000 dollars given by the testator. If the college had any objections, they should have made them. Probably every objection to the account which could have been made by the college was in fact made by the hospital.

It has been argued that the account which was settled and acquiesced in, was rendered by the executors and not by the trustees, and ought not to bar this process, which is against the surviving trustee. But it was a settlement of the very root and substance of this controversy. The executors announced their selection and appropriation of the stock for the fund. The trustees (being the same persons) became instantly chargeable with the management of it. It is the original misappropriation and selection, which is the subject of complaint. Suppose the trustees had not been the executors, and that the college and the hospital had requested the executors to deliver to the other persons as trustees the particular stock to constitute the trust fund; could those institutions object against the trustees, that those stocks did not constitute a proper fund? It would seem clear that the trustees might justify. They would say to the two institutions, "You acquiesced in the appropriation by the executors, and we also thought it advisable, safe and expedient." We think that that matter having been settled by a court of competent jurisdiction, without appeal, the decree is final and conclusive.

The college and the hospital were especially put upon their guard; for the executors, in their letter of December 27, 1823, informed their committee, that they should be duly notified when these accounts should be presented for allowance at the probate office, that they might object to any arrangements which the executors might have made for the capital of the 50,000 dollars. As no appeal was made from the decree of the probate court, all parties in interest must be presumed to have acquiesced in the arrangements which were then made for the capital of the trust fund of 50,000 dollars. If there had been an appeal, it would probably have been heard and de-

terminated before there was any depreciation upon the whole investment. Indeed it appears from the evidence, that the stock of the Merimack Manufacturing Company advanced twenty per cent from the time when the stock was selected in February, 1824, to December 1, 1825.

The claim now made upon the trustees, to make up the subsequent depreciation, would seem to be justified only on the ground of gross abuse of their trust, even if it were not barred by the decree in the probate court from which no appeal was made. But upon examining all the documents and evidence, it seems to us that there is no reason whereon to ground that imputation.

Trustees are justly and uniformly considered favourably, and it is of great importance

to bereaved families and orphans, that they should not be held to make good, losses in the depreciation of stocks or the failure of the capital itself, which they held in trust, provided they conduct themselves honestly and discreetly and carefully, according to the existing circumstances, in the discharge of their trusts. If this were held otherwise, no prudent man would run the hazard of losses which might happen without any neglect or breach of good faith.

The judgment of this court is, that the decree of the probate court, from which the appellants appealed, be, and it is hereby affirmed; and that the record be remitted to that court for further proceedings according to law to be there had; and that the appellee recover his costs.

BENTLEY v. CRAVEN.

(18 Beav. 75.)

Court of Chancery. Nov. 15, 1853.

The plaintiff Bentley carried on business in partnership with the defendants Craven, Prest and Younge, as sugar refiners, at Southampton. Craven was the managing partner, and generally resided in London, where he did the agency business of the firm, made all the purchases of sugar and kept the London books, visiting Southampton once a week for the purpose of superintending the affairs there. He was, however, at liberty to carry on, and did carry on, an independent business as a sugar dealer, in which he had great skill and knowledge, and was able to buy to great advantage. Accordingly, in 1851, he bought a quantity of sugar, and afterwards sold it to the firm at a profit, but at the fair market price of the day. Bentley having complained of this, on the ground that they were sugar refiners and not speculators in sugar, Craven took offense and canceled the transaction, but he, nevertheless, continued to speculate in sugars, and, without acquainting his partners with the fact, sold various quantities of his own sugars at various times to the firm, at the market prices of the day, but at a considerable profit in each case, the sums so gained by him amounting in the whole to about £853 17s. 3d.

R. Palmer and W. D. Lewis, for plaintiff.
Mr. Amphlett, for Prest. Mr. Cole, for Younge. Mr. Roupell and Mr. Selwyn, for Craven.

THE MASTER OF THE ROLLS. This appears to me to be founded on the first principles of equity, and that it would be a violation of them to allow this gentleman to retain the profit which he has made upon these sugars.

Two principles with relation to the doctrine of principal and agent have been recognized from the earliest times. One is, that an agent employed to purchase cannot legally buy his own goods for his principal; neither can an agent employed to sell, himself purchase the goods of his principal. If he should do so, and thereby make a profit, his principal may either repudiate the transaction altogether or, adopting it, may claim for himself the benefit made by his agent. The same principle is applicable to a great many other relations, as to that of trustee and cestui que trust and others. The court has repeatedly applied this rule where the transaction was perfectly bona fide; it is founded on this principle, that an agent will not be allowed to place himself in a situation which, under ordinary circumstances, would tempt a man to do that which is not the best for his prin-

cipal, and it is the plain duty of every agent to do the best he can for his principal. I have no doubt that many persons act in ignorance of this rule of equity; for otherwise these cases would not come so frequently into court. I have never seen a case which illustrated the principle more clearly than this.

The case is this: Four partners establish a partnership for refining sugar; one of them is a wholesale grocer, and, from his business, is peculiarly cognizant with the variations in the sugar market, and has great skill in buying sugar at a right and proper time for the business. Accordingly, the business of selecting and purchasing the sugar for the sugar refinery is intrusted to him. He being the person to buy, it is his duty and business to employ his skill in buying for the sugar refinery at the time he thinks most beneficial. Having, according to his skill and knowledge, bought sugar at a time when he thought it likely to rise, and it having risen, and the firm being in want of some, he sells his own sugars to the firm, without letting the partners know that it was his sugar that was sold, for that is expressly and clearly stated in his own affidavit.

In fact, he himself says, not only that he did not tell his copartners, but that he avoided it. The only way in which a sale of that sort could be made valid and effectual would be by communication of the fact. The agent should say to his principal "I have certain sugars of my own which I do not choose to sell to you, unless you give a particular price for them; you have the option to do it or not, as you think fit." If he had said that, the relation of principal and agent between them would, so far as this transaction was concerned, have been determined. If, after receiving this statement, his partners had consented to his terms, the transaction might have stood good; but, in the absence of such a statement, the purchase by an agent of his own goods for his principal cannot be sustained in this court, even though the sale may have been made at the fair market price, and at such a price as that at which he might have sold to any other person; and if, by such a transaction, he makes a profit, the principal is entitled to take that profit to himself. This accordingly puts an end to the questions as to whether the partners are bound to adopt or to repudiate the transaction; or if they adopt it, as to the price at which the sugar should be charged and the like. This gentleman has made a profit of £853 in the course of one year, by sales to himself as agent of the firm, and in my opinion the firm is entitled to that benefit and profit. He is agent for the firm for buying sugars; he has sold his own sugars to the firm and made that profit, and the firm are entitled to it accordingly.

MUNSON et al. v. SYRACUSE, G. & C. RY.
CO. et al.

(8 N. E. 355, 103 N. Y. 58.)

Court of Appeals of New York. Oct. 5, 1886.

Appeal by plaintiffs from a judgment upon a decision of the general term of the Fifth department of the supreme court, affirming a judgment entered upon the report of a referee in favor of defendant. The action was to enforce specific performance of a contract to deliver certain bonds of the Syracuse, Geneva & Corning Railway Company. The issues were referred to J. L. Angle, of Rochester, who reported in favor of plaintiff, August 20, 1880, and judgment was entered directing specific performance of the contract, from which judgment defendants appealed to the general term, Fourth department, on which appeal said judgment was reversed, on the ground that the contract sought to be enforced was against public policy. The case was again tried before A. J. Northrup, as referee, who reported in favor of defendants, upon which report judgment was entered dismissing the complaint, from which judgment plaintiffs appealed to the general term, when the last-named judgment was affirmed. Plaintiff thereupon appealed to the court of appeals.

Samuel Hand and B. W. Huntington, for appellants, Edgar Munson and others. Geo. F. Comstock, for respondents, Syracuse, G. & C. Ry. Co. and another.

ANDREWS, J. We think it would be difficult to affirm the judgment of the court below dismissing the complaint, if, in order to do so, it was necessary to uphold the proposition that the original contract of August 13, 1875, between the plaintiffs and Magee, was invalid either because Munson, one of the plaintiffs, was, at the time of entering into the contract, a director of the Sodus Bay & Corning Railroad Company, or for the reason that the contract violated the rule which prohibits combinations to prevent competition at a judicial or other public sale. The situation was briefly this:

The Sodus Bay & Corning Railroad Company was organized in 1871 to construct and operate a railroad from Corning, in the county of Steuben, to Sodus Bay, in the county of Wayne, a distance of about 86 miles, passing through the counties of Schuyler, Yates, and Ontario, by way of Savona, Penn Yan, and Geneva. Of this road the plaintiff Munson was president and a director. In 1872 the corporation created a mortgage on its projected road, its franchises and property, for \$1,500,000, to secure a contemplated issue of bonds to that amount, to be used in the construction of the road. It proceeded to secure rights of way over a portion of its line, graded about 30 miles of its track, between Savona and Geneva, and expended in the aggregate, in securing titles and in the

prosecution of the work, the sum of \$250,000. It issued bonds under the mortgage to the amount of \$257,000, from the proceeds of which the expenditures were made. At the date of the contract between the plaintiffs and Magee, August 13, 1875, the plaintiffs held and controlled, of the bonds, \$241,000 in amount; the remaining \$16,000 being in the hands of a former treasurer of the company, whose title thereto seems to have been disputed, but who subsequently received a dividend thereon from the proceeds of the mortgage sale. The title of the plaintiffs to the \$241,000 of bonds was not questioned, and there is no suggestion that they were not bona fide holders for value, or that the bonds did not represent a valid debt against the company for their full amount.

In January, 1874, the company became insolvent. It defaulted in the payment of the interest on its bonds at that date, and in the spring of 1875 all operations on the road were suspended, and the further prosecution of the enterprise was practically abandoned. In short, when the contract of August 13, 1875, was made, the company was hopelessly bankrupt, the work had stopped, the interest on its bonds had been unpaid for 18 months, and practically its whole property consisted of disconnected rights of way over a portion of its route, and a road-bed partially graded between Savona and Geneva; and whatever property it had of any value was acquired through the means furnished by the holders of the bonds.

Under these circumstances the parties entered into the contract of August 13, 1875. It recites that the plaintiffs own and represent \$241,000 of the bonds of the Sodus Bay & Corning Railroad Company, and that Magee, the other party to the contract, represents the persons and interests proposing to organize another railroad company for the construction of a railroad from the vicinity of Corning to Geneva. The parties of the first part (the plaintiffs) agree to proceed at once to secure the foreclosure of the mortgage, and purchase, on the foreclosure sale, the property, rights of way, franchises, and interests covered thereby, and convey the same to Magee, or to the railroad company proposed to be organized. Magee, the other party to the contract, agrees to deliver, or cause to be delivered, to Munson and his associates, in payment for the said property, rights of way, and franchises—First, mortgage bonds of the proposed railway company to the amount of 50 per cent. of the principal and interest of the bonds of the Sodus Bay & Corning Railroad Company held by them. The contract contains other stipulations not now necessary to mention.

In the view we take of another question in the case, we deem it unnecessary to determine whether the contract of August 13, 1875, was valid as between the original parties thereto; that is, whether the plaintiff Munson, in entering into the contract, vio-

lated any duty owing by him to the corporation of which he was a director, or whether the contract as a whole was, on the part of Munson and his associates, anything more than a legitimate arrangement to protect their interests as bondholders, and to make the mortgage security available for the payment of a part of the mortgage debt. The contract was not by or with the Sodus Bay & Corning Railroad Company; and, assuming that the question as to the validity of the original contract can be raised in this action, we are not prepared, without further consideration, to condemn the transaction on either of the grounds suggested. *Duncomb v. Railroad Co.*, 84 N. Y. 190; *Marie v. Garrison*, 83 N. Y. 14; *Harpending v. Munson*, 91 N. Y. 650. But this action is not brought to enforce the contract of August 13, 1875, against the defendant Magee. It is an action to compel the specific performance, by the defendant corporation, of the undertaking of Magee in that contract to deliver the bonds of the new company as therein provided, founded upon the assumption by the new company of that obligation, by resolution of its board of directors passed August 13, 1875, and also upon the subsequent contract of September 14, 1875, made between the company and the plaintiffs, which in its primary provision substituted the company to the place of Magee as the party of the second part in the contract of August 13, 1875.

The action in its entire scope is framed to enforce the obligation of the defendant corporation under its contract of assumption. It was tried upon this theory. The exceptions point to this as the ground of the action, and Magee is joined as defendant, and in the demand of relief, as the custodian of bonds of the company which the plaintiffs claimed he should be adjudged to deliver to them by the judgment in the action. Throughout the trial the action was treated as an action against the defendant corporation upon its contract, and in no respect as an action against Magee to enforce a liability against him under the contract of August 13, 1875. The plaintiffs, therefore, are compelled to meet the question whether, upon principles of equity, they are entitled to the aid of the court to enforce an executory contract between themselves on the one side, and the defendant corporation on the other, for the sale of the property of the former, in a case where one of the plaintiffs, at the time the contract was made, was a director of the purchasing corporation, and took part in making the contract upon which the action is brought.

For a proper understanding of the situation a few additional facts need to be stated. On the twenty-sixth of August, 1875, Magee and his associates organized a railroad company to construct a railroad from Corning to Geneva, as contemplated by the contract of August 13, 1875. The plaintiff Munson was

one of the promoters, and became a director and stockholder, and was the first president of the corporation. On the thirty-first of August, 1875, Magee executed a written assignment to the new corporation, the Syracuse, Geneva & Corning Railway Company, of his rights under the contract with the plaintiffs of August 13, 1875; and the board of directors, at a meeting on the same day, in which the plaintiff Munson participated, passed a resolution assuming the contract on the part of Magee, and agreeing to perform it, except in one particular not now material to be mentioned. On the fourteenth of September, 1875, the contract before referred to of that date was entered into between the plaintiffs and the new corporation, and was executed individually by each of the plaintiffs, and on the part of the corporation by the plaintiff Munson as president. The proceedings of the board of directors indicate that when the resolution of August 13, 1875, was passed, and for two or three months thereafter, the company contemplated building its road to Geneva on the same line substantially as that of the Sodus Bay & Corning Railroad Company, but in December, 1875, it located an entirely new line, not coincident in any part with the line originally contemplated, upon which new line its road was subsequently built. It is found, and the evidence supports the finding, that the best interests of the company were promoted by adopting its present route. The plaintiffs procured a foreclosure of the mortgage, and purchased the property, as they had agreed, and subsequently, in 1877, tendered a deed thereof to the defendant corporation, and demanded the delivery of the bonds, which was refused.

In determining the legal question presented, it is proper to say that there is no evidence of any actual fraud or collusion on the part of any of the parties to the original contract of August 13, 1875, or that the contract of assumption was induced by any improper appliances or motives whatever. It is plain that Magee and his associates, when they entered into the original contract, contemplated building the proposed road on the line of the Sodus Bay & Corning Railroad Company, and that the contract was made with a view of acquiring for the new road the rights of way and other property of that corporation. It is equally plain that the contract of assumption was entered into by the new corporation with the same expectation, and for the same purpose.

If the contract was otherwise unobjectionable, it could not, we think, be assailed on the ground that it was a contract outside of the power of the defendant corporation. The statute authorizes a railroad corporation to acquire land for its track and other necessary purposes, by voluntary purchase or by condemnation (Laws 1850, c. 140, §§ 14, 15); and an agreement, made on the purchase of rights of way, to pay therefor in bonds

of the purchasing corporation, secured by a mortgage on its property, is clearly, we think, within the implied, if not within the express, powers of a railroad corporation. Section 28, subd. 10. The contract made between the defendant corporation and the plaintiffs was in substance a contract to purchase rights of way; and although the defendant's line was not formally located on the line proposed to be purchased, and was in fact subsequently located on a different line, this change of purpose does not, we think, affect the question of corporate power.

But we are of opinion that the contract of September 14, 1875, is repugnant to the great rule of law which invalidates all contracts made by a trustee or fiduciary, in which he is personally interested, at the election of the party he represents. There is no controversy as to the facts bringing the case as to Munson within the operation of the rule. He and his associates were dealing with a corporation in which Munson was a director, in a matter where the interests of the contracting parties were or might be in conflict. The contract bound the corporation to purchase, and Munson, as one of the directors, participated in the action of the corporation in assuming the obligation, and in binding itself to pay the price primarily agreed upon between the plaintiffs and Magee. He stood in the attitude of selling as owner, and purchasing as trustee. The law permits no one to act in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside the transaction, or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them, as far as may be, impossible, knowing that real motives often elude the most searching inquiry; and it leaves neither to judge nor jury the right to determine, upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall.

It can make no difference in the application of the rule in this case that Munson's associates were not themselves disabled from contracting with the corporation, or that Munson was only one of ten directors who voted in favor of the contract. The contract on its face notified Munson's associates of his relation to the corporation, and that the contract was subject to be defeated on that ground; and, on the other hand, a corporation, in order to defeat a contract entered into by directors, in which one or more of them had a private interest, is not bound to show that the influence of the director or directors having the private interest determined the action of the board. The law cannot accurately measure the influence of a trustee with his associates, nor will it enter into the

inquiry, in an action by the trustee in his private capacity to enforce the contract, in the making of which he participated. The value of the rule of equity to which we have adverted, lies, to a great extent, in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of the trustees, vitiating, without attempt at discrimination, all transactions in which they assume the dual characters of principal and representative.

The rule has been declared and enforced in a great variety of cases; but in none, perhaps, with more vigor and completeness, both upon principle and authority, than in the leading case of *Davoue v. Fanning*, 2 Johns. Ch. 252. But the case of *Railway Co. v. Blakie*, 1 Macq. 461, decided by the house of lords, is in many of its features similar to the present one. In that case it appeared that the plaintiffs were a manufacturing firm, and that one of them was also a manager of the Aberdeen Railway Company, the defendant, and the chairman of the board. At a meeting of the managers, they by resolution authorized their engineer to contract for iron chairs needed by the company. The agent contracted with the plaintiffs' firm. It did not appear that the member of the firm, who was also a manager and the chairman of the company, intermeddled with the dealing on either side, further than that it may be assumed he was at the meeting which authorized the engineer to procure a supply of chairs. The plaintiffs brought their suit to enforce specifically the performance of the contract, or, in the alternative, to recover damages for its non-performance. After a decision in their favor in the lower court, the company appealed to the house of lords, where the ruling was unanimously reversed, on the ground that the contract was condemned by the rules of equity as having been made between the company of which one of the plaintiffs was a manager, and a private firm of which he was a member. The opinions of Lord Chancellor Cranworth, and of Lord Brougham, vindicate, upon impregnable grounds, the general rule, and its application to the particular case.

We have designedly omitted, up to this time, special reference to a circumstance which it is claimed takes the case out of the operation of the general equitable rule; that is, that the contract with the defendant corporation was not, on the part of the plaintiffs, a fresh dealing in respect to the sale of their interest in the property of the Sodus Bay & Corning Railroad Company, but was simply a substitution, in the place of Magee, of the corporation organized by him and his associates for the purpose of carrying out the original arrangement. But the promoters of the corporation are not the corporation. The legal body is distinct from the individuals who compose it. The statute confers no authority upon the promoters of a corporation to enter

into preliminary contracts binding the corporation when it shall come into existence. Such contracts may bind the individuals who make them. If adopted by the corporation, and they are within the corporate powers, and are not otherwise subject to objection, they may become the contract of the corporation, and enforceable as such.

In respect to contracts of promoters, Judge Redfield says: "The promoters are in no sense identical with the corporation, nor do they represent it in any relation of agency; and their contracts could, of course, only bind the company so far as they should be subsequently adopted by it as their successors." 1 Redf. Rys. 9.

But the corporation is at liberty to refuse to sanction them; and, if its sanction is obtained by the act or co-operation of directors who have a private interest, we perceive no reason why, under the general rule, the corporation may not resist an action for specific performance; at least, in a case where it has not accepted the consideration and taken the benefit.

It is claimed that the general policy of the law in this state sanctions the contract in

question, and we are referred to chapter 710, Laws 1873, which authorizes the purchaser, or the grantee of the purchaser, of the real estate, tracks, and fixtures of a railroad corporation sold under a mortgage or decree, to associate with him other persons, and form a new corporation to maintain and operate the road. But the transaction in question was not in any proper sense an arrangement for the reorganization of an existing railroad. It was contemplated that the new corporation should operate or maintain the road of the old corporation. The line of the new corporation, by its articles, extended only from Corning to Geneva; whereas the route of the old corporation was from Corning to Sodus Bay. When the contract was made, the enterprise of building the Sodus Bay & Corning road had been commenced, but the road had not been built. Its route had only in part been located, and the great burden and expense of the undertaking was yet to be incurred. The case is not in terms within the act of 1873; nor, as we think, within its spirit and intent.

These views lead to an affirmance of the judgment. All concur, except RAPALLO and FINCH, JJ., not voting.

RICH v. BLACK et al.

(33 Atl. 880, 173 Pa. 92.)

Supreme Court of Pennsylvania. Jan. 6, 1896.

Appeal from court of common pleas, Allegheny county; Thomas Ewing, Judge.

Bill by Martha K. Rich against Black & Baird, Daniel H. Barr, and others, to have said Barr declared trustee for plaintiff as to certain land, and to obtain an accounting by defendants. From a decree for plaintiff, defendants appeal. Affirmed.

J. S. & E. G. Ferguson, for appellants. M. A. Woodward, for appellee.

STERRETT, C. J. The rule of public policy which avoids, at the instance of the cestui que trust, purchases made by agents for sale, is practically absolute in its character. Courts of equity view such transactions with jealous eye; and it is only under special circumstances, amounting to a dissolution of the trust relation, when the parties have dealt at arm's length, that their validity is recognized. *Davoue v. Fanning*, 2 Johns. Ch. 254. And the reasons are obvious. On the one hand, the relation which such agents bear is confidential, and disarms the vigilance of their principals. It affords peculiar facilities for obtaining exclusive information in respect of the property intrusted to them for sale. Their employment implies that they have superior advantages for making sales, and that they will use every effort and means to obtain the highest price for the benefit of their principals. On the other hand, their individual interest is to purchase at the lowest price, and places them in a position which is inconsistent with the faithful and proper discharge of the duties of the trust. The opportunity will naturally lead to temptation, to abuse, and, as was aptly said by Mr. Chancellor Kent in *Davoue v. Fanning*, supra, be poisonous in its consequences. The cestui que trust is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power distinctly and clearly to show it. "There may be fraud," as Lord Hardwicke observed, "and the party not able to prove it." Thus an agent, by virtue of his trust relation, may discover valuable minerals in the land, and, locking the knowledge in his breast, take advantage of it in making a contract with his cestui que trust. If he deny it, how can the court find the fact? "The probability is that a trustee who has once conceived such a purpose will never disclose it, and the cestui que trust will be effectually defrauded." *Ex parte Lacey*, 6 Ves. 627. So he may take advantage of his superior knowledge of the market and skill in manipulation to obtain results beneficial to himself. "It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the cestui que trust

to come, at his own option, and without showing actual injury, and insist upon having the experiment of another sale" (*Davoue v. Fanning*, supra); or, as was held in our own case of *Swisshelm's Appeal*, 56 Pa. St. 475, treat the purchase as inoperative in respect of the land unsold by the trustee, and compel an account of the proceeds of sale made by him to innocent purchasers for value. "This is a remedy that goes deep, and touches the very root of the matter." *Davoue v. Fanning*, supra; *Leisenring v. Black*, 5 Watts, 303; *Parshall's Appeal*, 65 Pa. St. 224; *Rice v. Davis*, 136 Pa. St. 439, 20 Atl. 513; *Murphy v. O'Shea*, 2 Jones & Le T. 422. The cestui que trust must, it is true, move within a reasonable time; but what shall amount to a reasonable time will depend on circumstances, and lies in the discretion of the court. In the absence of special circumstances which may lengthen or shorten the time, the analogy of the law is followed. *Marshall's Estate*, 138 Pa. St. 285, 22 Atl. 90. These appellants misapprehend the rationale of this rule. They insist that because, as they claim, the sale was satisfactory to Mrs. Rich, the rule has no application. Conceding that in the first instance it was satisfactory, that fact would not take away her option to rescind; for these appellants then and for a long time afterwards ostensibly maintained towards her the character of agents for sale, and willfully concealed the fact of their own interest. They maintain their characters of inconsistency even now by claiming not only title as purchasers, but commissions as agents for sale. Roll, whom they first reported as the purchaser, confessedly knew nothing of it. The alleged interest of Gillespie and Neeb is more than doubtful, and, if it ever existed, was soon parted with. To all practical intents and purposes, these agents were the real purchasers, without the knowledge of their cestui que trust. *Rosenberger's Appeal*, 26 Pa. St. 67. However Mrs. Rich may have felt in the first instance in regard to the sale, it is not likely that it would have been satisfactory had she been fully informed of the facts. When she gave her agents a minimum price, it was manifestly intended as a guide to them in negotiating sale, and implied a just expectation on her part and an engagement on theirs that they would make an honest endeavor to obtain a higher price. If Roll, Gillespie, and Neeb were really intending purchasers, the obvious course was that these agents for sale should take competitive bids. They did not occupy the position of middlemen with equal duty to both. Their primary duty was to Mrs. Rich. But, so far as appears, no bona fide effort was made by them to perform this duty. Instead, Mrs. Rich was asked to take less, and, when this was refused, they hastened to avail themselves of the minimum price in their own interest, and had already made large profits before Mrs. Rich's discovery of the facts. If they could realize profits for themselves, they could and should have done so

for their cestui que trust. That was their employment, and that their undertaking; and equity will treat that as done which ought to have been done. To sustain the purchase made in these circumstances would work "actual injury" to Mrs. Rich, tend to encourage breaches of trust, and violate a wise rule of

public policy. Having taken action in time, the plaintiff was entitled to the relief which the decree of the court below is intended to secure. Decree affirmed, and appeal dismissed, with costs to be paid by appellants; and it is ordered that the record be remitted to the court below for further proceedings.

BENT v. PRIEST.

(86 Mo. 475.)

Supreme Court of Missouri. Oct. Term, 1885.

A. J. P. Garesche and J. M. Holmes, for appellant. T. L. Gant and J. M. Glover, for respondent.

BLACK, J. In 1873, the superintendent of insurance began proceedings to wind up the St. Louis Mutual Insurance Company, which was not then in a satisfactory condition. Most of the directors regarded a reinsurance as the best way out of the difficulty. Efforts were made to that end, including negotiations with the Mound City Life Insurance Company. Charles H. Peck, who was a large stockholder in the St. Louis Mutual, but not a director or officer, made proposals to some of the officers of the Mound City to bring about such an arrangement, the result of which was a contract between Peck and the president of that company, dated the 27th of November, 1873, by which, after reciting the desire of that company to effect the reinsurance, and the deemed necessity of Peck's services to accomplish that object, the company agreed to pay him \$155,000 within sixty days, for which sum Peck was to "devote his services for the procurement of such reinsurance and effecting a contract between said companies."

Peck thereupon approached the defendant, a director of the St. Louis Mutual, who at first did not take much interest in the matter. Peck, then, in substance, stated that he was largely interested in having the reinsurance effected; that it was worth ten or fifteen thousand dollars to the stockholders of the St. Louis Mutual, and that he meant business.

Priest and Wyman were partners in the real estate business, and upon Peck's suggestion that his business was legitimately within the partnership business, Priest referred Peck to Wyman, who was at a desk in the same room or office. The result of the negotiation between Peck and Wyman was that the former placed bonds of the Leavenworth, Atchison & Northwestern Railroad Company of the par value of fifteen thousand dollars in the hands of Mullikin to be handed to Wyman, if the reinsurance was effected, otherwise they were to be returned to Peck. This agreement was in writing, but was subsequently destroyed. The evidence, including a letter from Peck, shows that he agreed within thirty days to substitute money, or bonds of the Vulcan Iron Company, or St. Louis Gaslight Company, for these railroad bonds, the latter, it is said, then being worth but sixty cents on the dollar.

As the Mound City Insurance Company then stood, the superintendent of insurance did not regard it strong enough to make the reinsurance, and it was required to add a

half million dollars to its capital stock. In December, 1873, a contract of reinsurance was made by the St. Louis Mutual with the Mound City, the latter also stipulating that for a transfer of all of the assets of the St. Louis Mutual it would assume all the liabilities of that company, increase its own stock a half a million dollars, and out of this increased stock exchange its own stock for that of the St. Louis Mutual. Of the twenty directors of the St. Louis Mutual, seventeen, including the defendant, voted for the measure. The Mound City increased its stock as agreed, the reinsurance was approved by the superintendent of insurance and by the court in which the proceedings against the St. Louis Mutual were pending, and those proceedings were dismissed. By the 17th of January, 1874, the whole contract was substantially completed. Peck received his agreed compensation from the Mound City Insurance Company in secured notes which that company acquired by the assignment from the St. Louis Mutual. Peck would not, at least did not, substitute money or bonds of the iron company, or gas company, as he had agreed, for the railroad bonds in the hands of Mullikin, and Wyman, unable to do better, took those bonds. In August, 1874, Priest and Wyman dissolved their partnership, at which time Wyman handed over to Priest the one-half of the railroad bonds.

The conclusion from all the evidence is irresistible that defendant agreed to and did advocate and vote for the assignment and reinsurance, in consideration of the arrangement between Peck and Wyman. At all events the bonds were given to secure defendant's active influence in favor of the measure, though without this he might not have been hostile to the transaction.

In 1877 the superintendent of insurance commenced new proceedings against the St. Louis Mutual Life Insurance Company, and plaintiff was appointed receiver. By this suit he seeks to charge the defendant as a trustee of all the railroad bonds. The circuit court so held and decreed as to the one-half received by the defendant, and on his refusal to produce the same, entered a money judgment for the estimated value. From this judgment the defendant appealed. Plaintiff took a writ of error. In like manner both parties come to this court from the court of appeals, where the judgment of the circuit court was affirmed.

1. An agent or trustee cannot unite in himself the opposite character of buyer and seller, and if he does the profits may be charged with a trust for the benefit of the principal, unless the latter confirm the transaction with full knowledge of all the facts. So, too, if the agent make gains from the use of the trust funds or property he must account therefor. We need not cite authorities from this and other courts to support these plain propositions. Again, if the agent

accept any benefits in conducting the business of his principal he will hold them in trust for the principal. *Story, Agency* (8th Ed.) § 211; *Perry, Trusts*, § 206; *Jacobus v. Munn*, 37 N. J. Eq. 48.

The directors of a corporation occupy a fiduciary position. They are trustees and agents of the corporation and stockholders. In general they are governed by the same rules as are applied to trustees and agents. *Parker v. Nickerson*, 112 Mass. 195; *Railway Co. v. Poor*, 59 Me. 277; *Railway Co. v. Hudson*, 19 Eng. Law & Eq. 365. In *Perry on Trusts*, at section 207, it is said: "And so all advantages, all purchases, all sales, and all sums of money received by directors in dealing with the property of the corporation are made and received by them as trustees of the corporation, and they must account for all such moneys or advantages, received by them by reason of their position as trustees." Defendant does not seriously controvert these general principles of equity jurisprudence, but he insists they have no rightful application to this case, because the bonds were never made a part of the assets of the St. Louis Mutual, did not constitute a part of the consideration, avowed or concealed, paid by the Mound City, and were not made by him in the legitimate business of the corporation. He relies with full confidence upon *Tyrrell v. Bank*, 10 H. L. Cas. 26. The substantial facts of that case were these: The bank had been recently organized, and Tyrrell was its solicitor. Mrs. Campbell owned certain property, upon a part of which was situated a building known as the Hall of Commerce. Read had a contract with her for the purchase of the whole property at £49,200. Tyrrell and Read formed a combination to sell the property to the bank at an advanced price, and Tyrrell, for his influence, was to have a one-half interest in the contract, which Read had with Mrs. Campbell. Tyrrell kept the agreement secret from the bank, at the same time urged the bank to purchase, professing to act for it as solicitor. Eventually the bank purchased the Hall of Commerce part of the property at £65,000. Out of this Mrs. Campbell was paid, some litigated claims were settled, and the balance was paid to Read, who divided the profits with Tyrrell, each making some £6,000, and had left also the unsold portion of the property, alleged to be of the value of £8,000. The suit was brought by the bank against Tyrrell and Read. The master of the rolls dismissed the bill as to Read, and decreed Tyrrell a trustee for the bank of all interest acquired in the property, accounts were directed to be taken, and Tyrrell was ordered to convey to the bank his share in the property not sold to the bank. On appeal, prosecuted by Tyrrell, the decree was modified in form. The Lords considered that Tyrrell could not be decreed a trustee of the unsold portion of the property, and should not have been directed to convey that to the bank, because, as was said, the limit of the agency of

Tyrrell, the extent of his obligation, and the relation of solicitor and client, were to be ascertained by the extent of the property sold by Tyrrell to the bank. The lord chancellor very clearly states that Tyrrell could only be a trustee as to that portion of the property sold to the bank, and as to that he should make no gain. He proceeds to say the object which the master of the rolls has in view is to be accomplished in another way: "Tyrrell must receive from his clients, in his character of vendor to his clients, only that sum of money which, as between him and Read, Tyrrell must be taken to have paid for the property conveyed to his clients, but that sum of money must be ascertained in the following way: by deducting from it the value of the unsold property included in the contract between Read and Tyrrell, but not included in the contract of sale to the clients."

The bank among other things contended that, assuming Tyrrell's agency as to the bank was confined to the Hall of Commerce part of the property, still the circumstances showed that he received the share in the rest as a bribe, and for that reason the bank was entitled to a conveyance of it. As to this contention, Lord Chelmsford said: "No authority has been adduced in support of such a proposition, and I do not think it can be maintained. In order to simplify the question, let it be supposed that Tyrrell had acquired no interest in the property, but that Read had offered him £5,000 to induce the respondent to purchase, and that they had been persuaded by Tyrrell to buy at an excessive price. Of course, they might have rescinded the contract, but could they in any manner have obtained the £5,000 on the ground that it belonged to them? If, by reason of the agreement between Read and Tyrrell, the respondent had been prevailed upon to give too large a sum for the property, they might have maintained an action on the case against both the parties to the imposition upon them, and have recovered damages; or they might have sued their agent, Tyrrell, for damages arising from the breach of duty, and they would probably have received an amount equal to the sum which he had improperly received as a fair measure of the injury which they had sustained. But the £5,000 itself, as a specific demand, they could in no manner have recovered. The unsold part of the property in the same manner cannot be directly reached by any proceeding of the respondent." These remarks of Lord Chelmsford, if detached from the facts of that case and the decree actually made, appear to give some support to the defendant's position here.

The solicitor could be regarded as the agent of the bank only so far as the bank became the purchaser; beyond that he had a right to deal for himself; yet the decree as modified did not allow him to make any gain out of the transaction taken as a whole. He was allowed to keep the unsold

portion, but its value was deducted from the amount which he was allowed to receive from the clients in the statement of the account. Practically, there was little, if any, difference between the decree as made by the master of the rolls and as modified, in its effect upon the parties, and this seems to have been conceded in terms by Lord Cranworth. The facts there in judgment and the decree even as modified do not furnish a precedent in defendant's favor.

Where a trustee retired from his office in consideration that his successor paid him a sum of money, it was held that the money so paid should be treated as a part of the trust estate, and be accounted for as such by the retiring trustee, on the ground that he could make no profit directly or indirectly from the trust property, or from his office of trustee. *Sugden v. Crossland*, 3 Smale & G. 192. In *Gaskell v. Chambers*, 26 Beav. 360, it appears the Eagle Insurance Company desired to buy out the business of the London Mutual Insurance Company, and agreed to and did pay a specific consideration therefor, and, by a secret agreement with the directors, agreed to and did pay to them the further sum of four thousand pounds as a compensation for the loss of their officers. These directors were held to be trustees for the corporation, and it was also ruled that they received that sum by reason of their position as trustees, and must account therefor.

These cases are all quite clear to the effect that the trustee will not be allowed to make gain to himself, beyond his allowed compensation, by reason of his office and influence as such trustee. By accepting the office the director undertakes to give his judgment and influence to the interests of the corporation in all matters in which he represents or professes to represent it. That judgment and influence, if right, belongs to the corporation, and so does that which it produces, and the bonds received by the director are its property, as between it and the defendant. The circumstance that they came from Peck, and not directly from the Mound City Insurance Company, is wholly immaterial. They came from the agent of that company, and the extravagant amount paid Peck impresses one with the notion that more than fair commissions was included in the \$155,000. However that may be, what the director makes in his office as such belongs to the corporation. It will not do to clog these principles of law applied to principal and agent, trustee and cestui que trust, with exceptions and modifications. They must not be whittled away. Whatever may be the practice in such cases, the agreement by which the bonds were acquired was an illegal contract, as well as a plain breach of duty. No court, it is true, would aid the defendant or the receiver, or the corporation of which he is the receiver, in recovering the bonds from Peck, for that would be to execute the illegal contract. Neither would a court

assist Peck in recovering them back after the transaction was completed. So, too, an agent may resist an accounting on the ground that the subject of the agency was illegal, or against public policy. *Story, Agency*, § 235. But when the subject of the agency is entirely legal, and that was the case here, and profits are made by a violation of duty, it would be obviously unjust to allow the agent to reap the fruits of his own misconduct. *Id.* § 207. An agent is accountable to his principal for moneys that come into his hands as such, even if such amount be composed of usurious interest, and not collectible by the principal himself. *Chinn v. Chinn*, 22 La. Ann. 599. One party cannot hold back proceeds from another, of whom he was representative, on the ground that there was illegality in the way of getting the money. *Whart. Cont.* § 354. The defendant acquired the bonds while acting and professing to act in his capacity of director, and must be held to have received them in that capacity. The plaintiff's case is made out by the proof of these facts, and we are not concerned in the execution of the illegal agreement.

2. As to the writ of error prosecuted by the receiver we do not see that he has any right to the bonds which never came to the defendant. Wyman, who acquired them, is no party to this suit, and held no fiduciary relation to the plaintiff's corporation. The receiver has elected to take the course here pursued and must be content with such property as it will reach.

3. This suit was begun February 19, 1879, five years and ten to fifteen days after Wyman received the bonds for himself and defendant. The agreement by which the bonds were acquired and the receipt of the same are facts which were kept secret from all persons save those directly connected therewith, until 1878, when rumors were afloat pointing to these facts. They were then brought to the attention of the court, and soon thereafter this suit was begun. Defendant pleaded the five-year statute of limitations, and plaintiff replied that the fraud was not discovered until within five years next before the commencement of the suit. Section 3230, Rev. St., specifies five different classes of civil actions (other than those for the recovery of real estate) which can only be commenced within five years after the cause of action shall have accrued. The fifth is: "An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."

Our statute of limitations applies to equitable, as well as legal, causes of action, and we agree with counsel for the defendant that this clause under consideration should be considered in the light of the former equity rules, the place of which, in many respects, at least, it was designed to take. Beyond doubt the statute does not now and never did run

against an express continuing trust in favor of the trustee, certainly not until he openly repudiates the trust. *Johnson v. Smith*, 27 Mo. 591; *Smith v. Ricords*, 52 Mo. 581, 56 Mo. 553. Conceded it must be that by the equity rules, the statute was not applied by way of analogy, in cases of actual fraud, until the discovery of the fraud. But is it true, as is contended here, that by those rules the statute was applied without regard to the time of discovery in case of constructive frauds and trusts? It was said by Scott, J., in *Keeton's Heirs v. Keeton's Adm'r*, 20 Mo. 541: "In cases of resulting, implied and constructive trusts, where a party is to be constituted a trustee by a decree of a court of equity founded on fraud, it is well settled as a rule of equity, that the statute of limitations, and presumptions from lapse of time, will operate. With regard to the statute of limitations, it will run from the time that the facts are brought home to the knowledge of the party." See, also, *Perry, Trusts*, §§ 228, 230; 1 *Daniell, Ch. Pl.* 669; *Hunter v. Hunter*, 50 Mo. 445; *Ang. Lim.* § 470. In the case last cited the defendants were the uncles and agents of the plaintiffs for the management and sale of the lands; they purchased the lands, with the value of which plaintiffs were not familiar, at an under value; they then sold the same at an advanced price. It was a suit to establish a constructive trust for the profits arising from the re-sale. It was there said: "If a party is in possession of, or has notice of, the main facts constituting the fraud, the statute will commence running from that time." The difference of opinion expressed in that case and the subsequent one of *Rogers v. Brown*, 61 Mo. 187, is not pertinent to any inquiry here, for this case in no way concerns real estate.

Many authorities do hold that, in cases of constructive trusts and frauds, the statute will begin to run without regard to the time of the discovery. This appears to be due to the fact that often in such cases the facts are open and the law frequently draws its conclusion without regard to the motives, because of the confidential relation of the parties. Much, we think, depends upon the fact whether the fraud is a secret or open one. If the substantial facts constituting the fraud, in cases like the one under consideration, were open, it is believed, under the equity rules, the statute of limitations would have been applied at once, but if these facts were in their nature secret and were unknown, it is believed the statute would not begin to run until they were discovered, there being no want of diligence on the part of the complainant. Here the fraud consists in professing to act for and in the interest of the corporation, as was defendant's duty, when, in reality, he was acting for himself and for his private gain. The agreement under which this was done was in its very nature a secret one, one which the corporation would not naturally suspect, and one which would not be revealed by any act

openly done. Of course, here, simple knowledge of the existence of the agreement and acquisition of the bonds thereunder, brought home to the plaintiff, or the corporation of which he is receiver, would start the statute and from that time it would continue to run notwithstanding the subsequent appointment of the receiver. This knowledge was not acquired until much more than fifteen days after the receipt of the bonds, by Wyman. The circumstances by which the transaction was discovered show there were no laches on the part of the plaintiff or his corporation. We conclude the clause of the statute before noted applies to this case, and under it the cause of action is not barred.

4. A contract founded on a champertous consideration is illegal, against public policy and void. *Duke v. Harper*, 66 Mo. 55. In that case the contract there in question was held not to be champertous because the attorneys did not bind themselves to pay any portion of the expenses of the litigation. Where the right of the plaintiff, which he seeks to enforce, is derived under a title founded on his champerty, the suit must fail. Courts are not organized for the purpose of enforcing such contracts. Many of the authorities cited by defendant go to this extent and no farther. Some of them do appear to hold that where there is a champertous contract, by which the suit is prosecuted, and that fact comes to the knowledge of the court, it should dismiss the suit. *Barker v. Barker*, 14 Wis. 143; *Webb v. Armstrong*, 5 *Humph.* 379. Others appear to give a qualified approval to the doctrine. On the other hand a number of cases hold that the fact that the suit is being prosecuted under a champertous contract is no defense, and that the illegality of such a contract can only be set up when it is sought to enforce the contract. *Hilton v. Woods*, L. R. 4 *Eq.* 432; *Whitney v. Kirtland*, 27 N. J. *Eq.* 333; *Allison v. Railway Co.*, 42 Iowa, 274; *Court-right v. Burnes*, 3 *McCrary*, 60, 13 *Fed.* 317. Unless the plaintiff's title, by which he seeks to enforce a right, is infected by a champertous contract, we see no reason why the suit may not proceed, though such a contract exists as between the plaintiff and his attorney. It is time enough to turn a party out of court when he asks the aid of a court to enforce such a contract. This is, in substance, the rule as to most illegal contracts, and there is no good reason at this day for making an exception in this class of contracts.

Certain policy holders brought to light the facts upon which this suit is founded, and were permitted by the court to prosecute the same in the name of the receiver upon indemnifying him, and, as a consequence, the funds in his hands, against the payment of costs. These policy holders were but protecting their own rights. They could not well sue in their own names. In such cases it is not an uncommon thing for cautious

courts to require that the officer be made safe against costs of long and tedious suits. Thus far there is no element of champerty in the defense. It would seem the defendant offered to prove that the attorney by whom the suit was instituted and who represented these policy holders gave the bond, and, further, that he had an agreement with the receiver by which he was to have a certain portion of the avails of the suit for his services. In view of this offer let it be conceded, for the purpose of this case, without deciding the question that the agreement between the attorney and the receiver was champertous, still, applying the principle be-

fore announced, that constituted no defense to this action. The receiver's accounts will come before the court for its approval and it will be time enough then to examine into the questions of the validity of the agreement. The plaintiff is in no wise affected by the illegal agreement, even if any there was. We do not think public policy requires the courts to turn aside and investigate such side issues.

The judgment in this case, from which both parties come to this court, is affirmed.

HENRY, C. J., dissents. The other judges concur.

COOK v. GILMORE et al.

(24 N. E. 524, 133 Ill. 139.)

Supreme Court of Illinois. May 14, 1890.

Appeal from appellate court, first district.

Lynn Helm, for appellant. *Charles S. Miller*, for appellees.

SHOPE, C. J. The question presented by this record is whether a trustee, who accepts and performs the trust, without any contract or stipulation of the parties, or any provision in the order of court appointing him, for compensation for his services, is entitled to compensation for care bestowed, and for time expended in executing the trust. The rule laid down in the text-book is "that a trustee is not entitled to compensation for personal trouble and loss of time." Perry, Trusts, §§ 904-906; Hill, Trusts, 889; 2 Lewin, Trusts, 627. And such seems to be the rule established by the English court of equity, although in the later cases exceptions to that general rule have been more frequent, in cases where the court can find from the attending circumstances that both parties expected that compensation would be made. 2 Story, Eq. Jur. § 1268, and cases cited; authorities supra. The rule applied, not only to trustees so cited, but also to all who held a fiduciary relation, as executors and administrators, mortgagees in possession, receivers and guardians, and to officers, directors, and trustees of corporations. The rule is based upon the well recognized principle, upon which courts of equity invariably act, that the trustee should execute the trust for the benefit of the *cestui que trust* alone, and that he shall desire no profit by reason of the trust. And the rule was adopted and enforced for the reason that, while in a particular case the allowance of compensation might be justly allowed, and the estate not be charged with more than it might otherwise have to bear, yet the adoption of the contrary rule would have the tendency to tempt the trustee to disregard the interest of the beneficiaries, and lead, in general, to the consequence of loading the estate for the benefit of the trustee, by pretenses of care, trouble, and loss of time; thus placing the trustee in a position, which equity forbids, where his personal interests would conflict with the performance of his duty. And it is held that in this there was no hardship upon the trustee, for he might choose whether he will accept the trust or not. So a trustee might refuse to accept appointment by a court unless provision was made for proper compensation; and, if he undertook the trust with the understanding that upon subsequent application compensation would be allowed, the court may at the proper time ascertain and allow the same. Brocksopp v. Barnes, 5 Madd. 90; Morison v. Morison, 4 Mylne & C. 215; English note to Robinson v. Pett, 2 Lead. Cas. Eq.

417. By this well-settled rule the services of a trustee, in the absence of a provision for compensation in advance, are to be performed as a gratuity, without regard to the advantage that may result from his superior care, skill, and diligence in the management of the trust-estate. We are aware that in many of the states of the Union, and in the federal courts, a different rule prevails; but the law, as established by the courts of equity in England, in respect of compensation of conventional trustees, has been so long and firmly established in the jurisprudence of this state that it ought not to be changed by judicial determination. As said by the appellate court, the rule has been applied in all its strictness in this state whenever the question has arisen. See Constant v. Matteson, 22 Ill. 546; Hough v. Harvey, 71 Ill. 72; Huggins v. Rider, 77 Ill. 360. In some of the states, the right of mere conventional trustees to compensation has been fixed by statute; while perhaps in all, as in this state, laws have been passed allowing compensation of trustees required by law to be appointed, such as executors and administrators, guardians, conservators, and assignees of insolvent estates. And it is now universally held in this country that a receiver, being the arm of the court to execute its orders in respect of the property of which the court has taken control, may be allowed compensation out of the funds in his hands. In some, and perhaps a majority, of the states, where remuneration has been provided by statute to those to whom the law intrusts the care and management of the estates of lunatics, infants, deceased persons, insolvents, and the like, the courts by an equitable construction have extended the right to voluntary or conventional trustees, when the agreement, deed, will, or order of appointment is silent. See American note to Robinson v. Pett, supra. And this view is pressed upon us in this case with great force. But it must be answered, regardless of what our views might be if the question was an open one in this state, that the same statutes now in force, or others in every respect identical in effect, were in force when each of the decisions of this court referred to upon this question was rendered, and manifestly were not regarded by the court as controlling. Notwithstanding these statutes, this court adopted and has since adhered to the common-law rule. Appellant's trusteeship falls clearly within the rule, and, while he would be entitled to have allowed him all money actually expended in good faith for the preservation of the trust fund, if any, he can recover nothing for his personal or professional services in respect of his trusteeship. His claim for compensation as trustee, as well as for attorney's fees for professional services rendered during the continuance of the trust, were properly disallowed by the court. Hill, Trusts, 890; Perry, Trusts, § 904, and cases supra. The judgment of the appellate court must be affirmed.

In re SCHELL.

(53 N. Y. 263.)

Court of Appeals of New York. Sept. 23, 1873.

Appeal from order on settlement of accounts of Edward Schell, trustee, etc., of the estate of Jacob Appley, which disallowed an item of \$2,500 charged for his services as such trustee.

Jacob Appley died seized of a large real and personal estate. By his last will and testament he devised and bequeathed all his property, with certain exceptions, to his executors and the survivor of them, upon certain trusts therein named. The will, after reciting the trusts, contained this clause: "And also that my said executors retain and pay unto themselves out of said rents and incomes all costs, charges and expenses that they shall have to pay or be put unto in the fulfillment of this my will, and a reasonable compensation for their services."

By an order of the supreme court, Schell was appointed trustee in place of those named in the will. In his accounts he made a charge in gross of \$2,500 for his services. The referee reported in favor of its allowance.

Amasa J. Parker, for appellant. Samuel Hand, for respondent.

RAPALLO, J. The order appealed from shows upon its face that it was made upon the ground that the compensation of the trustee for his services should be limited to commissions, at the rate allowed by statute to executors and administrators, for receiving and paying out moneys.

This is the settled rule in cases where the creator of the trust has made no provision for compensation to the trustee. Under such circumstances the courts have by analogy allowed the same commissions which are by statute allowable to executors and administrators, and have restricted the allowances to those rates.

But where the instrument creating the trust provides that the trustee shall have a compensation for his services in executing the trust, such provision will be enforced. If the instrument declares the rate of compensation, it must be followed. If it establishes no rate, the value of the services should be ascertained by judicial investigation. *Meacham v. Sternes*, 9 Paige, 398.

The provision of the will in question is that the trustees (of whom the applicant is the successor) shall retain and pay unto themselves, out of the rents and income of the testator's estate, all costs, charges and expenses that they shall have to pay or be put unto in the fulfillment of his will, and a reasonable compensation for their services.

It would seem a sufficiently simple proposition that the question, what is a reasonable sum to be allowed to the trustee over and above his proper disbursements for his

services, is a question of fact determinable upon the same principles which would regulate such an inquiry were the controversy one arising upon an employment *inter vivos*.

But it is claimed on the part of the respondent that the statute which regulates the commissions of executors, administrators and guardians determines that the rate thereby allowed is a reasonable compensation, and that the subject of the amount of compensation is closed to further inquiry. The learned court at special term seems to have adopted this view, and its decision has been affirmed at general term. We cannot concur in the soundness of these conclusions. In the first place, the provisions of the statute do not in terms apply to trustees. The original trustees in this case were the same persons who were named in the will as executors, but their offices as trustees were additional to and distinct from their legal duties as executors. The applicant succeeds to the office of trustee and not of executor. The decisions which apply to trustees the same rules as to compensation which the statute applies to executors, etc., rest upon the principle of analogy and not upon the command of the statute. They are confined to cases where no provision is made by the creator of the trust for the compensation of the trustees. In such cases, there being no express declaration of the creator of the trust that his appointees should be compensated, yet it being unreasonable under ordinary circumstances to require them to perform their responsible duties gratuitously, it is a fair presumption that the testator assumed that they would be entitled to the commissions established by law for similar services when rendered by executors, etc. Where however he expressly provides that they shall have a reasonable compensation for their services, he must be supposed to have intended that the compensation should be reasonable with reference to the special circumstances of his estate and the services which he has required them to perform.

The object of the statute is to furnish a general and arbitrary rule for cases not otherwise provided for; but it should not govern where the testator has, by reason of peculiar circumstances existing in reference to his estate, required extraordinary services on the part of those to whose care he has confided it, and has specially provided that their compensation shall be reasonable, which is equivalent to declaring that it shall be proportioned to the value of the services they may render. By such a direction the testator necessarily confides to the tribunals under whose jurisdiction the administration of his estate may come, the adjustment of the compensation of his trustees, and this is a duty which those tribunals must perform conscientiously upon the evidence before them. It was therefore the duty of the court below in the case to determine whether the sum claimed by the trustee was or was not

reasonable under the circumstances, and to allow or reduce it according to their judgment, without being controlled by the statute. The case shows that the duties of the trustee were onerous, and involved more than the mere receipt and disbursement of money. He was intrusted with the management of forty houses and lots, the buildings being old and requiring frequent repairs, and the trustee swears that he has given them his personal care and attention, besides attending to the receipt and application of the funds.

Whether the sum of \$2,500 allowed by the referee is a reasonable amount is a question for the court below. The report of the referee is not conclusive, but merely for the in-

formation of the court. The court, at special term, should exercise its discretion whether to confirm or modify it, and if the amount is in its judgment excessive, it should be reduced, but the amount should be determined with reference to the facts of the case and not by the statute.

The orders of the special and general terms should be reversed, and the proceedings remitted to the court below to rehear at special term the motion to confirm the report of the referee.

The costs of the appellant should be allowed to him out of the fund.

All concur, except GROVER, J., not voting.
Ordered accordingly.

VAN ALLEN v. AMERICAN NAT. BANK.

(52 N. Y. 1.)

Court of Appeals of New York. Jan. 21, 1873.

Action to recover \$1,625.13, deposited by plaintiff with defendant in the name of Van Alen & Rice.

Van Alen & Rice were merchants in the city of New York. Before Feb., 1867, the plaintiff, a resident of Danville, Penn., had indorsed a note for Van Alen & Rice, due March 8, 1867.

On Feb. 4, 1867, plaintiff sent to Van Alen & Rice bonds, with a letter to the effect that they could be used "to protect the note on which I (plaintiff) am indorser. If you can get along without using them you can let me know, and I will give instructions as to future disposal of them."

On Feb. 15, 1867, plaintiff wrote another letter, giving instructions to "collect the coupon of the 7-30 bond, and retain all until you can determine as to your ability to meet the note maturing March 8. If you are able to meet it advise me so soon as you can determine, and I will then give further advice in regard to the bonds. * * * If you want to sell them and let the proceeds lay to your credit in bank, so that it will be available 8th March, do so. It would make your bank account look better, and perhaps do you good in that way."

The bonds were sold Feb. 20, 1867, for \$1,628.12. A check was received therefor which was used by Van Alen & Rice. On the same day they deposited with defendant \$1,711.66 "to cover the sale of the bonds." It was deposited for plaintiff. On the following day Van Alen & Rice wrote plaintiff, notifying him of the sale and deposit.

Van Alen & Rice made no subsequent deposit in the defendant's bank, and never drew any check against this deposit, or any check upon the bank, except a check in plaintiff's favor for the amount due him, March 6.

Van Alen & Rice had made an accommodation note for McCombie & Child, which became due March 4, at defendant's bank, for \$15,000. On the day it became due McCombie & Child sent their certified check to Van Alen & Rice, and that check was deposited with defendant to pay the note. On March 6 plaintiff served upon defendant a notice of his right to the money, and presented the check for payment. Payment was refused. Judgment for plaintiff.

Charles H. Woodbury, for appellant. Aaron J. Vanderpoel, for respondent.

CHURCH, C. J. The learned counsel for the appellant is undoubtedly right in the position that if, as between the plaintiff and Van Alen & Rice, there was no trust impressed upon the deposit in the bank defendant, to an amount equal to the proceeds of the bonds sold by Van Alen & Rice for the plaintiff, this action cannot be maintained. It is settled that the holder of a check cannot maintain an ac-

tion against the drawee, after a refusal to pay, for want of privity, and that a check against a general bank account does not operate as an assignment. *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Bank v. Millard*, 10 Wall. 152, and cases there cited. This action is based upon another principle equally well settled, viz., that so long as money or property belonging to the principal or the proceeds thereof may be traced and distinguished in the hands of the agent or his representatives or assignees, the principal is entitled to recover it unless it has been transferred for value without notice. 2 Grat. 544; *Pennell v. Deffell*, 4 De Gex, M. & G. 372; 6 Jones, Eq. 34; 2 Hem. & M. 417; 2 Kent, Comm. 796, 801. It appears to me clear that Van Alen & Rice were the agents of the plaintiff to sell the bonds, and were bound to keep the proceeds of the same for him. He owned the bonds, directed their sale, and also directed that the proceeds should be kept for him in a particular manner, and he was notified by Van Alen & Rice that they had been sold and the avails placed and would be kept as directed. These undisputed facts establish the relation of trustee and cestui que trust between the plaintiff and Van Alen & Rice as to the proceeds of these bonds.

It is claimed however that this principle is not applicable because the identical money for which the bonds were sold was not deposited. This objection would be fatal if there had in fact been no substitution of other money for the proceeds of the bonds. It seems to have been assumed on the trial that the check given upon the sale of the bonds was used by Van Alen & Rice for their own benefit, and if the evidence had stopped there the trust fund would have been gone and dissipated, and of course beyond the reach of being traced. But the uncontradicted evidence is that on the same day Van Alen & Rice substituted other money for that obtained for the bonds, and placed it in the bank defendant to their credit, to be retained for the plaintiff as arranged between them, and notified the plaintiff thereof. The letter of the 21st of February to the plaintiff in connection with the evidence of G. R. Van Alen is conclusive that the money referred to in the letter was that deposited in the bank defendant. The point made is this: A. having \$100, the proceeds of a sale of property of B., intends to place it in a repository and keep it for B., and instead of putting the identical bank bills in the designated place substitutes others of the same amount and keeps them for B. as such proceeds, can there be a doubt that the \$100 thus substituted would occupy the same position as the particular bills obtained for the property, and that they would be impressed with the same trust? Suppose Van Alen & Rice had got the check cashed by a third person and deposited the money, it would of course be regarded as the proceeds of the check, and belong to the plaintiff as effectually as the check itself. Does it make any difference whether the money was

obtained from a third person upon the check or from the safe of Van Alen & Rice? In either case the money is the proceeds of the check and stands in lieu of it. It is said that the secret intention of Van Alen & Rice cannot effect such a result. Between them and the defendant as to the substitution it was not secret. They in substance notified the plaintiff that they had placed on deposit the proceeds of his bonds and would keep it for him. They did deposit the amount which they treated as the proceeds, and declared it to be such. Can they deny it? Can any one for them? If I send a note to an attorney to collect, and deposit the money in a bank in his own name and keep it for me, is my title to the money impaired because he fails to deposit the identical bills? My agent collects \$100 rent for me and puts the bills in one pocket and takes the same amount from another pocket and deposits it and notifies me. Are my rights gone by the change of money? I think not. Stripped of unsubstantial forms, the case presented is that of a person delivering stock or bonds to an agent for sale with directions to deposit the proceeds in a bank to the credit of the agent, but to keep it in that way for him, and the agent follows the directions. Can there be a doubt as to the ownership of the money as between the agent and the principal? Clearly not. Suppose the principal had directed the agent to loan the money on a note or mortgage, would not the security belong to the principal? The bank defendant upon receiving the deposit became the debtor ostensibly to the depositor, but equitably to the real owner. The obligation incurred by the bank was to pay the money on demand in the usual course of business, and had a right to require a check from the depositor. When this formality was complied with and the bank was notified that the money actually belonged to the plaintiff, it did not lie in its mouth to set up a want of privity. Privity has nothing to do with the question. The bank had the plaintiff's money and gave its obligation in form to another person, but the obligation was in fact owned by the plaintiff and he can enforce it. There is no mystery or sanctity respecting the obligations of a bank in such a case, different from those of a private person, and if this money had been loaned to the latter under an agreement to repay it upon the presentation of the agent's check, he would not have been heard to say when the plaintiff presented the check, "I made no contract with you, and although I have no claim to the money you cannot maintain an action because there is no privity between us and the check does not operate as an assignment." The answer would be that the plaintiff owned the obligation, and had the same right to recover it as he would if the person had possession of his horse, and refused to deliver it on demand. The only effect of the direction to deposit in a particular manner was to relieve the agent upon complying with the direction from liability for loss without his fault. In the absence of such a direction the

principal, while he might pursue and claim the money, would not have been obliged to do so, and could have also held the agent personally.

It is objected also that the money was so mingled with the agent's own money as not to be traceable in the hands of the defendant. When Van Alen & Rice deposited this money for the plaintiff they included with it a few dollars of their own. But this does not affect the plaintiff's right to it. When a trustee deposits trust moneys in his own name in a bank with his individual money, the character of the trust money is not lost but it remains the property of the *cestui que trust*. If such money can be traced into the bank, and it remains there, the owner can reclaim it. When deposited, the bank incurred an obligation to repay it, which is not lessened or impaired because it incurred, at the same time, an obligation to pay other money belonging to the agent individually. If A. sells B.'s horse for \$100, and puts it in a box with \$100 of his own, the \$100 of B. may be claimed by him although the particular bills constituting it could not be identified. So if the same \$200 were deposited in a bank to the credit of A., the title of B. to \$100 would not be affected by the association, and the bank would owe that money to B. in equity, although it owed A. also for his individual money. These views are not only consonant with integrity and justice, but are fully sustained by authority.

The case of *Pennell v. Deffell*, 4 De Gex, M. & G. 372, is a leading and very instructive case upon this whole subject. It was a contest between the successor of one Green, an official assignee in bankruptcy, and the personal representatives of Green for moneys standing to his individual credit in the Bank of England and another bank. These moneys had been deposited from time to time by Green, and consisted of funds received by him in his official capacity as trustee and his own individual funds. The account was kept in his individual name, without any discrimination between the trust and private funds, and the question was, whether the various persons interested in the trust funds could claim the respective amounts due them, or whether the defendants were entitled to receive and administer upon the money as a part of the estate of Green. The master of the rolls held that the *cestui que trust* could not hold the money because it had no "earmark," and could not be traced and distinguished within the principle before adverted to. This decision was reversed upon appeal to the Court of Appeal in Chancery. The Lord Justice Knight Bruce, after a clear statement illustrating the doctrine upon which the principle rests, proceeds to say: "When a trustee pays trust money into a bank to his credit, the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as much and as effectually as the money so paid would have done had it specifically

been placed by the trustee in a particular repository and so remained; that is to say, if the specific debt shall be claimed on behalf of the cestuis que trustent it must be deemed specifically theirs. * * * This state of things would not, I apprehend, be varied by the circumstance of the bank holding also for the trustee, or owing also to him money in every sense his own." The Lord Justice Turner also delivered an elaborate opinion sustaining the same doctrine, in the course of which he says: "Suppose a trustee pays into a bank moneys belonging to his trust to an account not marked or distinguished as a trust account, and pays in no other moneys, could it for one moment be denied that the moneys standing to the account of the debt due from the bankers, arising from the moneys so paid in, would belong to the trust and not to the private estate of the trustee? Then suppose the trustee subsequently pays in moneys of his own, not belonging to the trust, to the same account. Would the character of the moneys which he had before paid in, of the debt which had before accrued, be altered? Again, suppose the trustee, instead of subsequently paying moneys into the bank, draws out a part of the trust moneys which he has before paid in, would the remainder of those moneys and of the debt contracted in respect of them lose their trust character? Then can the circumstance of the account consisting of a continued series of moneys paid in and drawn out alter the principle? It may indeed increase the difficulty of ascertaining what belongs to the trust, but I can see no possible ground on which it can affect the principle."

In the case of *Overseers of the Poor v. Bank of Virginia*, 2 Grat. 544, 44 Am. Dec. 399, an attorney deposited a check for the amount of a judgment in favor of his clients to his own credit, having a small amount of other money to his credit, and died. On the day of his death a note fell due belonging to the bank which it claimed to set off, but the court held that the clients were entitled to the money. Stanard, J., says: "The credits to Langhorne with the bank are several, and the sources of each distinctly identified. * * * They are as distinct and distinguishable as they would be were they in separate parcels in the hands of Langhorne, with labels on each designating the sources from whence they were derived." The same principle was decided in *6 Jones, Eq. 34*. So also in *Frith v. Cartland*, 2 Hem. & M. 417, where a person received from the plaintiff certain acceptances to take up paper owing to the plaintiff, and got them cashed and ran away. After mingling the money with his own, and making various changes and transformations, he was arrested, and the plaintiff was decided to be entitled to the money in preference to creditors; Vice-Chancellor Wood saying that "the court attributes the ownership of the trust property to the cestui que trust so long as it can be traced."

The same principle was decided in *Veil v. Mitchell*, 4 Washb. 105, in respect to the avails

of certain foreign bills collected by an agent.

In *Merrill v. Bank of Norfolk*, 19 Pick. 32, involving the same principle, Morton, J., said: "The defendants having the plaintiff's money in their hands, for which a demand was made before the action was commenced, are liable for the amount with interest from the time when it was demanded." These rules and adjudications, which are decisive of this case, accord with the equities. The bank defendant has no lien upon this money, and does not claim to have, and no claim is set up in the answer. Nor does it appear that any one else has. If Van Alen & Rice had given a lien for value upon this money, or had obtained a loan upon the apparent ownership of it in any way, the rights of the party holding the claim may have been superior to those of the plaintiff. No such claim is set up or shown. The note falling due the 20th of February was not set up in the answer, and if it had been, would not have operated as a defense. This deposit was demanded the 6th of February and could have been assigned by Van Alen & Rice, and the holder, if for value, could have enforced it. The note due the 20th was not an off-set, and could not be as against any but Van Alen & Rice. The question is therefore entirely between the plaintiff and Van Alen & Rice; the former claims the money and the latter admits the claim, and the facts sustain the justice of it. The defendant occupies the position of objecting to the title of the plaintiff without having or claiming any title itself. If Van Alen & Rice had refused to give a check, the plaintiff might have been obliged to resort to an equitable action; but if a title is established by the plaintiff, and he presented the evidence upon which the defendant agreed to pay the money, I see no reason why an action at law may not be maintained, but it is unnecessary to pass upon this point as it was not made. Neither was the point made that a part of the deposit could not be recovered.

It was suggested on the argument that notice to the bank by the depositor was necessary to protect the rights of the plaintiff, but this is not so. The title of the plaintiff does not depend upon whether the bank knew he had a title or not. That rested upon other facts. A notice to the bank might have prevented any transfer or the creation of a lien by the depositor, or prevented the bank from taking or acquiring such lien in good faith, but could not otherwise be necessary or important.

The appellant also claims that the plaintiff's money was in fact drawn out by the check for \$15,000 on the 4th of February.

The authorities before cited adopt the rule that moneys first deposited apply upon checks first drawn, and the accounts in the case of *Pennell v. Deffell* were adjusted upon that principle.

Without undertaking to determine when this rule should, and when it should not, be adopted, it is sufficient to say that the \$15,000 credit and debit was a special transaction. The check of a third person was put in to

pay an accommodation note of Van Alen & Rice and used for that purpose, so that the general rule would not apply to that item. With that exception no money was drawn after the deposit of \$1,711, which included the proceeds of the bonds. The decision in *Ætna Nat. Bank v. Fourth Nat. Bank*, *supra*, has no bearing on this case. There was no question of title in the plaintiff in that case,

and this court held that the obligation of the bank defendant to the depositor was discharged by the payment of another note against the depositor before the plaintiff's note became due, and that the plaintiff had no right of action.

The judgment must be affirmed. All concur except ALLEN and GROVER, JJ., dissenting.
Judgment affirmed.

WATERMAN et al. v. ALDEN et al.

(32 N. E. 972, 144 Ill. 90.)

Supreme Court of Illinois. Jan. 19, 1893.

Appeal from appellate court, second district.

Bill by Robert W., Charles, Albert H., and James D. Waterman, Sarah J. and Kate D. Moulton, Ellen L. Thomas, Caroline W. Syme, and J. Frank Wells, legatees under the will of James S. Waterman, deceased, for themselves, and all others similarly situated who may join therein, against Philander M. Alden, George S. Robinson, Sarah E., Mary J. Clayton, Charlotte and Caroline M. Waterman, Lizzie Chase, and Jennie Kinney, to obtain an accounting from said Alden and Robinson, to have them removed as trustees under said will, and for other relief. A decree was rendered, from which the complainants appealed to the appellate court. That court affirmed the decree, and complainants again appeal. Reversed.

W. R. Plum, for appellants. Carnes & Dunton, for appellees.

WILKIN, J. On the 28th day of November, 1870, James S. Waterman executed his last will and testament, by which he gave his wife one third of all his estate, and a specific legacy of \$5,000 in trust for the use of one Nellie Farnhdon. The rest of his estate was disposed of by the following residuary clause: "I give, devise, and bequeath all the rest, residue, and remainder of my estate, both real and personal, to the said Philander M. Alden and George S. Robinson, * * * the executors of this, my last will and testament, hereinafter nominated and appointed, in trust for the use and benefit of my brothers and sisters, to wit, [naming them] to have and hold, manage and control, the same for such purpose, for and during the term of twenty one years from and after the date of my decease, and during the continuance of said trust estate, as aforesaid, to receive, collect, and pay over to my said brothers and sisters above named the net income and profits thereof, in equal portions to each, annually, the child or children of a deceased brother or sister to take the same portion the father or mother would have taken if living; and, at the expiration of said twenty one years after my decease, I give, devise, and bequeath to my said brothers and sisters, their heirs and assigns, forever, the said rest, residue, and remainder of my estate, both real and personal, to be equally divided between them, share and share alike, the child or children of any deceased brother or sister to take the same share the father or mother would have taken if living, and, in case of the death of any of my said brothers or sisters leaving no issue, the share of such brother or sister would have taken if living to be equally divided among my surviving brothers and sisters."

The testator died July 19, 1883, and on the 24th of the same month said will was duly admitted to probate in the county court of De Kalb county, whereupon said Alden and Robinson were qualified, and took upon themselves the duties of executors and trustees, as in and by the will provided. The estate was very large, being inventoried at about \$531,000, consisting of farm lands and other real estate to the value of \$127,512.70, and the balance in cash, notes and accounts, stocks, etc. The widow declined to take under the will, and, her husband having left no child or children, or descendants of such, one half of the entire estate, real and personal, was partitioned and set off to her, as provided by the statute in such case. The administration was still pending and undetermined in said county court at the filing of this bill. Said Alden and Robinson had reduced a part of the trust property to possession, and made a partial distribution of the proceeds thereof to the beneficiaries, when on the 9th of June, 1887, Robert W. and Charles Waterman, surviving brothers of the testator, and certain children of deceased brothers and sisters, claiming under said residuary clause, began this action in the circuit court of said De Kalb county against Alden and Robinson, to compel them to render an account of their trusteeship, to charge them with certain losses to the trust estate by reason of their negligent and wrongful conduct in and about the management of the same, and to have them removed as such trustees, and others appointed in their stead. After protracted litigation a final decree was rendered in the cause by the circuit court of Lee county, to which it had been removed. The complainants carried the record to the appellate court of the second district by appeal. There both parties assigned errors, and an extended statement of the case, with a very carefully prepared opinion by Cartwright, J., was filed (42 Ill. App. 294), affirming the decree of the circuit court in all respects. This appeal is from that judgment of affirmance. The record is unusually voluminous, and the argument of counsel on behalf of appellants has taken an almost unlimited range. It would be impossible to even casually notice all the points made, without extending this opinion to an unreasonable length. For a full statement of the facts of the case we refer to the opinion of the appellate court. We also concur in the conclusions reached by that court, as set forth in said opinion, except as hereinafter indicated.

The points more particularly pressed upon our attention are—First, the circuit court erred in refusing to remove appellees as trustees; second, the circuit court erred in refusing to hold said trustees personally liable for the loss of the "Marsh indebtedness;" third, the circuit court erred in its division of the costs and expenses of the litigation. The parts of the final decree relating to these

assignments of error are as follows: "It is further ordered, adjudged, and decreed that the motion of complainants, filed herein on the 17th of July, 1890, for the removal of Alden and Robinson as trustees, be overruled." "And it is further ordered, adjudged, and decreed that this court has no jurisdiction to investigate the charge against said Alden and Robinson or either, on account of any alleged loss growing out of the failure of the Sycamore Marsh Harvester Man'f'g Co., the Marsh Binder Man'f'g Co., C. W. Marsh, and W. W. Marsh, or either, or two or more, of them, or the alleged neglect of the said Alden and Robinson to collect or secure the payment of obligations owing by them, or some of them, to the estate of James S. Waterman, dec'd." "It is further ordered, adjudged, and decreed that the expenses of this litigation be paid up to October 15, 1889, as found by said master's report, to wit: \$3,869.71, and the attorneys' fees and attorneys' expenses in this cause paid or incurred since October 15, 1889, as enumerated, and shown by the testimony of D. J. Carnes and William Lathrup, heard in open court, up to July 19, 1890, to wit: \$1,348.27 to be allowed said trustees in their accounts when they shall have actually paid the same, and shall be charged to the principal fund, less one-fourth part of the gross attorneys' fees therein included, which one-fourth part is found by the court to be \$988.62, and which one-fourth part said trustees are ordered to bear personally, leaving \$4,229.36 to be charged to the principal fund. This decree shall not be construed as allowing or disallowing any other expense of this litigation paid or incurred by said trustees since October 15, 1889. And it is further ordered and decreed that the costs of this proceeding be taxed as follows,—that is to say, that two thirds thereof be paid by the trustees, as such, out of the principal fund in their hands, and one third of said costs out of the distributable income going to the complainants, and that in taxing the costs the clerk allow \$500 paid by stipulation on file herein to Mason B. Loomis, and \$360 paid by said trustees to Sherwood Dixon, as special masters; also payment by them of \$15.40 for witness fees, and \$312.80 for depositions; which sums, so far as paid by them, except that paid Master Dixon, are shown by his report to have been paid, and are embraced in the items of \$3,869.71 costs of this litigation. The clerk will also tax, as part of the complainant's costs herein, the sum of \$392.86, paid by complainant for taking depositions; also \$47.40 for certified copies of record, \$2.50 for service of subpoenas, \$8 witness fees paid by complainants' solicitor. The clerk will also tax the usual taxable costs incurred by either party." We will consider the foregoing questions in the order named, referring to the facts appearing in the record especially applicable thereto.

There is no difficulty in finding the legal

measure of care and diligence required at the hands of trustees in the management of a trust estate. Cases may be found holding that, inasmuch as no compensation can be allowed them when not expressly provided for, they can only be held liable for losses which result from their gross negligence or willful misconduct; but the rule undoubtedly is that they must discharge the duties of their trust to the best of their skill and ability, "with such care and diligence as men fit to be intrusted with such matters may fairly be expected to put forth in their own business of equal importance." 2 Story, Eq. Jur. § 1268b; 2 Pom. Eq. Jur. § 1070. The evidence in this case clearly shows, and in fact it is admitted, that appellees were, prior to the filing of this bill, guilty of some negligence in and about the management of the trust property. First, they wholly failed to keep proper accounts of the trust funds, and of their dealings with the same, as will more fully appear hereafter. In the second place, Robinson gave little or no attention to the business, being much of the time absent from the state. It will not do to say, as is attempted, that his personal attention was not necessary to the proper management of the business, in view of the fact that numerous letters were written him by Alden, complaining of his continued absence, and demanding his presence and attention to the estate. Finally, general negligence was shown in failing to promptly collect or secure claims due the estate, especially owing by the Marsh Manufacturing Companies. It does not follow necessarily that, because of these acts of negligence, a court of chancery should remove them. Courts of equity have a very broad jurisdiction over trust estates and trustees, and will remove the latter for a failure, through neglect or from willfulness, to perform their duties, or will compel them to carry out the trust which they have been appointed to and have accepted, as shall appear, under all the circumstances of a given case, for the best interest of the estate and all parties interested in the same. In 2 Story, Eq. Jur. § 1289, it is said: "It is not, indeed, every mistake or neglect of duty or inaccuracy of conduct of trustees which will induce courts of equity to adopt such a course, [remove the trustees,] but the act or omission must be such as to endanger the trust property, or to show a want of honesty, or a want of proper capacity to execute the duties, or want of reasonable fidelity." The dereliction of duty on the part of these trustees seems to have resulted from mere negligence rather than willfulness, and we are of the opinion that the chancellor was justified, on the whole record, in refusing to remove them.

Whether or not the trustees should be held personally liable for losses sustained by the complainants on the Marsh indebtedness is attended with much more difficulty. It is alleged in the bill that among

the assets which came into their hands were three judgment notes payable to said James W. Waterman,—one for \$5,000, dated April 27, 1883, due in 90 days, signed by the Sycamore Marsh Harvester Company and C. W. and W. W. Marsh; one for the sum of \$3,000, dated June 13, 1883, due in 90 days, by the same parties; and one for \$5,350.40, dated January 1, 1878, by C. W. and W. W. Marsh alone. It is there alleged that after said notes came into their hands, and were due and payable to them, they knew the makers were embarrassed financially, and likely to fail, but took no steps to collect or secure the same until June 30, 1884; that said Alden, being cashier, one of the directors, and a large stockholder in the Sycamore National Bank, on October, 1883, the said Alden knowing the financial embarrassment of the said makers of said notes, said bank loaned them about \$25,000; that thereafter said Alden pressed said parties for security for said bank indebtedness, which was given, but that he made no effort whatever to obtain security for said indebtedness due the estate, although security therefor could have been obtained; that on said June 30, 1884, Alden caused the notes due the estate to be put in judgments in the circuit court of Lee county, although the circuit court of De Kalb county was at the time in session, the makers of said notes having property in the last-named county subject to lien and levy of judgments on said notes; that he employed the same attorney who represented said bank, and he at the same time took judgment in its favor for said \$25,000 indebtedness; that, through the wrongful and negligent conduct of said trustee, said property in De Kalb county was allowed to be levied upon and taken on executions in favor of said bank and others, to the exclusion of those in favor of the estate; that, through the negligence of the trustees, property attempted to be levied upon in said county on executions in favor of the estate was wrongly described, and thereby priority of lien in favor of said estate lost; that by reason of such neglect and mismanagement on the part of appellees the greater part of the said indebtedness was wholly lost to said estate. The first special master to whom the case was referred found against the complainants on these allegations as to negligence and omissions of duty on the part of the trustees, and reported that they should not be held liable for the loss; but the chancellor before whom the case was pending took a different view of the evidence, and on exceptions to the master's report found "that said trustees, Alden and Robinson, should have known that said Marsh Harvester Manufacturing Company and the Marshes were insolvent, and in failing condition, from the time of the death of the said James S. Waterman until their actual failure, about July, 1884, and that said trustees did not exercise due and proper diligence to collect or have

secured said undisputed indebtedness to said estate; and it appearing, had said trustees diligently pressed said undisputed indebtedness to said estate for payment or security, that security might have been obtained therefor, so it is ordered that trustees, Alden and Robinson, be charged with the payment of said undisputed indebtedness to said estate." This order only includes the two notes signed by the manufacturing companies and the Marshes, the other note being disputed, as hereafter shown. On a re-reference of the case the master was directed to report the amount of loss on said two notes, which he did, finding the amount to be \$1,365.51; but the circuit court of Lee county, as appears from the foregoing extract from its decree, refused to allow the claim for want of jurisdiction. That a loss to the complainants has been sustained by reason of the failure of appellees to collect the whole amount of those notes is not denied. That they might have been collected by the use of ordinary business management and diligence, or secured, is clearly established by the evidence. We think it is equally clear that the trustees knew that said parties were heavily indebted, and liable to fail, long before any effort was made by them to secure or collect said indebtedness. The only finding of the court below on the facts is to that effect. While Special Master Loomis by his report excuses the conduct of the trustees, he does not do so on the ground that they were not negligent, but rather upon the theory that, from the relations existing between the testator and the Marshes, it is fair to presume that he, if living, would have used no more care and diligence in enforcing those claims than did appellees. It need scarcely be suggested that no such test can properly be applied to the conduct of trustees. There may be abundant reason for believing that Mr. Waterman, though a careful business man, would much rather have lost the indebtedness than to have pressed the collection of it, but that furnishes no excuse for these trustees to neglect or fail to use all reasonable diligence in the matter. Mr. Waterman might do with his own as he pleased, but the duties of these appellees are fixed by law, and if they have violated those duties they are personally liable.

The question, then, as to whether or not the circuit court erred in refusing to hold appellees liable to make good said loss, must be decided upon the admission that, upon the facts proved and found by that court in a proper tribunal, they can be so held; the only question now being, did said court properly hold that it had no jurisdiction to adjudicate upon the matter? That courts of chancery have jurisdiction generally, on the application of beneficiaries of a trust fund, to charge trustees with losses occurring through their negligence or mismanagement, is too clear to call for the citation of authorities. The decree of the circuit court

seems to have proceeded upon the theory that, inasmuch as the trustees were also executors of the will of James S. Waterman, a court of chancery could not compel them to make good the loss sustained by complainants without interfering with the jurisdiction of the county court before which the administration of the estate was pending. This, we think, is a misapprehension. The negligence in failing to secure or collect these claims, it is said, was the negligence of the executors, over whom, in the administration of the estate, the county court has exclusive jurisdiction. The relief sought by this bill is against the trustees, and not the executors; and, if the relief prayed cannot be granted by a court of chancery, it must be because complainants have failed to prove such dereliction of duty on the part of appellees, in their capacity as trustees, as should make them liable, and not because their bill seeks to remove any part of the administration of the estate from the county court. It does not follow, because Alden and Robinson were guilty of negligence in not collecting said indebtedness as executors, they are not also guilty of neglect of duty in that regard as trustees. Suppose other persons had been executors, and they had been guilty of the conduct charged in this bill, causing the loss here complained of, and these trustees, with full knowledge of that misconduct, had not only consented, but themselves contributed, thereto, would there have been any doubt as to the power of a court of chancery to charge the trustees, regardless of the liability of the executors in their settlement of the estate in the county court? The executors and trustees being the same persons, it is impossible that there should be an act of fraud or breach of duty by the executors which is not consented to and acquiesced in by the trustees. The question is not in which capacity appellees are liable, and hence cases cited by counsel on either side, discussing the question as to whether funds were held in the one capacity or another, have no application. On the allegations of the bill, and the finding of the facts by the circuit court, the debts in question have been absolutely lost to the estate, and to that extent the complainants have been injured; and the only question which can now or hereafter arise between these parties is, have these trustees, by their negligent conduct, become liable for that loss? Nothing which may be hereafter done in the settlement of the estate in the county court can affect this question, and we are unable to see why these complainants should be sent to that court for the settlement of their rights. We are therefore of the opinion that the circuit court erred in refusing to take jurisdiction of the question of the liability of appellees for said loss, and that it should have decreed that they make good the same to the trust fund in their hands.

As to the note signed by the Marshes

alone, the first master reported that the makers claimed to have a defense against it, and, when the case was again referred, the master was directed to ascertain whether or not a valid defense did exist to said note, and report the same. He reported that a defense was insisted upon, and that on the testimony of said C. W. and W. W. Marsh it was established, the only question being as to the competency of those parties as witnesses to prove the defense; and on that question he found that in their favor. We think his conclusion as to their competency was correct. Moreover, it does not appear that appellees could have secured or collected that note, however prompt and diligent they might have been. The Marshes denied that they owed it, and do not say they would have paid or secured it if applied to for that purpose; whereas they admit that the other two notes were undisputed, and could have been secured if security had been asked for. Appellees should not, therefore, be held liable on said personal note.

Both parties object to the apportionment of the costs and expenses of the suit made by the circuit court. We think the order in that regard is quite as favorable to appellees as the facts of the case would justify. They are responsible for the most expensive portion of this litigation, in failing to keep proper accounts of their trusteeship. In the first special master's report is the significant finding that they "made out and exhibited an entirely new book of accounts as executors, also one as trustees, since the filing of the bill;" and that fact the master well says "amounts to an admission that prior books were not what they ought to be." There is no claim on their part that they attempted to keep accurate separate accounts of the trust estate. The only apology for failing to do so is that they did not know how to classify the two kinds of property. But they were entitled to counsel, at the expense of the trust estate, to assist them, and, if necessary, to the directions of a court of equity in that regard. They certainly had no right to omit a plain legal duty because they may have been in doubt as to how it should be performed. On that theory they might have neglected that duty during the entire period of their trusteeship. At all events, on the report of the first master the court found it necessary to again refer the case to a second master to make a complete statement of the account, and this of necessity greatly increased the costs and expenses of the suit. Appellees cannot therefore justly complain that they were required to pay a considerable part of the whole expense. On the other hand, owing to the large amount and variety of assets belonging to the estate, it was a matter of some difficulty at least, as the result of this litigation shows, to determine just what property belonged to principal and what to income. As before said, appellees were entitled to the advice of coun-

sel, and, if necessary, the aid of the court, to properly settle that question. The statement of the account approved by the court below is therefore for the benefit of all parties interested in the trust estate,—those who take the income, and those who shall finally take the principal; and it cannot be said that either should be entirely exempt from liability for costs and expenses in making it. It is conceded that taxing costs in a chancery proceeding is always within the sound legal discretion of the chancellor, and that his decree in that regard will only be reviewed where it is shown that there has been an abuse of that discretion. We see no reason for interfering in the present case on that ground. It is insisted with great earnestness that the account stated by the last special master, and approved by the court,

is erroneous, in that it fails to charge the trustees with interest on the small amounts which had been charged wrongfully by Alden for railroad fare and commissions on insurance. It is perhaps true that the account is inaccurate in that respect, but the matter is of so little importance that no court ought to entertain the objection as reversible error. We have examined the account, and compared it with the proofs in the case, and are satisfied that it is substantially correct, and does justice between the parties, except in the matter of the Marsh indebtedness, as above stated. For that error the decree of the circuit court will be reversed, and the cause will be remanded to the circuit court, with directions to enter a decree in conformity with the views herein expressed. Reversed and remanded.

HUTCH.& BUNK.EQ.—35

In re BARKER'S TRUSTS.

(1 Ch. Div. 43.)

Chancery Division. Nov. 6, 1875.

This was a petition under the trustee act, 1850, and the bankruptcy act, 1869, asking for the removal of the sole trustee of a will (who had also a beneficial interest under it), on the ground that he had been adjudicated bankrupt, and for the appointment of a new trustee in his place, and for a vesting order.

Part of the property subject to the trusts of the will consisted of bonds transferable by delivery with coupons. The trusts were to receive the income, and pay it to one of the petitioners during life.

Mr. Chitty, Q. C., and Mr. Bush, in support of petition. Chapman Barber, for trustee. Solicitors: Tatham, Procter & Co.; Walter, Moojen & Co. Mr. Chester, for other parties.

JESSEL, M. R. In my view, it is the duty of the court to remove a bankrupt trustee who has trust money to receive or deal with, so that he can misappropriate it. There may, be exceptions, under special circumstances, to that general rule; and it may also be that, where a trustee has no money to receive, he ought not to be removed merely because he has become bankrupt; but I consider the general rule to be as I have stated. The reason is obvious. A necessitous man is more likely to be tempted to misappropriate trust funds than one who is wealthy; and besides, a man who has not shewn prudence in managing his own affairs is not likely to be successful in managing those of other people.

However, if special circumstances are required for the removal of a bankrupt trustee, I should in the present case find them in the nature of the trust property. Part of the property consists of bonds with coupons, which could very easily be made away with. The trustee must be removed, and I make an order accordingly.

CHICK et al. v. WILLETTS.

(2 Kan. 384.)

Supreme Court of Kansas. Jan. Term, 1864.

Error from district court, Shawnee county.

Nathan P. Case, for plaintiffs in error. J. & D. Brockway, for defendant in error.

CROZIER, C. J. Two questions are presented by the record: First, which law, the twentieth section of the Code, or the second section of the "amendatory act," prescribes the limitation; and, second, when an action upon a promissory note, secured by a mortgage on real estate, is barred by the statute of limitations, has the mortgagee any remedy upon the mortgage? These are the facts: On the sixth day of April, 1858, at Kansas City, in the state of Missouri, the defendant executed to the plaintiffs his promissory note, payable one day after date. Afterwards, and on the 12th day of August of that year, the defendant, to secure the payment of the note, executed, in this state, a mortgage upon some lots in Topeka, which mortgage contained a stipulation that if default was made in the payment of the note for two years from the date of the mortgage, that instrument might be foreclosed, etc. On August 13, 1863, a suit was instituted upon the note and mortgage, and the facts, as above stated, being admitted, judgment was rendered for the defendant. To reverse that judgment this proceeding is instituted.

The note having been made in Missouri, would, under the act of February 10, 1859, have been barred in two years from the passage of that act, if there were nothing else to be considered. By a stipulation in the mortgage, the time of payment was deferred two years from August 12, 1858.

The mortgage having been made in this state, was the arrangement, with reference to our statute of limitations, a Kansas or Missouri contract? Although no change was made upon the face of the note, yet the clause of the mortgage referred to was effective to change its terms as if written across its face. The time of its payment, with reference to the land, was extended two years. Its payment, as against the land, could not be enforced before that time; nor would the limitation laws begin to run against it until the expiration of that time. These changes in the original contract were effected by the paper which was executed in this state. The contract evidenced by the mortgage is essentially different from that set out in the note, and must control it. Therefore, the contract, as it stood, after the making of the mortgage, was a Kansas contract, and would not be barred in two years.

The statutes of limitation of this state are wholly unlike the English statute, and differ materially from the limitation laws of those states which have adhered to the com-

mon law forms of action and modes of procedure. Those statutes apply, in terms, to the forms of the action at law and contain no provisions concerning an equitable proceeding. If a party had concurrent remedies, one at law, the other in equity, courts of equity applied the limitation prescribed for the action at law. But in all other cases they were said to act merely in analogy to the statutes, and not in obedience to them.

In this state, the case is entirely different. The distinction between actions at law and suits in equity is abolished; and the statutes of limitation apply equally to both classes of cases. They were made to apply to the subject matter, and not to the form of the action. In England and the states referred to, a limitation different from that prescribed for simple contracts in writing, was prescribed for specialties. Here, "an action upon a specialty, or any agreement, contract or promise in writing," must be brought within three years; and it matters not what the relief demanded may be, whether such as could formerly be obtained only in a court of law, or such as might have been afforded by a court of equity exclusively.

Mortgages here differ essentially from mortgages at common law, and in the states referred to. At common law, a mortgage was a conveyance with a defeasance, and gave the mortgagee a present right of possession. Upon it, even before the conditions were broken, he might enter peaceably or bring ejectment. If the condition was broken, the conveyance became absolute. If the money was paid when due, the estate reverted to the mortgagor; if not so paid, the estate was gone from him forever. After a time, the law of mortgage was so modified that the legal title was not considered as having passed until the condition was broken. At a later day, another still more important innovation was made. While it was considered that, upon the condition broken, the mortgagee became invested with the legal title, and was entitled to possession, yet, in that condition of things, his title was subject to a defeasance. The rents and profits operated as cancellation, pro tanto, of his conveyance; and when they reached a sum sufficient to reimburse his original investment, with such use as the law allowed, the legal title reverted to the mortgagor, and he would be entitled to the possession; and he had a right to facilitate this operation by payment of the money, and upon application to a court of equity, his title would be disencumbered of the cloud the mortgage cast upon it. This right of the mortgagor was called "the equity of redemption," and, considering the then prevalent theory of mortgages, the phrase was peculiarly appropriate and expressive. The title had passed, but he had a right to redeem; and it is among the highest glories of equitable jurisprudence, that at so early a day the means of enforcing this right were supplied. Some

of the states still adhere to the common law view, more or less modified by the real nature of the transaction; but in most of them, practically, all that remains of the old theory is their nomenclature. In this state, a clean sweep has been made by statute. The common law attributes of mortgages have been wholly set aside; the ancient theories have been demolished; and if we could consign to oblivion the terms and phrases—without meaning except in reference to those theories—with which our reflections are still embarrassed, the legal profession on the bench and at the bar would more readily understand and fully realize the new condition of things. The statute gives the mortgagor the right to the possession, even after the money is due, and confines the remedy of the mortgagee to an ordinary action and sale of the mortgaged premises; thus negating any idea of title in the mortgagee. It is a mere security, although in the form of a conditional conveyance; creating a lien upon the property, but vesting no estate whatever, either before or after condition broken. It gives no right of possession, and does not limit the mortgagor's right to control it—except that the security shall not be impaired. He may sell it, and the title would pass by his convey-

ance—subject, of course, to the lien of the mortgagee.

If we are right in these views as to our statute of limitations, and the operation of a mortgage under our law, the English cases and cases in New York and Ohio, cited by counsel for plaintiffs, have no application to the case at bar. The statutes of limitation under which they were made, make distinctions between notes and mortgages which do not exist here; and the operations of notes and mortgages there and here are totally different. The decisions are not authorities in this case, for the reason that they are not applicable, and cannot be made so. If our limitation law omitted mortgages, and our law of conveyances gave the right of possession to the mortgagee, some of them would be in point; but as neither of these conditions exist here, they throw no light upon the questions under consideration in the case at bar.

Our conclusions are, that the twentieth section of the Code prescribes the limitation to an action on the note or mortgage, and as the three years expired on the 12th day of August, 1863, a suit commenced on the 13th was too late. Judgment affirmed.

All the justices concurring.

BARRETT et al. v. HINCKLEY.

(14 N. E. 863, 124 Ill. 32.)

Supreme Court of Illinois. Jan. 19, 1888.

Appeal from superior court, Cook county;
J. E. Gary, Judge.

Watson S. Hinckley, plaintiff, sued George D. Barrett, Adalina S. Barrett, and William H. Whitehead, impleaded with others, defendants, in ejectment. Judgment for plaintiff, and the above-mentioned defendants appealed.

Whitehead & Packard, for appellants.
Wilson & Moore, for appellee.

MULKEY, J. Watson S. Hinckley, claiming to be the owner in fee of the land in controversy, on the twenty-sixth day of February, 1885, brought an action of ejectment in the superior court of Cook county against the appellants, George D. Barrett, Adalina S. Barrett, William H. Whitehead, and others, to recover the possession thereof. There was a trial of the cause before the court without a jury, resulting in a finding and judgment for the plaintiff, and the defendants appealed. The evidence tends to show the following state of facts: In 1870, Thomas Kearns was in possession of the land, claiming to own it in fee-simple. On August 3d of that year he sold and conveyed it to William H. W. Cushman for the sum of \$80,000. Cushman gave his four notes to Kearns for the balance of the purchase money,—one for \$12,500, maturing in 30 days; three for \$16,875 each, maturing, respectively, in two, three, and four years after date,—and all secured by a mortgage on the premises. The notes seem to have all been paid but the last one. In 1878, Kearns died, and his widow, Alice Kearns, administered on his estate. Previous to his death, however, he had hypothecated the mortgage and last note to secure a loan from Greenebaum. Subsequently, and before the commencement of the present suit, Greenebaum, in his own right, and Mrs. Kearns, as administratrix of her husband, for value, sold and assigned by a separate instrument in writing the mortgage and note to the appellee, Watson S. Hinckley. This is in substance the case made by plaintiff. The defendants showed no title in themselves or any one else. The conclusion to be reached, therefore, depends upon whether the case made by the plaintiff warranted the court below in rendering the judgment it did.

It is claimed by appellants, in the first place, that much of the evidence relied on by appellee to sustain the judgment below was improperly admitted by the court, and various errors have been assigned upon the record questioning the correctness of the rulings of the court in this respect. They, however, go further, and insist that, even conceding the facts to be as claimed by appellee himself, they are not sufficient in law to sustain the action. As the judgment be-

low will have to be reversed on the ground last suggested, it will not be necessary to consider the other errors assigned. We propose to state as briefly as may be some of the reasons which have led us to the conclusion reached. In doing so, it is perhaps proper to call attention at the outset to some considerations that should be steadily kept in mind as we proceed, and to which we attach not a little importance.

It is first to be specially noted that this is a suit at law, as contradistinguished from a suit in equity. It is brought to enforce a naked legal right, as distinguished from an equitable right. The plaintiff seeks to recover certain lands, the title whereof he claims in fee-simple. To do this he is bound to show in himself a fee-simple title at law, as contradistinguished from an equitable fee. *Fischer v. Eslaman*, 68 Ill. 78; *Wales v. Bogue*, 31 Ill. 464; *Fleming v. Carter*, 70 Ill. 286; *Dawson v. Hayden*, 67 Ill. 52. Has he done this? He attempts to derive title remotely through the mortgage from Cushman to Kearns, but upon what legal theory is not very readily perceived. His immediate source of title, however, seems to be Mrs. Kearns, as administratrix of her husband, and Greenebaum, as pledgee of the note and mortgage. The instrument through which he claims is lost or destroyed, and all we know concerning its character is what the plaintiff himself says about it. As to its contents, he does not pretend to state a single sentence or word in it, but characterizes it as an assignment, and gives the conclusions which he draws from it in general terms only. After stating his purchase of the note and mortgage in January, 1880, he says: "The assignment was from Mrs. Kearns, the administratrix of Thomas Kearns' estate, and Elias Greenebaum, the banker. At the time of the purchase, a separate writing was given to me,—a full assignment. * * * It was a very explicit assignment, or full assignment, of the note and mortgage, and the land, the property, and all the right and title to the land." It will be observed, the instrument is throughout characterized as an assignment only, which does not, like the term "deed" or specialty, signify an instrument under seal. A mere written assignment, founded upon a valuable consideration, is just as available for the purpose of passing to the assignee the equitable title to land as an instrument under seal. Such being the case, we would clearly not be warranted in inferring that the assignment was under seal, from the simple fact that the witness gives it as his opinion that the instrument was "a full assignment" of the land, which is nothing more than the witness' opinion upon a question of law. There not being sufficient evidence in the record to show that the assignment was under seal, it follows that, even conceding the legal title to the property to have been in Mrs. Kearns and Greenebaum,

or either of them, it could not have passed to the appellee by that instrument, and, if not by it, not at all, because that is the only muniment of title relied on for that purpose. This conclusion is of course based upon the fundamental principle that an instrument *inter partes*, in order to pass the legal title to real property, must be under seal. But this is not all. Even conceding the sufficiency of the assignment to pass the legal title, the record, in our opinion, fails to show that the assignors, or either of them, had such title; hence there was nothing for the assignment to operate upon, so far as the legal estate in the land is concerned. Having no such title, they could not convey it. "*Nemo plus juris ad alienum transferre potest, quam ipse habet.*" That the legal estate in this property was not either in Greenebaum or Mrs. Kearns at the time of the assignment to plaintiff is demonstrable by the plainest principle of law. Let us see. Thomas Kearns was the owner of this property in fee. He conveyed it in fee to Cushman. The latter, as a part of the same transaction, reconveyed it by way of mortgage to Kearns. By reason of this last conveyance, Kearns became mortgagee of the property, and Cushman mortgagor. According to the English doctrine, and that of some of the states of the Union, including our own, Kearns, at least as between the parties, took the legal estate, and Cushman the equitable. According to other authorities, Kearns, by virtue of Cushman's mortgage to him, took merely a lien upon the property to secure the mortgage indebtedness, and the legal title remained in Cushman. For the purposes of the present inquiry, it is not important to consider just now, if at all, which is the better or true theory. It is manifest, and must be conceded, that the legal estate in the land, after the execution of the mortgage, was either in the mortgagee or mortgagor, or in both combined. Such being the case, it is equally clear appellee, to succeed, must have deduced title through one or both of these parties. This could only have been done by showing that the legal title had, by means of some of the legally recognized modes of conveying real property, passed from one or both of them to himself. This he did not do, or attempt to do; indeed, he does not claim through them, nor either of them. Not only so; neither Mrs. Kearns nor Greenebaum, through whom appellee does claim, derives title through any deed or conveyance executed by either the mortgagor or mortgagee; nor does either of them claim as heir or devisee of the mortgagor or mortgagee.

As the assignment of the note and mortgage to appellee did not, as we hold, transfer or otherwise affect the legal title to the land, it may be asked, what effect, then, did it have? This question, like most others pertaining to the law of mortgages, admits of two answers, depending upon whether the

rules and principles which prevail in courts of equity or of law are to be applied. If the latter, we would say none; because, as to the note, that could not be assigned by a separate instrument, as was done in this case, so as to pass the legal title. *Ryan v. May*, 14 Ill. 49; *Fortier v. Darst*, 31 Ill. 213; *Chickering v. Raymond*, 15 Ill. 362. As to the mortgage, it is well settled that could not be assigned like negotiable paper, so as to pass the legal title in the instrument, or clothe the assignee with the immunity of an innocent holder, except under certain circumstances which do not apply here. *Railway Co. v. Loewenthal*, 93 Ill. 433; *Hamilton v. Lubukee*, 51 Ill. 415; *Olds v. Cummings*, 31 Ill. 188; *McIntire v. Yates*, 104 Ill. 491; *Fortier v. Darst*, 31 Ill. 212. But that the mortgagee, or any one succeeding to his title, might, by deed in the form of an assignment, pass to the assignee the legal as well as the equitable interest of the mortgagee, we have no doubt, though there is some conflict on this subject. 2 Washb. Real Prop. 115, and authorities there cited. Yet the assignors, in the case in hand, not having the legal title, as we have just seen, could not, by any form of instrument, transmit it to another. If, however, the rules and principles which obtain in courts of equity are to be applied, we would say that, by virtue of the assignment, the appellee became the equitable owner of the note and mortgage, and that it gave him such an interest or equity respecting the land as entitled him to have it sold in satisfaction of the debt.

There is perhaps no species of ownership known to the law which is more complex, or which has given rise to more diversity of opinion, and even conflict in decisions, than that which has sprung from the mortgage of real property. By the common law, if the mortgagor paid the money at the time specified in the mortgage, the estate of the mortgagee, by reason of the performance of the condition therein, at once determined, and was forever gone, and the mortgagor, by mere operation of law, was remitted to his former estate. On the other hand, if the mortgagor failed to pay on the day named, the title of the mortgagee became absolute, and the mortgagor ceased to have any interest whatever in the mortgaged premises. By the execution of the mortgage, the entire legal estate passed to the mortgagee, and, unless it was expressly provided that the mortgagor should retain possession till default in payment, the mortgagee might maintain ejectment as well before as after default. This is the view taken by the common-law courts of England, and which has obtained, with certain limitations, in most of the states of the Union, including our own, in which the common-law system prevails. In *Carroll v. Ballance*, 26 Ill. 9, which was ejectment by the mortgagee against the assignee of the mortgagor, to recover the mortgaged premises, this court thus states the English rule on the

subject: "In England, and in many of the American states, it is understood that the ordinary mortgage deed conveys the fee in the land to the mortgagee, and under it he may oust the mortgagor immediately on the execution and delivery of the mortgage, without waiting for the period fixed for the performance of the condition, [citing *Coote Mortg.* 339; *Blaney v. Bearce*, 2 *Greenl.* 132; *Brown v. Cram*, 1 *N. H.* 169; *Hobart v. Sanborn*, 13 *N. H.* 226; *Paper-Mills v. Ames*, 8 *Metc. (Mass.)* 1]. And this right is fully recognized by courts of equity, although liable to be defeated at any moment in those courts by the payment of the debt." Again, in *Nelson v. Pinegar*, 30 *Ill.* 481, which was a bill by mortgagee to restrain waste, it is said: "The complainant, as mortgagee of the land, was the owner in fee, as against the mortgagor and all claiming under him. He had the *ius in re*, as well as *ad rem*, and being so is entitled to all the rights and remedies which the law gives to such an owner." So, in *Oldham v. Pfeigar*, 84 *Ill.* 102, which was ejectment by the heirs of the mortgagor against the grantee of the mortgagor, this court, in holding the action could not be maintained, said: "Under the rulings of this court, the mortgagee is held, as in England, in law the owner of the fee, having the *ius in re*, as well as the *ius ad rem*." In *Finlon v. Clark*, 118 *Ill.* 32, 7 *N. E.* 475, the same doctrine is announced, and the cases above cited are referred to with approval. *Taylor v. Adams*, 115 *Ill.* 570, 4 *N. E.* 837. Courts of equity, however, from a very early period, took a widely different view of the matter. They looked upon the forfeiture of the estate at law, because of non-payment on the very day fixed by the mortgage, as in the nature of a penalty, and, as in other cases of penalties, gave relief accordingly. This was done by allowing the mortgagor to redeem the land on equitable terms at any time before the right to do so was barred by foreclosure. The right to thus redeem after the estate had become absolute at law in the mortgagee was called the "equity of redemption," and has continued to be so called to the present time. These courts, looking at the substance of the transaction, rather than its form, and with a view of giving effect to the real intentions of the parties, held that the mortgage was a mere security for the payment of the debt; that the mortgagor was the real beneficial owner of the land, subject to the incumbrance of the mortgage; that the interest of the mortgagee was simply a lien and incumbrance upon the land, rather than an estate in it. In short, the positions of mortgagor and mortgagee were substantially reversed in the view taken by courts of equity.

These two systems grew up side by side, and were maintained for centuries without conflict or even friction between the law and equity tribunals by which they were respectively administered. The equity courts did not attempt to control the law courts, or even

question the legal doctrines which they announced. On the contrary, their force and validity were often recognized in the relief granted. Thus, equity courts, in allowing a redemption after a forfeiture of the legal estate, uniformly required the mortgagee to reconvey to the mortgagor, which was of course necessary to make his title available in a court of law. In maintaining these two systems and theories in England, there was none of that confusion and conflict which we encounter in the decisions of the courts of this country; resulting, chiefly, from a failure to keep in mind the distinction between courts of law and of equity, and the rules and principles applicable to them respectively. The courts there, by observing these things, kept the two systems intact, and in this condition they were transplanted to this country, and became a part of our own system of law. But other causes have contributed to destroy that certainty and uniformity which formerly prevailed with us. Chiefly among these causes may be mentioned the statutory changes in the law in many of the states, and the failure of the courts and authors to note those changes in their expositions of the law of such states. Perhaps another fruitful source of confusion on this subject is the fact that in many of the states the common-law forms of action have been abolished by statute, and instead of them a single statutory form of action has been adopted, in which legal and equitable rights are administered at the same time, and by the same tribunal. Yet the distinction between legal and equitable rights is still preserved, so that, although the action in theory is one at law, it is nevertheless subject to be defeated by a purely equitable defense. Under the influence of these statutory enactments and radical changes in legal procedure, by which legal and equitable rights are given effect and enforced in the same suit, the equitable theory of a mortgage has in many of these states entirely superseded the legal one. Thus, in New York it is said, in the case of *Trustees, etc., v. Wheeler*, 61 *N. Y.* 88, "that a mortgage is a mere chose in action. It gives no legal estate in the land, but is simply a lien thereon; the mortgagor remaining both the legal and equitable owner of the fee." Following this doctrine to its logical results, it is held by the courts of that state that ejectment under the Code will not lie at the suit of the mortgagee against the owner of the equity of redemption. *Murray v. Walker*, 31 *N. Y.* 399. In strict conformity with the theory that the mortgagee has no estate in the land, but a mere lien as security for his debt, the courts of New York, and others taking the same view, hold that a conveyance by the mortgagee before foreclosure, without an assignment of the debt, is in law a nullity. *Jackson v. Curtis*, 19 *Johns.* 325; *Wilson v. Troup*, 2 *Cow.* 231; *Jackson v. Willard*, 4 *Johns.* 41. And this court seems to have recognized the same rule as obtaining in this state, in *Delano v. Bennett*, 90 *Ill.* 533.

The New York cases just cited, and all others taking the same view, are clearly inconsistent with the whole current of our decisions on the subject, as is abundantly shown by the authorities already cited. The doctrine would seem to be fundamental that if one *sui juris*, having the legal title to land, intentionally delivers to another a deed therefor, containing apt words of conveyance, the title at law, at least, will pass to the grantee; but for what purposes or uses the grantee will hold it, or to what extent he will be able to enforce it, will depend upon circumstances. If the mortgagee conveys the land without assigning the debt to the grantee, the latter would hold the legal title as trustee for the holder of the mortgage debt. *Sanger v. Bancroft*, 12 Gray, 367; *Barnard v. Eaton*, 2 Cush. 304; *Jackson v. Willard*, 4 Johns. 40. It is true, the interest which passes is of no appreciable value to the grantee. Thus, in the case last cited, Chancellor Kent, in speaking of it, says: "The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond." In *Wait's Actions and Defenses* (volume 4, p. 565) the rule is thus stated: "By the common law, a mortgagee in fee of land is considered as absolutely entitled to the estate, which he may devise or transmit by descent to his heirs." In conformity with this view, *Pomeroy*, in his work on *Equity Jurisprudence*, (volume 3, p. 150,) in treating of this subject, says: "In law, the mortgagee may convey the land itself by deed, or devise it by will, and on his death intestate it will descend to his heirs. In equity, his interest is a mere thing in action, assignable as such, and a deed by him would operate merely as an assignment of the mortgage; and in administering the estate of a deceased mortgagee a court of equity treats the mortgage as personal assets, to be dealt with by the executor or administrator." We have already seen that under the decisions of this court, and by the general current of authority, a mortgage is not assignable at law by mere indorsement, as in the case of commercial paper. But, on the other hand, the estate and interest of the mortgagee may be conveyed to the holder of the indebtedness, or even of a third party, by deed with apt words of conveyance; and the fact that it is in form an assignment will make no difference. 2 Washb. Real Prop. 115, 116. Such an assignee, if owner of the mortgage indebtedness, might, no doubt, maintain ejectment in his own name for his own use. Or the action might be brought in his name for the use of a third party owning the indebtedness. *Kilgour v. Gockley*, 83 Ill. 109. So, in this case, if the action had been brought in the name of *Kearns'* heirs for the use of *Hinckley*, no reason is perceived why the action might not be maintained.

It must not be concluded, from what we

have said, that the dual system respecting mortgages, as above explained, exists in this state precisely as it did in England prior to its adoption in this country, for such is not the case. It is a conceded fact that the equitable theory of a mortgage has, in process of time, made in this state, as in others, material encroachments upon the legal theory which is now fully recognized in courts of law. Thus, it is now the settled law that the mortgagor or his assignee is the legal owner of the mortgaged estate, as against all persons except the mortgagee or his assigns. *Hall v. Lance*, 25 Ill. 250, 277; *Emory v. Keighan*, 88 Ill. 482. As a result of this doctrine, it follows that, in ejectment by the mortgagor against a third party, the defendant cannot defeat the action by showing an outstanding title in the mortgagee. *Hall v. Lance*, supra. So, too, courts of law now regard the title of a mortgagee in fee in the nature of a base or determinable fee. The term of its existence is measured by that of the mortgage debt. When the latter is paid off, or becomes barred by the statute of limitations, the mortgagee's title is extinguished by operation of law. *Pollock v. Maison*, 41 Ill. 516; *Harris v. Mills*, 28 Ill. 44; *Gibson v. Rees*, 50 Ill. 383. Hence the rule is as well established at law, as it is in equity, that the debt is the principal thing, and the mortgage an incident. So, also, while it is indispensable in all cases to a recovery in ejectment that the plaintiff show in himself the legal title to the property as set forth in the declaration, except where the defendant is estopped from denying it, yet it does not follow that because one has such title he may under all circumstances maintain the action; and this is particularly so in respect to a mortgage title. Such title exists for the benefit of the holder of the mortgage indebtedness, and it can only be enforced by an action in furtherance of his interests; that is, as a means of coercing payment. If the mortgagee, therefore, should, for a valuable consideration, assign the mortgage indebtedness to a third party, and the latter, after default in payment, should take possession of the mortgaged premises, ejectment would not lie against him at the suit of the mortgagee, although the legal title would be in the latter, for the reason it would not be in the interest of the owner of the indebtedness. In short, it is a well-settled principle that one having a mere naked legal title to land in which he has no beneficial interest, and in respect to which he has no duty to perform, cannot maintain ejectment against the equitable owner, or any one having an equitable interest therein, with a present right of possession. This case, with a slight change of the circumstances, would afford an excellent illustration of the principle. Suppose the present plaintiff had obtained possession under his equitable title to the note and mortgage, and the heirs of *Kearns*, who hold the legal title, had brought ejectment against him, the action clearly could not have

been maintained, for the reasons we have just stated. But it does not follow, because such an action would not lie against him, that he could, upon a mere equitable title, maintain the action against others. *Cottrell v. Adams*, 2 Biss. 351-353, Fed. Cas. No. 3,272; 9 Myers, Fed. Dec. 240. The question in that case was almost identical with the question in this, and the court reached the same conclusion we have. See, also, *Speer v. Haddock*, 31 Ill. 439.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

LADUE v. DETROIT & M. R. CO.

(13 Mich. 380.)

Supreme Court of Michigan. July Term, 1865.

Appeal in chancery from Wayne circuit.

The facts, so far as they are necessary to an understanding of the legal questions involved in the case, will be found stated in the opinion.

G. V. N. Lothrop, for complainant. H. H. Emmons and A. Pond, for defendants.

CHRISTIANCY, J. The mortgage, which the bill in this case seeks to foreclose, was executed by John Ladue to the complainant and Francis E. Eldred, composing the firm of Ladue & Eldred, on the 4th day of August, 1852, to secure and indemnify the firm against any indorsements which might be made, or liabilities to be incurred, by them as sureties for John Ladue, as well as for any moneys they might advance for him, according to the condition of a bond to which the mortgage was collateral, and which was of like effect. There was nothing in the papers or in the arrangement between the parties which bound Ladue & Eldred to make any advances or to indorse any paper for John Ladue, or to incur any liability for him, nor was the latter bound to accept any such accommodation. The effect of the arrangement was that such advances and liabilities, if made or incurred, would be purely optional on the part of the mortgagees. This mortgage was duly recorded on the day of its date. On the 9th day of May, 1853, John Ladue, the mortgagor, sold and conveyed the mortgaged premises to Charles Howard (through whom the railroad company derive their title), by warranty deed, which was duly recorded on the 9th day of July, 1853. John Ladue, however, remained in possession, using the premises as before, until his death, December 4, 1854.

No claim is made for any advances made by Ladue & Eldred to John Ladue, but the whole claim under the mortgage is based upon indorsements made for him by the mortgagees, which have been paid by Andrew Ladue, one of the complainants, and all these indorsements, as shown by the proofs, were made some time after the sale to Howard and the recording of his deed. Whatever indorsements were made prior to that time seem to have been taken up by John Ladue; and it does not satisfactorily appear by the evidence that any of these indorsements, made since the recording of Howard's deed, were made in renewal of paper indorsed by them previous to that time. No indorsements made prior to the recording of Howard's deed are in any way involved, and the case may therefore be considered in all respects in the same light as if no such previous indorsements had ever been made, especially as it does not appear that at the time of the sale to Howard, or the recording of his deed, there was any ex-

isting unsatisfied indorsement, or any subsisting liability, inchoate or otherwise, incurred by the mortgagees for the mortgagor.

The mortgagees, at the time of the indorsements in question, had no notice of the deed to Howard, unless the record of that deed is to be considered such notice, the deed having been some months previously recorded. The validity of the mortgage, as between the parties, for any amount of advances which might be made, or liabilities incurred under it, after they should have been thus made or incurred, is not questioned by the defendants; nor is it denied that the record of it would be sufficient notice to subsequent purchasers and incumbrancers, of the amount which the mortgagees might actually have advanced or indorsed for the mortgagor; or, in other words, the amount for which it had become an actual and subsisting security, at the time when the question of notice of the mortgage became material, which, for the purposes of this case, is admitted to cover the period from the purchase by Howard down to the time of the recording of his deed, the record of which is claimed to be notice to the mortgagees as regards any advances made to, or liabilities incurred by, them for the mortgagor after the recording of the deed. Nor is it denied, that if the mortgagees, by the contracts or arrangements between them and the mortgagor (to secure which, on the part of the latter, was the object of the mortgage), had been bound to make advances or to indorse for the mortgagor, the record of the mortgage would have been full notice to Howard, and the mortgage would have been good against him, though the advances were not in fact made or the paper indorsed until after the deed to him and actual notice of that deed to the mortgagees. The defendants also admit that the result would be the same under this mortgage, as to any advances made or paper indorsed by the mortgagees for the mortgagor, before they had actual or constructive notice of the sale and deed to Howard. But they insist that, as there was not at the time of Howard's purchase or the recording of his deed any debt of the mortgagor, or any liability incurred for him by the mortgagees, absolute or inchoate, nor any obligation on their part to incur such liability, the mortgage was not then an incumbrance in fact or in legal effect; that it could only become such from the time when the advances or indorsements were actually made; and it being optional with the mortgagees whether they would make any such advances or indorsements, and the indorsements being made subsequent to the recording of Howard's deed, the mortgage is, in legal effect, subsequent to the deed, and the record of the deed was notice to the mortgagees of Howard's rights.

The first question, therefore, for our determination is, what was the legal effect of the mortgage (if any) upon the land, at

the time of the recording of the mortgagor's deed to Howard?

That a mortgage in this state, both at law and in equity, even when given to secure a debt actually subsisting at its date, conveys no title of the land to the mortgagee (especially since the statute of 1843, taking away ejectment by the mortgagee); that the title remains in the mortgagor until foreclosure and sale, and that the mortgage is but a security, in the nature of a specific lien, for the debt, has been already settled by the decisions of this court. *Dougherty v. Randall*, 3 Mich. 581; *Caruthers v. Humphrey*, 12 Mich. 270; and *Crippen v. Morrison*, to be reported in 13 Mich. His is in accordance with the well-settled law of the state of New York, from which our system of law in regard to mortgages has been, in a great measure, derived. *Jackson v. Willard*, 4 Johns. 41; *Collins v. Torrey*, 7 Johns. 277; *Runyan v. Messerean*, 11 Johns. 534; *Gardner v. Heartt*, 3 Denio, 232; *Edwards v. Insurance Co.*, 21 Wend. 467; *Waring v. Smyth*, 2 Barb. Ch. 119; *Bryan v. Butts*, 27 Barb. 504; *Bank v. Tallman*, 31 Barb. 201; *Cortright v. Cady*, 21 N. Y. 342.

This view of a mortgage is also sustained by several of the English decisions, and substantially this is the more generally received American doctrine, as will sufficiently appear by reference to the decisions, most of which have been carefully collected in the elaborate brief of the defendant's counsel, but which are too numerous to be cited here. There are exceptions and peculiarities in particular states, in some of which, as in some of the New England states and Kentucky, the old idea of an estate upon a condition continues to rankle in the law of mortgages, like a foreign substance in the living organism, but is rapidly being eliminated and thrown off by the healthy action of the courts under a more vigorous application of plain common sense. But few of the incidents of this antiquated doctrine are now recognized in most of the states of this Union; the title, for nearly all practical purposes, being now recognized, both at law and in equity, as continuing in the mortgagor, and the mortgage as a mere lien for the security of the debt. But wherever any vestige of this now nearly exploded idea continues to prevail, in connection with the more liberal doctrines of modern times which the courts have been compelled, from time to time, to adopt, it seems only to confuse and deform the law of mortgages by various anomalies and inconsistencies, making it a chaos of arbitrary and discordant rules, resting upon no broad or just principle; while, by recognizing the mortgage as a mere lien for the security of the debt, at law as well as in equity, and thus giving it effect according to the real understanding and intention of the parties, the law of mortgages becomes at once a system of homogeneous principles, easily understood and applied, and just in their operation.

A mortgage, then, being a mere security for the debt or liability secured by it, it necessarily results:

(1) That the debt or liability secured is the principal, and the mortgage but an incident or accessory. See cases above cited; also, *Richards v. Synes*, Barnad. Ch. 90; *Roath v. Smith*, 5 Conn. 133; *Lucas v. Harris*, 20 Ill. 165; *Vansant v. Allman*, 23 Ill. 31; *Ord v. McKee*, 5 Cal. 615; *Ellison v. Daniels*, 11 N. H. 274; *Hughes v. Edwards*, 9 Wheat. 489; *Green v. Hart*, 1 Johns. 580; *McGan v. Marshall*, 7 Humph. 121; 4 Kent, Comm. 193; *McMillan v. Richards*, 9 Cal. 365.

(2) That anything which transfers the debt (though by parol or mere delivery), transfers the mortgage with it. See cases above cited, especially *Vansant v. Allman*, 23 Ill. 31; *Ord v. McKee*, 5 Cal. 615; *Ellison v. Daniels*, 11 N. H. 274. See, also, *Martin v. Mowlin*, 2 Burr. 978; *Clark v. Beach*, 6 Conn. 164; *Southern v. Mendane*, 5 N. H. 420; *Wilson v. Kimball*, 27 N. H. 300, 36 N. H. 39; *Crowl v. Vance*, 4 Iowa, 434; 1 Blackf. 137; 5 Cow. 202; 9 Wend. 410; 1 Johns. 580.

(3) That an assignment of the mortgage without the debt is a mere nullity. *Ellison v. Daniels*, 11 N. H. 274; *Jackson v. Bronson*, 19 Johns. 325; *Wilson v. Throop*, 2 Cow. 195; *Weeks v. Eaton*, 15 N. H. 145; *Peters v. Jamestown Bridge Co.*, 5 Cal. 324; *Webb v. Flanders*, 32 Me. 175; 4 Kent, Comm., ubi supra; *Thayer v. Campbell*, 9 Mo. 277.

(4) That payment, release, or anything which extinguishes the debt, ipso facto extinguishes the mortgage. *Lane v. Shears*, 1 Wend. 433; *Sherman v. Sherman*, 3 Ind. 337; *Ryan v. Dunlap*, 17 Ill. 40; *Armitage v. Wickliffe*, 12 B. Mon. 496; *Paxon v. Paul*, 3 Har. & McH. 399; *Perkins v. Dible*, 10 Ohio, 433; *Buckenridge v. Ormsby*, 1 Marsh. 257; *Cameron v. Irwin*, 5 Hill, 272. It will be seen from these authorities that some, if not all, of these incidents or characteristics of a mortgage are recognized by some of the courts which still hold the mortgage to be a conveyance of the estate,—an idea, however, with which they are utterly inconsistent, as such incidents can only logically flow from the doctrine that the estate still remains in the mortgagor, and that the mortgage is but a lien for security of a debt.

These propositions being established, the necessary result is that the mortgage instrument, without any debt, liability, or obligation secured by it can have no present legal effect as a mortgage or an incumbrance upon the land. It is but a shadow without a substance,—an incident without a principal,—and it can make no difference in the result whether there has once been a debt or liability which has been satisfied, or whether the debt or liability to be secured has not yet been created, and it requires, as in this case, some future agreement of the parties to give it existence. At most,

the difference is only between the nonentity which follows annihilation and that which precedes existence.

The instrument can only take effect as a mortgage or incumbrance from the time when some debt or liability shall be created, or some binding contract is made, which is to be secured by it. Until this takes place, neither the land nor the parties, nor third persons, are bound by it. It constitutes, of itself, no binding contract. Either party may disregard or repudiate it at his pleasure. It is but a part of an arrangement, merely contemplated as probable, and which can only be rendered effectual by the future consent and further acts of the parties. It is but a kind of conditional proposition, neither binding nor intended to bind either of the parties, till subsequently assented to or adopted by both.

Though the question does not properly arise here, we take it for granted, for the purposes of this case, that the mortgage instrument may, if properly executed, go upon the record, and become effectual between the parties when the debt or liability contemplated shall have been created, unless the mortgagor has, in the meantime,—as he had a clear right to do,—parted with the title and deprived himself of the power of creating an incumbrance upon it. But the mere recording of the instrument would not make it a mortgage or incumbrance in legal effect, if it were not so before, nor give it a greater effect as to third persons than it had between the parties. The record of such an instrument might be an intimation that advances and indorsements were contemplated as probable, and that they might, therefore, have been already made; and for this reason might, to this extent, properly put a purchaser or incumbrancer upon inquiry. But unless it is to have a greater effect than the record of other mortgages, it could be notice only of such facts as might have been ascertained by inspection of the instrument and papers referred to, and by inquiry; in other words, by a knowledge of the rights of the parties in respect to the land at the time notice became material, which, for the purposes of this case, as already explained, we shall assume to be from the time of Howard's purchase down to the time when he recorded his deed. The result must, therefore, be the same here as if there had been no record. Had Howard made the most diligent inquiry in connection with the inspection of the papers, what facts could he have ascertained? Nothing material to the rights of the parties or to his own rights beyond the facts already stated,—nothing which, in any manner, interfered with the mortgagor's absolute right of sale. He would have learned, in fact, that the instrument recorded as a mortgage was not, in legal effect, a mortgage, nor upon any principle of justice or equity an incumbrance upon the land; that either party had a per-

fect right to refuse to give that future assent, or to enter into that future contract or arrangement, by which alone it could acquire vitality or force. He had, therefore, a just right to conclude that the record of his deed would be fair notice to the persons mentioned as mortgagees, as the instrument could only become a mortgage subsequent to that time, and then only by reason of some future debt or liability which it required the further assent and agreement of the parties to create. He had a right to conclude that, upon every sound principle, Ladue & Eldred would, as prudent men, be as likely, and ought to be as much bound, to look to the record before making any such advances, or indorsing paper for the mortgagor, as if a new mortgage for the purpose were to be taken at the time, since they had the same option to make the advances or not, as any new mortgagee would have had, and ought, therefore, to be governed by the same prudential considerations. And they must be presumed to have known that John Ladue, until such advances or indorsements were made by them, had full power to sell the land free from any incumbrance of the mortgage instrument, which had not as yet become a mortgage.

But it is urged, on the part of the complainant, that it was the duty of Howard, on making the purchase, to give actual notice of the fact to the mortgagees, so that they might not afterwards be led to incur further liabilities on the faith of the mortgage. In England, where there is no general registry law by which the record of deeds and mortgages is made notice to all the world, and the state of the title cannot therefore be always ascertained in this way as with us, and where parties, therefore, can only rely upon actual notice, there may be good reason for requiring actual notice in such a case. But upon no principle which I have been able to comprehend, do I think such actual notice should be required in a case like the present. Nor have I been able to see any just or substantial reason why the record of Howard's deed (which was long before this mortgage instrument took effect as an incumbrance, and therefore prior in fact and law) should not be deemed notice to the mortgagees in the same manner, and to the same extent, as if their mortgage had not been executed or recorded until the time when it became effectual as a mortgage by their indorsements. Within the very spirit and purpose of the registry law, it seems to me, the record of the deed must be held notice in the one case as well as in the other. The opposite view, it seems to me, rests upon the erroneous idea that the recording of a mortgage adds something to its validity as between the parties, and that, even as between them, an instrument may be made a mortgage by recording it, which would not have that operation without the record. This, certainly, is not the effect of

our registry laws. If Howard could not rely upon the record of his deed for giving notice to these mortgagees, as to future advances or indorsements, without which their mortgage instrument could never become effectual, even as between the parties, then it is difficult to see why he should be allowed to rely upon it as against any person who he might know had contemplated purchasing or taking a mortgage upon the property, and whose efforts or conversations had gone so far as to render it probable to the mind of such person that his preliminary negotiations or conversations might, at some future period, have resulted in a purchase or a mortgage; though at the time of the record of Howard's deed they had not resulted in any binding contract whatever, and both parties were at liberty to disregard them, without any breach of faith. As to all such persons, it has, I think, been generally conceded that the record of a deed is sufficient notice. In *Craig v. Tappin*, 1 Sandf. Ch. 78, a case cited by complainant's counsel, it was held that notice that a mortgage was about to be made, is not enough to bind a party with notice of the mortgage. And see *Cushing v. Hurd*, 4 Pick. 252; *Warden v. Adams*, 15 Mass. 232.

I have thus far endeavored to show that upon principles resulting from the nature of a mortgage, as recognized here, this mortgage should be considered, in fact and in legal effect, subsequent to the deed, and that the registry of the deed should, therefore, be considered notice to the mortgagees. The authorities upon this question are not so numerous as one would be led to expect; but the few which are to be found are conflicting. I shall first notice those which are claimed to be opposed to the conclusion at which I have arrived. The English authorities upon this question I consider of very little, if any, weight, for the reason already stated, and for the further reason that, for several purposes, a mortgage is there still held to be a conveyance of the estate upon condition, and the mortgagee as having the legal title—a doctrine upon which the right of tacking (never recognized in this state) to some extent depends, the legal title coupled with an equity being held to prevail over an equity. 4 Kent, Comm. 117; Coote, *Mortg.* 410 et seq.; opinion of Lord Cranworth in *Hopkinson v. Ralt*, 7 Jur. (N. S.) 1209. The latter remark applies also with equal force to the decisions cited from Kentucky. *Nelson's Heirs v. Boyce*, 7 J. J. Marsh. 401, goes upon the express ground that the mortgage conveys the legal title, and that the mortgagee, therefore, is not bound to notice the record of a mortgage subsequently made by the mortgagor, who has only the equity of redemption. It cites *Bank v. Vance*, 4 Litt. 173, as supporting the doctrine of tacking upon this ground. *Nelson v. Boyce* also assigns, as another reason, why the record should not be notice, a pro-

vision of their statute allowing sixty days in which to record a mortgage, and says an examination of the record by the first mortgagee might therefore be of no use. Now it is clear that neither of these reasons for refusing to the record the effect of notice exists here. Of the case of *Burdett v. Clay*, 8 B. Mon. 287 (besides the fact that the mortgagee there holds the legal estate), it may further be noticed that, though the previously recorded mortgage was in part to secure future liabilities, yet all the liabilities were incurred before the subsequent mortgage. There are some few cases in this country, decided mainly, if not solely, upon the authority of *Gordon v. Graham*, 7 Vin. Abr. p. 52, 2 Eq. Cas. Abr. 598, which can have little influence here, not only for the reason above stated, but because the case itself is no longer law, even in England. This case decided that a mortgagee holding a mortgage to secure money lent, and future advances (which he was not bound to make), was entitled to preference over a subsequent mortgagee, even for advances made after notice of the second mortgage. But so far as relates to advances made after such notice, this case was expressly overruled by the house of lords in *Hopkinson v. Ralt*, 7 Jur. (N. S.) 1209, 5 Law Times (N. S.) 90.

Most of the cases cited by complainant's counsel against the proposition I have endeavored to establish have no bearing upon the particular question we are now discussing. *Bank v. Finch*, 3 Barb. Ch. 293, only decides that when a mortgage is given to secure an existing debt, the mortgagee does not lose his security by extending the time and taking a renewal note for the same debt. In *Craig v. Tappin*, 2 Sandf. Ch. 78, the question of notice did not arise, and so far as the reasoning of the court has any bearing upon the present question, it is in favor of the position I have endeavored to establish. In *King v. McVickar*, 3 Sandf. Ch. 208, *Stuyvesant v. Hone*, 1 Sandf. Ch. 419, and *Stuyvesant v. Hall*, 2 Barb. Ch. 151, no question of future advances or liabilities was involved; but the question relating to the effect of the record was similar to that decided in this court in *James v. Brown*, 11 Mich. 25, and decided the same way,—a question so entirely foreign to that we are now discussing as to require no comment.

Eyer v. Bank, 11 Ill. 381, only decides that a mortgage subsequently executed is entitled to preference over one previously executed for future advances, after notice of the second mortgage to the first mortgagee. The notice in this case happened to be an actual notice, but the question of the effect of the record, as notice, was not involved nor decided. *Rowan v. Rifle Co.*, 29 Conn. 282, has no bearing upon this question. The title had never been in the debtor, but was conveyed by a third person to, and held by, the creditors, in security for future advances for the debtor, which the creditors had agreed

to make. The decision stands well upon two grounds: First. The title being in the creditors and not in the debtor, the creditors were not bound to notice the record of a mortgage made by the debtor, who had no title. Second. That the advances were not voluntary, the creditors being bound to advance \$40,000, and the balance being advanced to save their interest and to carry the contract into effect. Hence the creditors were allowed priority for all their advances, though part were made after notice of the mortgage.

In *Wilson v. Russell*, 13 Md. 495, the deed of trust, which was in the nature of a mortgage, recited that the mortgagees had agreed to loan the mortgagors their notes, from time to time, as might be desired, etc. The case seems to have been decided mainly on the authority of *Gordon v. Graham*,—the authority of which is recognized, though it was not needed in that case. It does not appear whether there was actual notice of the second mortgage, and no difference is intimated between actual notice, and the record. In *Taylor v. Man's Ex'rs*, 5 Rawle, 51, the question, so far as regarded the effect of the record, was similar to that in *James v. Brown*. The judgment was, in legal effect as well as in date, a prior incumbrance, and the mortgage, in legal effect as well as in date, subsequent to it. There were no future advances in question.

There are, however, two cases (and they are the only ones cited, or which I have met with) which are directly opposed to the conclusion at which I have arrived, and which go to the point that the record of Howard's deed would not be notice to *Ladue & Eldred*. *McDaniels v. Colvin*, 16 Vt. 300, and *Truscott v. King*, 6 Barb. 346; s. c. on appeal, 6 N. Y. 166. *McDaniels v. Colvin* rests upon the authority of English cases, among which is that of *Gordon v. Graham*, which are adopted by the court as authority. The case expressly holds that the record of the second mortgage could not be held notice, even as to subsequent advances, under the first mortgage. Judge Redfield (afterwards chief justice) dissented. See his remarks upon this question (sustaining the views I have adopted). 12 Am. Law Reg. p. 191. And in the extent and character of the actual notice to be given by the subsequent to the prior mortgagee, this case would not probably now be recognized as law in any court in this country. *Truscott v. King* was the case of a judgment to secure a sum due, as well as future advances which might be made, and a mortgage was subsequently made by the debtor. Advances were made by the judgment debtor after the mortgage was recorded. As decided in 6 Barb. it was held that the judgment took precedence for all advances until actual notice of the mortgage, on the ground that the record is only notice to subsequent, and not to prior, incumbrancers. In the court of appeals (6 N. Y.), where the judgment was reversed on other

grounds, Judge Jewett, who gives the leading opinion of the court, does not allude to this point. It is only alluded to by *Edmonds, J.*, who says: "It is well settled that a judgment for future advances is good, not only against the debtor, but also against subsequent incumbrancers, at least up to the time when a subsequent judgment or mortgage should intervene. But when such subsequent incumbrance may be said to intervene is not so well settled, whether at the time it is put upon the record, or at the time the prior incumbrancer has actual notice of it. The supreme court, in deciding the case, held that it ought to be only from the time of actual notice, because the docketing of a judgment or recording of a mortgage was, under the statute, notice only to subsequent, and not to prior, incumbrancers. In this, I am inclined to think, the court was right."

Now, it seems to me, the real question which lay at the basis of the inquiry in the above case, and to which that decided by the court was only incidental and secondary, was, which in legal effect was the prior, and which the subsequent, incumbrance, and this depended solely upon the fact when, as regarded the advances in question, they respectively took effect. Did the judgment, in legal effect, become an incumbrance for such advances before they were made and before there was any agreement that they should be made? What were the relative rights of the parties to the judgment at the time the mortgage was recorded? Could the judgment be enforced as an incumbrance for these advances, by reason of any rights or obligations existing between the parties at that time? If not, then, as to these advances, there was no incumbrance at the time the mortgage was recorded and the incumbrance of the judgment was, in legal effect, subsequent to the mortgage. This, which seems to me to be the main question, is neither discussed nor alluded to either by the supreme court or the court of appeals. The court, therefore, in simply saying that the record of the mortgage is notice only to subsequent incumbrancers, assume, as it seems to me, without an attempt to establish, the main point in controversy. There may, perhaps, be some difference, in principle, between a judgment given as security for future advances, and a mortgage given for a like purpose. But if there is not, and if the decision in *Truscott v. King* is to be considered as equally applicable to a mortgage, then I cannot resist the conviction that it is in direct conflict with the principles which necessarily result from the uniform course of decision in that state,—holding a mortgage to be a mere security for, and incident of, the debt, incapable of a separate and independent existence.

Having examined the cases relied upon by the complainant's counsel, as tending to controvert the conclusions at which I have arrived, I will now refer to those of an op-

posite tendency, some of which expressly hold the record to be notice of the intervening conveyance or incumbrance.

In *Collins v. Carlisle*, 13 Ill. 254, there was a mortgage to secure future advances, and a contract subsequent in date and time of record for the sale of the land by the mortgagor, both recorded. It was held, the mortgage was valid for those advances only which were made prior to the recording of the contract. The principle is not discussed, but it seems to be taken for granted that the record of the contract was notice as to advances afterwards made.

In *Kramer v. Bank*, 15 Ohio, 253, it was held that a mortgage to indemnify against indorsements to be made for the mortgagor is valid and constitutes a lien, which takes precedence of the lien of a judgment rendered after such indorsements have been made. But it is said the lien of a judgment would probably be preferred to the lien of the mortgage for advances made subsequent to the recovery of the judgment. The liability of the mortgagee had attached before the subsequent judgment, and, therefore, the point was not involved. But in the subsequent case of *Spader v. Lawler*, 17 Ohio, 371, which was also the case of a mortgage to secure future advances, it was held that the mortgage must be postponed to a mortgage subsequently recorded, but before the future advances were made, thus directly holding the record notice as to advances thereafter made under the first recorded mortgage; in other words, treating the first as a subsequent mortgage in reference to advances made after the record of the second. It is true that one of the grounds upon which the decision seems to be placed is that the record of the mortgage (for the advances) ought to give notice of the amount of the incumbrance.

The first case, so far as I have been able to discover, which fully meets and discusses the question upon principle, is that of *Terhoven v. Kerns*, 2 Barb. 96. It was the case of a judgment to secure future advances, which were optional; and it was held that such judgment, as to advances made after the rendition of a subsequent judgment, was not a lien as against the latter. The judgments are treated by the court as standing upon the same grounds as mortgages, and the question is discussed generally. It is held, that a mortgage to secure future advances, which are optional, does not take effect between the parties as a mortgage or incumbrance until some advance has been made,—that, if not made until after another mortgage or incumbrance has been recorded, it is, in fact, as to such after advances, a subsequent and not a prior incumbrance; and that the record of the subsequently recorded mortgage is notice, as to such after advances, as much as if the mortgage first recorded had not been executed until after such advances were made. The doctrines of this case were fully as strongly reaffirmed in *Bank of Montgomery's Appeal*, 36 Pa. 170.

See, also, *Parmenter v. Gillespie*, 9 Barr. 86, and note "a," as to distinction between cases when the mortgagee is bound to make the advances, and when they are optional. The doctrine of these cases is pronounced reasonable by Sanford, J., delivering the opinion of the court in *Boswell v. Goodwin*, 31 Conn. 71, and he pointedly asks why such mortgage should not be treated "in all respects as if executed at the time when the advances are made." But one of the judges dissented as to this point, and the case was decided upon other grounds.

Judge Redfield, late chief justice of Vermont, ably discusses this question in a note to the case of *Boswell v. Goodwin*, 12 Am. Law Reg. p. 92, arriving substantially at the same conclusion as that at which I have arrived. And Mr. Washburn in 1 Washb. Real Prop. p. 542, says it seems now to be the general rule.

The counsel for the complainant have strongly urged the inconvenience which must result, especially to banks and bankers (who are accustomed to take such mortgages), by requiring an examination of the record every time they are called upon to make such advances under such a mortgage. Like Judge Redfield (in the note above cited), I have not "been able to comprehend" this hardship. It is, at most, but the same inconvenience to which all other parties are compelled to submit when they lend money on the security of real estate,—the trouble of looking to the value of the security. But, in truth, the inconvenience is very slight. Under any rule of decision they would be compelled to look to the record title when the mortgage is originally taken. At the next advance they have only to look back to this period, and for any future advance only back to the last, which would generally be but the work of a few minutes, and much less inconvenience than they have to submit to in their ordinary daily business in making inquiries as to the responsibility, the signatures and identity of the parties to commercial paper. But if there be any hardship, it is one which they can readily overcome, by agreeing to make the advances; in other words, by entering into some contract, for the performance of which, by the other party, the mortgage may operate as a security. They can hardly be heard to complain of it as a hardship that the courts refuse to give them the benefits of a contract which, from prudential or other considerations, they were unwilling to make, and did not make until after the rights of other parties have intervened. Courts can give effect only to the contracts the parties have made, and from the time they took effect.

The decree must be reversed, and the bill dismissed, and the appellants must recover their costs in both courts.

MARTIN, C. J., and COOLEY, J., concurred. CAMPBELL, J., did not sit in this case.

AETNA LIFE INS. CO. OF HARTFORD
v. TOWN OF MIDDLEPORT. SAME v.
TOWN OF BELMONT. SAME v. TOWN
OF MILFORD.

(8 Sup. Ct. 625, 124 U. S. 534.)

Supreme Court of the United States. Feb.
6, 1888.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was an appeal from a decree of the circuit court of the United States for the Northern district of Illinois, dismissing on demurrer the bill of the Aetna Life Insurance Company, the present appellant. The substance of the bill is that the complainant is the owner of 15 bonds, of \$1,000 each, issued by the township of Middleport, in the state of Illinois, dated February 20, 1871, and delivered to the Chicago, Danville & Vincennes Railroad Company. These bonds were payable to bearer, and were bought of the railroad company by the complainant, who paid value for them. The bill recited that this railroad company was incorporated in 1865 under the laws of the state of Illinois, with power to construct a railroad from a point in Lawrence county, by way of Danville, to the city of Chicago; that an act of the legislature of that state, passed March 7, 1867, authorized cities, towns, or townships, lying within certain limits, to appropriate moneys and levy a tax to aid the construction of said road; and "that said act authorized all incorporated towns and cities, and towns acting under township organization, lying wholly or in part within 20 miles of the east line of the state of Illinois, and also between the city of Chicago and the southern boundary of Lawrence county, in said state, to appropriate such sums of money as they should deem proper to the said Chicago, Danville & Vincennes Railroad Company, to aid it in the construction of its road, to be paid as soon as the track of said road should be laid and constructed through such cities, towns, or townships: provided, however, that a proposition to make such appropriation should first be submitted to a vote of the legal voters of such cities, towns, or townships at a regular, annual, or special meeting, of which at least ten days' previous notice should be given; and also provided that a vote should be taken on such proposition, by ballot, at the usual place of election, and that a majority of the votes cast should be in favor of the proposition. And your orator further avers that said act authorized and required the authorities of such cities, towns, and townships to levy and collect such taxes, and to make such other provisions as might be necessary and proper for the prompt payment of such appropriations so made." It is then alleged that on the eighth day of June, 1867, after due publication of notice according to law, a meeting of the legal voters of said town of Middleport was held, at which they cast their votes by ballot upon the proposition to levy and

collect a tax of \$15,000 upon the taxable property of the inhabitants of the town to aid in the construction of said railroad, provided Watseka, a city in the county of Iroquois, situated in or near the south line of said town, should be made a point in said road; that it appeared, on counting the votes, that 323 were in favor of and 68 were against such tax, and that thereupon the proposition was duly declared carried, the proceedings relating to the meeting and vote duly attested by the town clerk and the moderator of the meeting, and by said clerk duly recorded in the town records. The bill further averred that the railroad company accepted this vote and appropriation of the township, and, relying upon such vote and the good faith of said town, accepted the condition of the appropriation, and constructed and completed its track through said town; that on the tenth day of February, 1871, the board of town auditors adopted a resolution of which the following is a copy: "Whereas the township of Middleport did, on the eighth day of June, 1867, vote aid to the Chicago, Danville & Vincennes Railroad Company to the amount of fifteen thousand dollars, and it appearing that said township is unable to pay such amount in money, therefore resolved by the board of auditors of said township that bonds issue to said Chicago, Danville & Vincennes Railroad Company to the amount of fifteen thousand dollars, together with a sufficient amount to cover the discount necessary on said bonds in negotiating the same, to-wit, one thousand five hundred dollars; said bonds to be dated February 20, A. D. 1871, and to bear interest at the rate of ten per cent. from date per annum." In pursuance of this resolution, it was alleged that on the twenty-fourth day of March, 1871, the supervisor and town clerk of Middleport executed the 15 bonds which are the subject of this suit; that "the said bonds were numbered one to fifteen, inclusive, and were delivered to the said railroad company, upon the fulfillment of the conditions of said vote, in payment of ninety cents on the dollar of the appropriation made to said company by said vote; both parties believing that said bonds were fully authorized by law, and were legal, valid, and binding on said town, and also believing them to be legal evidences of the debt in favor of said company incurred by said town in voting said appropriation." It was then alleged that on or about the twenty-sixth day of June, 1876, the town of Middleport, which up to that time had paid the interest upon the bonds, filed a bill in equity in the circuit court for the county of Iroquois against the complainant corporation as the holder of said bonds, and certain other persons, "alleging, in substance, the making and issuing of said bonds, as herein stated, that the same were delivered to your orator, and that your orator was the holder thereof, and that the same were made and issued without authority of law, and were invalid, and praying the court so to decree, and to enjoin

your orator from collecting the same, and for other relief, as by the record in the cause, upon reference thereto, will fully appear." It was averred that the circuit court dismissed the bill, but that upon appeal to the supreme court of Illinois the decree dismissing it was reversed,—that court holding that these bonds were void, as issued without authority of law; and the case was remanded to said circuit court for further proceedings, whereupon it passed a decree, in conformity with the opinion of said supreme court, adjudging the bonds void, and enjoined their collection. The bill then charged that said supreme court, while holding the bonds to be void, did not deny, but impliedly admitted, the validity of the appropriation by the town, and insisted that by the issue and delivery of said bonds to the railroad company, and their sale by that company to the present complainant, it was thereby subrogated to the rights of action which that company would have on the contract evidenced by the vote of the town, and the acceptance and fulfillment of the contract by the railroad company. It was also alleged that no part of the principal sum named in the bonds, or any part of said appropriation, had ever been paid, but that, on the contrary, the town of Middleport denied all liability therefor; that ever since the purchase of said bonds the complainant had continued to hold, and then held, the same, and had been and then was the holder of all rights which the railroad company or its assigns had against said town by reason of the premises. A decree was then prayed for that the town of Middleport should pay to complainant the amount found due, and should without delay levy and collect all taxes necessary for such payment; also, that the court would enforce the rights of complainant by writs of mandamus, and such other and further orders and decrees according to the course of equity as should be necessary and proper; and also prayed that W. H. Leyford, in whose hands as receiver the Chicago, Danville & Vincennes Railroad Company had been placed by the court, it being insolvent, might be made a party defendant thereto. To this bill the defendant demurred, and assigned the following as causes for demurrer:

First. That said bill does not contain any matter of equity whereon this court can ground any decree or give complainant any relief as against this respondent.

Second. Bill shows it is exhibited against respondent and the Chicago, Danville & Vincennes Railroad Company and William Leyford, its receiver, as respondents thereto, and the facts set forth therein show the same relief cannot be granted against all of said respondents, and fails to state facts showing respondents jointly liable, but stated facts which show this respondent, if liable at all, is not jointly liable or in any manner connected with the others, and the bill is multifarious.

Third. Fails to show any written agreement on which suit is brought that would bind re-

spondent, and fails to state facts showing a cause of action exists against respondent that arose within five years last past before bringing suit.

Fourth. Fails to show any written agreement on which suit is brought binding on respondent on which has arisen a cause of action within the last ten years prior to bringing this suit.

Fifth. Fails to set forth facts showing an excuse for the great delay in bringing suit which is shown on face of bill, and equity will not relieve against laches.

Sixth. Bill contains many blanks of dates and names and nothing on face of bill from which facts can be obtained to fill same.

The court below sustained the demurrer, and dismissed the bill, from which judgment complainant appealed.

O. J. Bailey, Jas. H. Sedgwick, and Francis Fellowes, for appellant. Robert Doyle, for appellee.

Mr. Justice MILLER, after stating the case as above, delivered the opinion of the court.

In the argument of the demurrer before the circuit court, several objections to the bill were taken. The defendant in error, however, relies here upon three principal grounds of defense: First, it denies the right of subrogation, upon which rests the whole case of the complainant; second, it relies upon the statute of limitations of five years; and, third, it asserts that the former decree in the state court is a bar to the action here. The circuit court held that the statute of limitations was a bar to the present suit, and dismissed the bill on that ground.

But we regard the primary question, whether the complainant is entitled to be substituted to the rights of the railroad company after buying the bonds of the township, a much more important question, and are unanimously of opinion that the transaction does not authorize such subrogation. The bonds in question in this suit were delivered by the agents of the town of Middleport to the railroad company, and by that company sold in open market as negotiable instruments to the complainant in this action. There was no indorsement, nor is there any allegation in the bill that there was any express agreement that the sale of these bonds carried with them any obligation which the company might have had to enforce the appropriation voted by the town. Notwithstanding the averment in the bill that the intent of complainant in purchasing said bonds, and paying its money therefor, was to acquire such rights of subrogation, it cannot be received as any sufficient allegation that there was a valid contract to that effect. On the contrary, the bill fairly presents the idea that by reason of the facts of the sale the complainant was in equity subrogated to said rights, and entitled to enforce the same against the town of Middle-

port. The argument of the learned counsel in the case is based entirely upon the right of the complainant to be subrogated to the rights of the railroad company by virtue of the principles of equity and justice. He does not set up any claim of an express contract for such subrogation. He says: "The equity alleged in the plaintiff's bill is, as I have said, the equity of subrogation. Before proceeding to call the attention of the court to the facts from which this equity arises, it may be useful to advert to the instances in which the right of subrogation exists, and to the principles on which it rests." He founds his argument entirely upon the proposition that when the complainant purchased these bonds he thereby paid the debt of the town of Middleport to the railroad company, as voted by it, and that, because it paid this money to that company on bonds which are void, it should be subrogated to the right of the company against the town. The authorities on which he relies are all cases in which the party subrogated has actually paid a debt of one party due to another, and claims the right to any security which the payee in that transaction had against the original debtor. But there is no payment in the case before us of any debt of the town. The purpose of the purchase as well as the sale of these bonds, and what the parties supposed they had effected by it, was not the payment of that debt, but the sale and transfer of a debt of the town from one party to another, which debt was evidenced by the bonds that were thus transferred. Neither party had any idea of extinguishing by this transaction the debt of the town. It was very clear that it was a debt yet to be paid, and the discount and interest on the bonds was the consideration which induced the complainant to buy them.

The language of this court in *Otis v. Culum*, 92 U. S. 447, is very apt, and expresses precisely what was done in this case. In that case *Otis & Co.* were the purchasers of bonds of the city of Topeka from the First National Bank of that place. These bonds were afterwards held by this court to be void for want of authority, just as in the case before us. A suit was brought against the bank, which had failed and was in the hands of a receiver, to recover back the money paid to it for the bonds. After referring to the decision of *Lambert v. Heath*, 15 Mees. & W. 486, this court said: "Here, also, the plaintiffs in error got exactly what they intended to buy, and did buy. They took no guaranty. They are seeking to recover, as it were, upon one, while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it, they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume. Such securities through the channels of commerce, which they are made to seek, and where they find their market. They pass from

hand to hand like bank-notes. The seller is liable *ex delicto* for bad faith; and *ex contractu* there is an implied warranty on his part that they belong to him, and that they are not forgeries. While there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage ground upon which it would have placed him." Page 449.

Nor can this case be sustained upon the principle laid down in this court in *Louisiana v. Wood*, 102 U. S. 294. That was a case in which the city of Louisiana, having a right by its charter to borrow money, had issued bonds and placed them on the market for that purpose. These bonds were negotiated by the agents of the city, and the money received for their sale went directly into its treasury. It was afterwards held that they were invalid for want of being registered. Afterwards the parties who had bought these bonds brought suit against the city for the sum they had paid, on the ground that the city had received their money without any consideration, and was bound *ex aequo et bono* to pay it back. The court said: "The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied."

In the present case there was no borrowing of money. There was nothing which pretended to take that form. No money of the complainants ever went into the treasury of the town of Middleport; that municipality never received any money in that transaction. It did not sell the bonds, either to complainant or anybody else. It simply delivered bonds, which it had no authority to issue, to the railroad company, and that corporation accepted them in satisfaction of the donation by way of taxation which had been voted in aid of the construction of its road. The whole transaction of the execution and delivery of these bonds was utterly void, because there was no authority in the town to borrow money or to execute bonds for the payment of the sum voted to the railroad company. They conferred no right upon anybody, and of course the transaction by which they were passed by that company to complainant could create no obligation, legal or implied, on the part of the town to pay that sum to any holder of these bonds.

City of Litchfield v. Ballou, 114 U. S. 190, 5 Sup. Ct. 820, sustains this view of the subject. That town had issued bonds for the purpose of aiding in the construction of a system of water-works. In that case, as in *Louisiana v. Wood*, the bonds were so far

in excess of the authority of the town to create a debt that they were held by this court to be void, in the case of *Buchanan v. Litchfield*, 102 U. S. 278. After this decision, Ballou, another holder of the bonds, brought a suit in equity upon the ground that, though the bonds were void, the town was liable to him for the money which he had paid in their purchase. This court held that there was no equity in the bill, on the ground that, if the plaintiff had any right of action against the city for money had and received, it was an action at law, and equity had no jurisdiction. It was also attempted, in that case, to establish the proposition that, the money of the plaintiffs having been used in the construction of the water-works, there was an equitable lien in favor of the plaintiffs on those works for the sum advanced. This was also denied by the court.

One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor; that, being forced under such circumstances to pay off the debt of a creditor who had some superior lien or right to his own, he could, for that reason, be subrogated to such rights as the creditor, whose debt he had paid, had against the original debtor. As we have already said, the plaintiff in this case paid no debt. It bought certain bonds of the railroad company at such discount as was agreed upon between the parties, and took them for the money agreed to be paid therefor. But, even if the case here could be supposed to come within the rule which requires the payment of a debt in order that a party may be subrogated to the rights of a person to whom the debt was paid, the payment in this case was a voluntary interference of the Aetna Company in the transaction. It had no claim against the town of Middleport. It had no interest at hazard which required it to pay this debt. If it had stood off, and let the railroad company and the town work out their own relations to each other, it could have suffered no harm and no loss. There was no obligation on account of which, or reason why, the complainant should have connected itself in any way with this transaction, or have paid this money, except the ordinary desire to make a profit in the purchase of bonds. The fact that the bonds were void, whatever right it may have given against the railroad company, gave it no right to proceed upon another contract and another obligation of the town to the railroad company. These propositions are very clearly stated in a useful monograph on the Law of Subrogation, by Henry N. Sheldon, and are well established by the authorities which he cites. The doctrine of subrogation is derived from

the civil law, and "it is said to be a legal fiction, by force of which an obligation extinguished by a payment made by a third person is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another. * * * It takes place for the benefit of a person who, being himself a creditor, pays another creditor whose debt is preferred to his by reason of privileges or mortgages, being obliged to make the payment, either as standing in the situation of a surety, or that he may remove a prior incumbrance from the property on which he relies to secure his payment. Subrogation, as a matter of right, independently of agreement, takes place only for the benefit of insurers; or of one who, being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; or of a co-obligor or surety who has paid the debt which ought, in whole or in part, to have been met by another." *Sheld. Subr.* §§ 2, 3. In section 240 it is said: "The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own." This is sustained by a reference to the cases of *Shinn v. Budd*, 14 N. J. Eq. 234; *Sandford v. McLean*, 3 Paige, 117; *Hoover v. Epler*, 52 Pa. St. 522.

In *Gadsden v. Brown*, Speer, Eq. 37, 41, Chancellor Johnson says: "The doctrine of subrogation is a pure, unmixed equity, having its foundation in the principles of natural justice, and from its very nature never could have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound; and, so far as I have been able to learn its history, it has never been so applied. If one with a perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound, who could not but choose to abide the penalty." This is perhaps as clear a statement of the doctrine on this subject as is to be found anywhere.

Chancellor Walworth, in the case of *Sandford v. McLean*, 3 Paige, 122, said: "It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of

course, without any agreement to that effect. In other cases the demand of a creditor, which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished."

In *Railroad Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482, this court said: "The right of subrogation is not founded on contract. It is a creation of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice, and is independent of any contractual relations between the parties."

In the case of *Shinn v. Budd*, 14 N. J. Eq. 234, the New Jersey chancellor said (pages 236, 237): "Subrogation as a matter of right, as it exists in the civil law, from which the term has been borrowed and adopted in our own, is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor, for the benefit of a third person, takes place only for his benefit who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser who extinguishes the incumbrances upon his estate, or of a co-obligor or surety who discharges the debt, or of an heir who pays the debts of the succession. Code Nap. bk. 3, tit. 3, art. 1251; Civil Code La. art. 2157; 1 Poth. Obl. pt. 3, c. 1, art. 6, § 2. 'We are ignorant,' say the supreme court of Louisiana, 'of any law which gives to the party who furnishes money for the payment of a debt the rights of the creditor who is thus paid. The legal claim alone belongs, not to all who pay a debt, but only to him who, being bound for it, discharges it.' *Nolte & Co. v. Their Creditors*, 9 Mart. (La.) 602; *Curtis v. Kitchen*, 8 Mart. (La.) 706; *Cox v. Baldwin*, 1 Miller, (La.) 147. The principle of legal substitution.

as adopted and applied in our system of equity, has, it is believed, been rigidly restrained within these limits." The cases here referred to as having been decided in the supreme court of Louisiana are especially applicable, as the Code of that state is in the main founded on the civil law from which this right of subrogation has been adopted by the chancery courts of this country. The latest case upon this subject is one from the appellate court of the state of Illinois,—*Suppiger v. Garrels*, 20 Bradw. 625,—the substance of which is thus stated in the syllabus: "Subrogation in equity is confined to the relation of principal and surety and guarantors; to cases where a person, to protect his own junior lien, is compelled to remove one which is superior; and to cases of insurance. * * * Any one who is under no legal obligation or liability to pay the debt is a stranger, and, if he pays the debt, a mere volunteer." No case to the contrary has been shown by the researches of plaintiff in error, nor have we been able to find anything contravening these principles in our own investigation of the subject. They are conclusive against the claim of the complainant here, who in this instance is a mere volunteer, who paid nobody's debt, who bought negotiable bonds in open market without anybody's indorsement, and as a matter of business. The complainant company has therefore no right to the subrogation which it sets up in the present action.

Without considering the other questions, which is unnecessary, the decree of the circuit court is affirmed.

These principles require, also, the affirmance of the decrees in the cases of the same appellant against the town of Belmont, (No. 1,135,) and the town of Milford, (No. 1,136;) and so it is ordered.

PUSEY v. PUSEY.

(1 Vern. 273.)

Michaelmas Term. Nov. 20, 1684.

Bill was that a horn, which, time out of mind, had gone along with the plaintiff's estate, and was delivered to his ancestors in ancient time to hold their land by, might be delivered to him; upon which horn was this inscription, viz. "Pecote this horn to hold huy thy land."

The defendant answered as to part, and

demurred as to the other part, and the demurrer was that the plaintiff did not by his bill pretend to be entitled to this horn, either as executor or devisee; nor had he in his bill charged it to be an heir-loome.

The demurrer was overruled, because the defendant had not fully answered all the particular charges in the bill, and was ordered to pay costs. And the lord keeper was of opinion that if the land was held by the tenure of a horn or cornage, the heir would be well entitled to the horn at law. Vide 1 Inst. 107a.

Mollineux's Case.

(Latch, 172.)

UN promise Rutland Mollineux sur Consideration de, &c. de fair assurance de certain terre, le quel le assumor refuse de fair. R. M. lya luy en le Court de Requests, pur aver le promise perform. Et pur aver un Prohibition, il alleadge deux Causes.

Primierement, Quia ad un Action sur le Casè al common Ley. A q̄ fuit dit, en t̄ il recoversa forsq̄ damages; Mes icy le fuit est forsq̄ pur aver assurance del mesme chose, pur fair quel est nul Action al common Ley. Et tiel course est ordinary en un Court de Equity. Jones uncore ne serra suffer in Court de Requests, commentq̄ ils issint font en le Chancery.

Secondement, Appierrt diens le Bill, q̄ le Plaintiff R.M. est un Recusant Convict, quel per le Statute de _____ est excommunicate person, & pur t̄ ne puit suer. Doderidge respond, que le Defendant la ad admit le Plaintiff able. Et fuit respond a luy, & ore quel voy q̄ serra Decree pers luy. Aint icy pur remedy, pur t̄ q̄ Defendant vient icy pur Remedy troppe tarde. Le Court ne voet granter Prohibition. Et Doderidge Justice dit, q̄ le Court doit fair Justice al recusant Convict.

HALL v. WARREN.

(9 Ves. 605.)

Chancery. July 4, 1804.

The bill was filed to obtain a specific performance of an agreement, executed by the defendant, for the sale of an advowson and estate to the plaintiff, Hall, in trust, for the other plaintiff, Hanson, at such price as the advowson should be valued at by Mr. Morgan, and the other premises by persons to be nominated. The agreement was dated the 9th of March, 1802. On the 8th of May following, under a commission of lunacy, the defendant was found a lunatic from the 1st of May, 1792, with lucid intervals.

Two grounds of defence were taken by the answer of the lunatic, by his committee: 1st, that he was insane at the time of the execution of the contract: 2dly, that the plaintiffs knew his situation, and took advantage of it, to induce him to sell to Hall; concealing the circumstance, that Hanson was the real purchaser; being aware, that from a former quarrel the defendant would not sell to him. A great deal of evidence was gone into, on both sides, as to his state of mind.

Mr. Romilly, Mr. Stanley, and Sir Thomas Turton, for plaintiffs, pressed for an issue; insisting upon their right to a decree, upon the ground, either that the defendant was not a lunatic, when he entered into the contract; or, that it was executed in a lucid interval. They had not traversed the inquiry.

Mr. Piggott, Mr. Fonblanque, and Mr. Cooke, for defendant.—The rule, as laid down by Lord Thurlow, in *Attorney General v. Parnter*, 3 Brown, Ch. 441, 443, is, that where a person seeks to avoid his own act, by alleging incompetence at the time, the proof is incumbent upon him. But where it has been previously found, that the party to be affected by the transaction, was not competent at a previous date, those who seek to bind him, must show his competence at the time. It is difficult to determine the degree of capacity necessary to characterize a lucid interval. Lord Thurlow seems to think it sufficient, that any man would suppose him capable of transacting for himself. This plaintiff has had the opportunity of traversing the inquiry. In *Owen v. Davies*, 1 Ves. Sr. 82, Lord Hardwicke takes the distinction between the case of an estate vested in trustees, and in the lunatic himself; observing, that in the latter case that circumstance may prevent the remedy in equity, and leave it at law.

But, independent of the question of sanity, at the date of this transaction, to obtain a performance under such circumstances, the terms of the contract ought to be clearly proved, fair, reasonable, and certain. In this instance, the value of the advowson was

to be ascertained by the actuary of an insurance office, who was named; and the value of the other premises by other persons, to be nominated. It does not appear, that these valuers ever were named; and that cannot be supplied by the court; who cannot give the arbitrator the information, which the party could have given. How can this court supply the want of judgment as to the value of the timber? In *Emery v. Wase*, 5 Ves. 846, 8 Ves. 505, Lord Alvanley considered an agreement to sell according to the valuation of another person, not such as the court would be desirous to enforce. Praying an issue, and undertaking to show a lucid interval at the date of the agreement, they must also show, that the plaintiff was bound at that time. An issue is granted only in aid of a legal right, as that of an heir at law: not where the object is the specific performance of an agreement. In that case the course required, that the plaintiff should have previously ascertained his right at law; that he should show, he had sustained damage, which was not repaired by the verdict; and that the very essence of the relief was, that he should have the thing in specie.

Mr. Romilly, in reply.—An agreement to sell at the valuation of another person is not unusual. The chance is perfectly equal. In *Emery v. Wase* the decision was not upon that ground. If the party refuses to name a valuer, the court refers it to the master. A plaintiff clearly has a right to a specific performance; even though a jury would give twice the amount in damages. Upon the question of lunacy, it is clear, a lunatic is bound by an act done in a lucid interval; and till the act of Geo. II (St. 15 Geo. II, p. 607, c. 30), even marriage, contracted in a lucid interval, was good. The person who has a contract with the lunatic, is permitted to traverse; as he may show, that the party with whom he contracted never was a lunatic. But the question, whether the defendant was a lunatic at the date of the agreement, could not have been tried in a traverse. In *Ex parte Ferne*, 5 Ves. 450, 832. Lord Rosslyn's opinion was, that the jury could not find as to any intervening period. But certainly the question, whether he was in a lucid interval, could not have been tried: the inquiry in such a proceeding as to that, being, whether the party is liable to lucid intervals; not as to the particular time. It seems to be supposed, that, if the defendant is now a lunatic, the contract cannot be executed; by analogy to criminal cases, in which a man who becomes a lunatic, at any time before execution, is not punished. But if that objection holds in civil cases, it will apply equally to prevent a decree for a specific performance against the representatives; for they cannot tell what the lunatic might have said. In *Owen v. Davies* there happened to be trustees: but this party does not object; but chooses to take the title with the defect.

THE MASTER OF THE ROLLS. The object of this bill is to obtain the specific performance of an agreement. Supposing the contract to have been entered into by a competent party, and to be in the nature and circumstances of it unobjectionable, it is as much of course in this court to decree a specific performance, as it is to give damages at law. See *White v. Damon*, 7 Ves. 30. The contract is produced and proved. Upon the face of it nothing appears to prevent execution. There is nothing unreasonable, as between the parties, upon the face of it. It fixes no value upon the estate: but it provides a mode, in which the value is to be ascertained, that is perfectly fair and equal between them. It must be supposed, that if competent, they had taken the proper means of getting at the real value, by employing persons of skill to value the advowson and the farms. The first objection against carrying this agreement into execution is, that in consequence of some dispute with Hanson, the defendant had an objection to dealing with him. But the evidence does not bring it up to that; showing, not that he made any declaration to that effect, but only, that some quarrel had taken place, totally unconnected with the subject of the contract. The circumstance, therefore, that Hall is a nominal contractor, is immaterial; for it happens in a vast proportion of cases, that the contract is entered into in the name of a trustee.

But the principal objection to the performance is, that the defendant was not competent, having been insane at the time the contract bears date. That is matter of fact. In support of that fact alleged, the inquisition is produced; by which the defendant is found a lunatic from a period long antecedent, but with lucid intervals. That inquisition, having been taken in the absence of the plaintiff, is not conclusive upon him. But it is evidence *prima facie* of the lunacy. It is however competent to third parties to dispute the fact; and to maintain, that, notwithstanding the inquisition, the object of it was of sound mind at any period of the time which it covers. An opportunity, it is said, has been already afforded of traversing the inquisition: and undoubtedly, if it would have answered the plaintiff's purpose merely to have traversed and contradicted the finding, by showing that the defendant was not a lunatic, he ought to have embraced that opportunity; and it was unnecessary to come here in the first instance. But if, as it is said, he may have been a lunatic, with reference to the general state and habit of his mind, during a considerable space of time, but with lucid intervals, and the contract was executed during one of those lucid intervals, I doubt very much whether that could have been got at by a traverse; whether, upon that proceeding, it could have been ascertained, that upon a given day he had a lucid interval; which might come to be a

material inquiry with reference to the execution of this contract; for though the plaintiff wishes for an issue upon both points, he seems from the general tenour of his statement to confide more in establishing a lucid interval than in negating the fact, that the defendant ever was deranged. It was not therefore improper for the plaintiff, under these circumstances, to waive the opportunity of traversing, and to come here for an issue; upon the supposition, that the contract was entered into, either by a person who was not a lunatic; or in a lucid interval. In the latter case it would be equally binding; for the law upon this subject is, that all acts done during a lucid interval are to be considered done by a person perfectly capable of contracting, managing, and disposing of, his affairs, at that period. This has more frequently occurred upon wills. A multitude of questions has been raised upon the execution of a will during a lucid interval; and, that being proved, the will has been held valid and effectual, to all intents and purposes, for the conveyance of real and personal estate, as if the testator had never been deranged. It must be the same as to contract, or any disposition of property. If he had made an absolute conveyance it would have been good, if made in a lucid interval.

The question, therefore, being reduced to the fact, there is no circumstance to prevent the execution of the contract; supposing the party to have been competent; and the fact of his competence ought to be put in a course of inquiry. I should certainly refuse, upon the evidence before me, to determine that he was not a lunatic; and as to a lucid interval, upon this evidence, I should hesitate considerably; not being sufficiently apprized of all the circumstances of his life at that particular period. The history of the contract itself is not brought forward. The circumstances of the negotiation do not appear. Something material to the competence might arise or result from the very mode in which the negotiation was conducted. In one case, I remember, the manner, in which the will was written and executed, went a great way towards showing, it was in a lucid interval; the mode of the act being part of the evidence of the testator's sanity. See *Temple v. Temple*, 1 Hen. & M. 476. There is some general evidence with reference to his situation for some considerable time previous to the contract; and very little negative evidence: none applying exactly, or approaching nearly, to the period, except the servant's; and that not of a nature to be conclusive; supposing the evidence strong about the period. But it is for a jury to determine, what was the degree of efficiency and competence of his mind at the time. All the difficulties suggested by the defendant, the plaintiffs will have to struggle with; for, if general lunacy is established, they will be under the necessity of showing, according to *Attorney General v. Parnter*, that there was, not

merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind, sufficient to enable the party soundly to judge of the act. That is an inquiry much more fit for examination *viva voce* before a jury, than upon written depositions.

There is nothing, therefore, to prevent my sending it to that inquiry. Difficulties indeed are suggested, supposing even that it should be found that the contract was made in a lucid interval, as to the mode in which it is to be carried into execution; for it is said, as to that, there are provisions in it, which cannot now be executed. I do not see those difficulties so strong as to be convinced, that it is impossible to execute it; that the previous inquiry is not to be made, and would be nugatory; for if there was a valid and binding contract, the supervening incapacity of one party cannot deprive the other of the benefit. Nothing appears in the acts to be done, so purely personal, that they cannot be supplied without the intervention of the mind and the act of the party; for they are to be done with reference to a given mode; and with regard to ascertaining the

value, a mode equivalent, and as effectual and fair, may be found. So, as to the objection from the difficulty of making the conveyance, the difficulty that struck Lord Hardwicke, in *Owen v. Davies*, was avoided there; as there were trustees. But it does not appear to me, that, if the plaintiff is satisfied with that which is in truth no title, but only an enjoyment under this court, he ought not to have all the court can give him. It is disadvantage to him, of which the other cannot complain, that he cannot get a good title; but must rest an indefinite period, without a title, having only the enjoyment. These difficulties are not so strong as to preclude the previous inquiry, before we can ascertain the precise mode, in which the subsequent parts are to be carried into execution. Therefore take an issue.

The issue directed was the same as in a former case of *Clerk v. Clerk*, 2 Vern. 412, whether the defendant was a lunatic at the time of the execution of the contract; and if so, whether he had lucid intervals; and whether the contract was executed during a lucid interval. *Niell v. Morley*, 9 Ves. 478.

RINDGE v. BAKER.

(57 N. Y. 209.)

Commission of Appeals Cases. 1874.

Action to recover one-half the expense of a party-wall in Norwich, Chenango county. The parties agreed by parol, in April, 1869, to construct a basement or cellar-wall of stone eight feet high, one-half of the width of which should stand upon the plaintiff's land and the other half upon the defendant's land, and to build upon the stone wall a partition of wood between their respective adjoining buildings. This agreement as the plaintiff testified, was before the commencement of the construction of the stone wall so far modified that the partition above the stone wall was to be constructed of brick instead of wood. In pursuance of this agreement each party at his own expense built one-half of the basement wall, and laid upon this wall, thus constructed, sleepers upon which to rest the first floor of their respective buildings. The plaintiff so constructed the cellar or basement wall of his building as to correspond to the basement stone wall erected by the parties, and procured his building timber to be cut the proper length for use in the brick wall, in the construction of which the defendant had agreed to join him. The defendant then refused to join the plaintiff in the construction of the brick wall, whereupon the plaintiff gave him notice to join in its construction, and that in case of his failure to do so, he should proceed and construct it and compel him to pay one-half of the expense of its construction. The defendant again refused to join the plaintiff in its construction, and forbade him from constructing it on the defendant's premises. The plaintiff then proceeded and constructed the wall and brought this action to recover one-half of the necessary expenses of its construction. Judgment for plaintiff.

Charles Mason, for appellant. E. H. Prindle, for respondent.

GRAY, C. The contract, under which the parties commenced and proceeded in the construction of the party-wall, was for an interest in land, an easement which could not have been acquired by parol; and the defendant's failure to perform it, however injurious that failure may have been to the plaintiff, would not, had the contract remained wholly unexecuted, have afforded him a cause of action. But the defendant having proceeded with the plaintiff in its execution, so far as to lead the plaintiff to believe that the contract was made not only in good faith but that it would be fully executed on the part of the defendant, inasmuch, that the plaintiff had contributed his share to the construction of that part of the wall which by the contract was to be made of stone; had, at the same time, constructed the cellar or

basement walls in his own apartment to conform to the party-wall thus constructed by the equal contribution of the parties; and had also procured his timber for use in the construction of the residue of his building, to be cut of the length requisite for use in the brick wall, which by their agreement, the defendant was, after the completion of the stone wall, to join in constructing upon it. His failure, at this stage of the performance of the contract, by refusing to join in that part of the party-wall which was to consist of a brick wall above and to rest upon the stone wall, operated under the circumstances, as a fraud upon the plaintiff; and hence in an action for specific performance an equitable estoppel upon the defendant would have been established, and with the right of the plaintiff to a decree against the defendant for a specific performance of the contract; or, in other words, that he join the plaintiff in constructing the brick wall, as the jury in answer not only to the interrogatory submitted to them, but in substance, by their general verdict, found he had agreed to do. 2 Story, Eq. Jur., § 750; Will. Eq. Jur. 283; *Malins v. Brown*, 4 N. Y. 403, 407, 411. But, because the plaintiff had, and might have pursued this remedy, it by no means proves that he had no other remedy equitable in its character, which would produce the same result in less time and at less expense, and under the circumstances, better adapted to the ends of justice in a case like the one under consideration. The time which would necessarily have been consumed in the prosecution of an action for specific performance, and the consequent delay in the erection of the wall would, under the exigency of the case in hand, and with all needful arrangements by the plaintiff for completing his half of the wall, and using it in the construction of other parts of his building, result in damages to him nearly as great, if not greater, than the expenses incurred in constructing the defendant's half. Such a remedy was therefore so inexpedient as to amount to a denial of justice, and if the plaintiff has no other equitable remedy, or is not permitted to avail himself of one, he must bear with conceded injustice and blame the law. Such a state of things ought not to be tolerated, and need not be, where established equitable principles prevail. If the wall had been constructed at the joint expense of both parties, as in good conscience it should have been, and repairs upon it had become necessary, each party would have been obliged to contribute to them, and if either party, after notice by the other to do so, had declined, the party giving the notice (as the plaintiff did in this case), might have proceeded, made the repairs, and maintained his action for the amount of one-half of the expense incurred in making them, upon the ground that the benefit was equal, and that even-handed justice would compel

each party to bear his share of the burden. *Campbell v. Mesier*, 4 Johns. Ch. 334, 338, 339, 8 Am. Dec. 570.

A decree for specific performance is nothing more or less than a means of compelling a party to do precisely what he ought to have done without being coerced by a court. Such a decree might well go further, and provide that in case of delay by the defendant beyond some reasonable time, to be fixed by the court after notice of the decree, the plaintiff might proceed and erect the wall, one-half of the necessary expense of which should be paid by the defendant. And now that the plaintiff has, after due notice, borne the defendant's share of the burden, and done exactly what would necessarily be by a decree for specific performance have been adjudged that the defendant ought to have done without suit, no good reason can be assigned why, when the exigency of the case has rendered the remedy by action for specific performance wholly inadequate to accomplish the ends of justice, the defendant should not be held responsible for his share of the burden when it is shown that in equity he ought to do so, upon the same principle that a party who ought in equity to contribute one-half of the necessary expense of repairing a wall is bound, after notice and refusal, to pay the adjoining owner who has repaired it one-half of the necessary expenses of the repairs; and notwithstanding the facts which establish the equitable obligation to build may be widely different from such as would establish an equitable obligation to repair, yet the principle upon which contribution is enforced is the same in each case. Contribution was at one time enforced only in a court of equity, and it was said by Baron Parke (6 Mees. & W. 168) that Lord Eldon regretted, not without reason, that courts of law had ever assumed jurisdiction of the subject; they have nevertheless done so, and as Justice Bronson said in *Norton v. Coons*, 3 Denio, 130, 132, "borrowed their jurisdiction on this subject from courts of equity, and along with it, taken the maxim that equality is equity." And Story, in his work upon Contracts (second volume, § 885), referring to contribution by co-sureties or co-guarantors, says, it was formerly questioned whether at law contribution could be enforced without some positive agreement to that effect; but it is now well established that it may be enforced both in law and equity. The right to maintain such an action at law has not, in this state, been questioned in modern times, and especially where the remedy can be as conveniently administered in an action at law as in equity, since both are administered by the same judge.

The judgment should be affirmed.

DWIGHT, C. This is an action brought to recover the one-half of the amount of the expense incurred by the plaintiff in building

a party-wall between the premises of the plaintiff and the defendant. The plaintiff bases his right of action on a parol agreement between him and the defendant. It appeared at the trial, according to the testimony of both parties, that there had been such an agreement to build a stone wall, which was suitable as a foundation for a partition-wall to rest upon, and that was actually carried out by their mutual consent and acts. Whether there was an agreement to go further, and to build a party-wall was contested. The plaintiff's claim was, that there was an agreement to build at joint expense, a wooden partition between buildings to be erected on the respective lots of the parties, and that this was afterward so modified as to substitute a brick partition-wall in its place. The question was submitted to the jury in the following form: "Did the defendant, E. D. Baker, agree with the plaintiff, H. A. Rindge, that he would join with said Rindge in the building of the brick wall in question?" The jury found in the affirmative.

The form in which the case is presented for the consideration of this court is, assuming the existence of the parol agreement, and that the foundation-wall was actually built by both parties, and that the defendant now refuses to go on and complete the brick portion of the wall, can the plaintiff, upon due notice, complete that portion of the wall at his own expense, and recover from the defendant his proportion of the outlay? It is to be observed that this is not the ordinary case of an easement created by parol, but that it is a more special inquiry, whether a parol agreement to build a wall is enforceable in a court of justice, and if so, whether it can be substantially enforced under the facts of the present case by an action to recover the amount necessarily expended in construction. It will be proper to consider at the outset whether a written agreement to build a wall is capable of enforcement in equity. If not, it would of course follow that a parol agreement partly executed cannot be. On the general question of enforcing a covenant to build or to repair, there has been great diversity of opinion, and the decisions are conflicting. The leading authorities in England are *Mosely v. Virgin*, 3 Ves. Jr. 185; *Wilkinson v. Clements*, L. R. 8 Ch. App. 96. Other cases are collated in Story, Eq. Jur. §§ 725, 729 (11th Ed.). In *Wilkinson v. Clements*, supra, one of the latest decisions by the appellate court, it is said to be the settled rule in England that the court will not in general enforce a covenant to build houses. The principal reason seems to be that damages supply an adequate compensation. Where, on the other hand, damages will not answer, the usual rule prevails, and a remedy will be granted in equity, on account of the inadequacy of the relief at law. This was the result in that case; and a

party having performed his part of the contract, had his remedy in equity, against the other party. The point in *Mosely v. Virgin* was, that an agreement to build may be enforced if sufficiently certain and specific. This is the view of Mr. Justice Story. The cases earlier than *Wilkinson v. Clements* are collected in *Beck v. Allison*, 4 Daly, 421, in which case the conclusion is maintained, in an elaborate opinion, that in a proper case, the jurisdiction to decree specific performance of a covenant to repair exists, the case being placed on the same general ground as that of a covenant to build. The present case falls within the rule established by these authorities. It was not a general and indefinite covenant. The place on which the wall was to be erected was fixed by the contract; its length, height and thickness were prescribed, as well as the materials of which it was to be constructed. This is the test given in *Mosely v. Virgin*, *supra*, and in *Story*, Eq. § 727. The plaintiff could have had no adequate remedy in damages, as he needed to have the wall stand on the defendant's land, in order to carry out his building as it was planned. The result is that if the agreement had been in writing it would have been enforced by a court of equity.

The next inquiry is, whether the act of building the stone foundation-wall was such a part performance as to take the case out of the statute of frauds. This is not an instance of a mere parol license, executed in part; it is rather that of an agreement, from which the defendant was to receive the same benefit as the plaintiff. The inducement on the defendant's part to allow the plaintiff's wall to stand on his land, and to aid in constructing it, was the fact that he was to receive a benefit from having the same support to his own part of the wall, from the plaintiff's land and a corresponding service and expenditure. If, then, the court will not entertain an action for specific performance in the present case, it will be because there are some parol agreements which have been partly carried out that do not fall within the general rule that part performance takes the case out of the statute of frauds. No reason can be given why an ordinary contract to purchase land in fee shall be withdrawn from the statute by part performance, which will not apply to the present case. Mr. Frye states the rules as follows: (1) The act of parol performance must be referable to the alleged agreement and no other. (2) They must be such as render it a fraud on the defendant, to take advantage of the contract not being in writing. (3) The agreement to which they refer must be such as in its own nature is enforceable by the court. (4) There must be proper evidence of the parol agreement. *Frye, Spec. Perf. (Am. Ed.) 251*. All of these exist in the present case. In commenting upon the third, he remarks that the agreement must be of such a nature that the

court would have had jurisdiction in respect to it in case it had been in writing. It has already been shown that the court would have enforced the contract between the plaintiff and defendant had it been written.

The next inquiry is, whether the plaintiff was bound to resort to the remedy of specific performance? It would seem not. Specific performance is merely a remedy for an existing right; each of the parties, by force of the contract, became a trustee for the other; there was an equality of burdens as well as of rights growing out of the contract relations of the parties. Specific performance is but a single mode of enforcing the equitable duties growing out of these relations. The parties have voluntarily subjected themselves to the rule that "equality is equity;" each of them having thus become equitably bound to pay his share of the amount necessary to construct the wall, is liable in equity to an action for contribution. This has been applied to cases of contribution between co-contractors. *Story, Eq. Jur. § 64, f; 1 Pars. Cont. 31*. The whole doctrine rests upon principles of natural justice and equity. The plaintiff had his choice of remedies. He might demand specific performance; in which case he would pay only one-half of the expense, and insist upon the defendant's rendering the other half; or, after demand and refusal, he might build the entire wall and bring his action for contribution. He has elected to take the latter course.

It is claimed that the present action is not an equitable one. The fact that it is brought for money is not decisive upon that point. The real test in such an action is this: if it be brought for damages for breach of contract it is a case at law; if it be brought for money, by way of performance of the contract, it is a case in equity. Thus where a vendor, in a contract for the sale of land, sues for the price, his action is equitable. The mutuality of the contract gives each of the parties the same remedy; and yet the recovery by the vendor is simply in money. If this theory did not prevail in respect to contracts partly performed, the vendor would be utterly without remedy, since it is well settled that there is no action at law on a parol contract in part performed. That the vendor can have an equitable action for money is established in *Crary v. Smith*, 2 N. Y. 60; *Brown v. Haff*, 5 Paige, 240; *Will. Eq. Jur. 290*. The action in the present case was brought for relief, and the facts disclose an equitable cause of action. The fact that it was tried by jury, with consent of parties, is immaterial, as the court might, of its own motion, have submitted the questions to a jury; and any informality in the mode of procedure was waived by mutual consent. No preliminary settlement of the issues is requisite. *Colman v. Dixon*, 50 N. Y. 572.

This view of the case is strengthened by

the fact that the common-law courts hold that if a tenant in common, or joint tenant, or other person who is under a duty to repair, fails to contribute after a demand by a co-tenant or co-obligor, the latter, on incurring the necessary expense, may bring an action on the case to recover the proportionate share of the defaulting party. *Loring v. Bacon*, 4 Mass. 575; *Mumford v. Brown*, 6 Cow. 475, 16 Am. Dec. 440; *Doane v. Badger*, 12 Mass. 65. This action is based on a failure to discharge the equitable duty imposed on the defendant which is derived from the principle of natural justice lying at the root of the doctrine of contribution. It is however urged that the defendant does not, by this action, obtain an easement of permanent value to himself. The answer is that if he does not he suffers only by his own neglect. The correct view however is that the judgment will establish his right and act as an estoppel against the plaintiff and all claiming under him, as the existence of the easement is the very proposition which it is necessary to establish in order to recover. A final suggestion is that the parol contract having been partly executed, the parties to it are estopped from denying the existence of the easement. The authorities are quite distinct to this effect, and the proposition is fully justified by the rules of estoppel as applied to the case of expenditures made upon land on the faith of the representations of an owner. *Brown v. Bowen*, 30 N. Y. 541, 86 Am. Dec. 406; 3 Washb. Real Prop. 68, and cases cited. In *Campbell v. McCoy*, 31 Pa. 263, a parol executed agreement to erect a dam was held to be irrevocable in equity, and that it created a permanent right which would survive the erection itself. *Rerick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497. The same rule was applied to the laying down of water-pipes in *Le Fevre v. Le Fevre*, 4 Serg. & R. 241, 8 Am. Dec. 696. In *McKellip v. McIlhenny*, 4 Watts, 317, 28 Am. Dec. 711, the doctrine was applied to a license to flood land, on which money and labor had been expended, on the faith of the license. *Beatty v. Gregory*, 17 Iowa, 114, 85 Am. Dec. 546, is a case of a wall partly built on a licensee's land.

There is, in some of the authorities, a confusion growing out of a want of accurate discrimination between cases arising in law and equity. At law a parol license, owing to the statute of frauds, is revocable at the pleasure of the licensor, notwithstanding the expenditure of money on his land by the licensee. The cases on this subject are so numerous and so uniform that it would be a waste of time to refer to them. In equity the rule is quite different. As a court of equity will take a parol contract for the sale of lands out of the statute of frauds, when it is partly performed, it will, on the same principle, treat an executed parol contract for an easement as equivalent to a grant

under seal, where the parties cannot be restored to their original position. Under this doctrine the acts of the parties in the present case have created a permanent easement upon the land, of which all who may purchase of them are bound to take notice. The judgment for the plaintiff, in the present case, simply recognizes the existence of that easement, and the added duty or obligation of mutual contribution for its erection and maintenance.

The judgment of the court below should be affirmed.

REYNOLDS, C. It appears to be conceded that the agreement to erect the party-wall created, or was intended to create an easement in land, and that to make it valid, it should have been in writing. It was by parol, and was doubtless void under the statute of frauds. The parties however proceeded under it, so far, as that it is also agreed, that in consequence of part performance the plaintiff might, after the repudiation by the defendant, have appealed to a court of equity to compel him to specifically perform; and yet it is conceded that a resort to this remedy would have been, if successful, inadequate to redress the injury to the plaintiff. In the earlier days of the law, a party having some claim to equitable relief was obliged to resort to a tribunal exercising that sort of jurisdiction, invented, it is said, in some of the old books, to do justice in cases wherein the courts of common law were deficient, and of the common law it has been said that by reason of its flexibility it was capable of affording an adequate remedy in most cases of wrong. It however did happen that separate courts of common law and equity jurisdiction did exist for a long time, and until within a comparatively recent period, existed in this state; and it may not be denied that under this system, by reason of the ignorance of counsel or the learning of judges and chancellors, it occasionally happened that suitors were found in the wrong forum and turned away without relief on payment of costs. Of whatever magnitude such an evil may have been it seems very clear to me, that it was attempted to be remedied by our constitution of 1846 and the Code of 1848, with its multitude of modifications.

It is suggested that the present action is one at common law and cannot be maintained upon a void contract. This general rule no judge or lawyer will dispute. It is further said, the plaintiff's remedy was in equity, where he should have succeeded, but success would have been of no practical value; in other words, the remedy would have been worse than the disease. He came into a court having general jurisdiction both in law and equity, and stated the facts of his case in his complaint, as he was authorized by law to do, and in the most essential

particular proved their truth, as is found by the verdict of the jury, and had judgment. If he may not have properly had judgment, it being agreed that he was entitled to relief, where else should he go to obtain it? The court to which he applied had the authority to do him justice in some form, and it could turn him over to none other; for no other court existed to which he could apply for the remedy he was in some form entitled to. Since the radical changes to which reference has been made, it has sometimes been very difficult to distinguish by any thing that appears in a pleading, between an action at law or a suit in equity. Before the change in practice, the distinction between a common-law declaration and a bill in chancery was very well understood. Now both jurisdictions are blended, and a party is permitted to state his case upon its facts, in his own form, and to take such relief as he ought to have, if he be entitled to any, and if he makes any mistake in his allegations the court may, in its discretion, conform the allegations to the facts proved, and give the appropriate judgment which either law or equity demands. General jurisdiction, both in law and equity, having been united in the same court, with a form of procedure common to all cases, it is difficult by the mere inspection of a pleading, to determine whether a given case is to be governed by legal or equitable rules; and I am of the opinion, that the inevitable result of such a system will be the abolition of all substantial distinctions between law and equity. If different and distinct forms of pleading and proceeding were preserved, the two separate jurisdictions might be longer continued, even when the same court took cognizance of both.

It is said that this is a pure and simple action at law, to recover damages for the breach of a void contract. It must be confessed that the complaint bears some of the marks of an old-fashioned common-law declaration, omitting its prolixity. But, as I understand, it also states in a concise form all the facts upon which the plaintiff relies for relief, and these facts have, at least substantially, been found by the jury to be true. Why may not this, under the present system, be called a bill in equity? It is quite true that there is no prayer for specific performance of the partially performed contract, but that is not of the slightest consequence, as has been often held. *Marquat v. Marquat*, 12 N. Y. 336; *Emery v. Pease*, 20 N. Y. 62. In the latter case, what was from the prayer of the complaint, regarded by the whole supreme court as an action at law, to recover money due upon an account stated, and the plaintiff nonsuited because he had not appealed to the equity ear of that court was, in the court of appeals, disapproved, because the facts stated entitled the plaintiff to an accounting as in the case of a

partnership, and the case thereafter proceeded upon that theory. That case, in principle, does not appear to me to be unlike this, so far as the form of proceeding and forum is concerned. It seems to be clear that the defendant ought to have done as he verbally agreed to do. He had got the plaintiff into more or less difficulty, for the reason that his promises had been not only relied upon, but his fidelity evinced by acts tending to the consummation of the common purpose. He then repudiates, and the plaintiff must suffer great injury if he stops the improvement contemplated, and incur extra cost and expense if he perform the work and furnish the material which the defendant agreed to do and ought to have done.

It is quite true that the defendant forbade the plaintiff from proceeding to complete the party-wall according to the mutual parol agreement, but if the matter had gone so far as that equity would compel him to complete it, his order to stop could be of no more force or effect than that of an ancient monarch who ordered the waves of the ocean to be stayed.

It is further urged that even if the defendant pay the judgment against him, he has no grant of an easement to continue the party-wall on the land of the plaintiff. This in one sense may be entirely true, but the same law that, in effect, compels him to perform his agreement with the plaintiff by paying damages, will protect him in the enjoyment of every right of property which he could have had if he had not made it necessary to appeal to the courts. It does not appear that he ever requested the plaintiff to grant him any easement whatever; and we are not to assume that if he had, and offered to fulfill the conditions of his part of the agreement, it would have been refused. Indeed, if it appeared in his answer in this case that he had offered to pay (which was at least equal to performance) upon the condition that the plaintiff granted an easement equal to what the contract demanded, I think the court ought to and would have so ordered, but the defendant put his right upon an entirely different contingency and must abide the result.

Another objection is made against the propriety of the judgment of the supreme court in this case that there is no precedent for it, and that it is the very first of the kind known to the law. While I do not quite agree to the fact as alleged, I am yet willing to assume that there is no case reported in the books which affords an exact precedent for the judgment I am prepared to give. Where precedents are reasonable they furnish a safe guide to follow; and where they are unreasonable, as is not uncommon, a delicate and difficult question is often presented. But where there are no precedents that appear to be binding upon the conscience of a court, the demands of justice re-

quire that, in a proper case, one should be made. In the present case we all agree that the plaintiff has sustained an injury for which he should have redress, and there is no complaint that the judgment below has awarded him more damages than he was fairly entitled to recover. It is possible that

a case precisely like this has never before arisen, but if any shall hereafter arise, it may as well be understood that a party thus injured is not without an adequate remedy in the courts.

The judgment of the supreme court should be affirmed, with costs.

ADDERLEY v. DIXON.

(1 Sim. & S. 607.)

Chancery.

The plaintiffs having purchased and taken assignments of certain debts which had been proved under two commissions of bankrupt, agreed to sell them to the defendant for 2s. 6d. in the pound.

The defendant's solicitor, accordingly, gave notice of the sale to the assignees, and prepared an assignment of the debts, and the plaintiffs, notwithstanding the purchase money had not been paid, executed it, and signed the receipt for the consideration money, and left it in the solicitor's hands. The bill was filed to compel the defendant specifically to perform the agreement, and to pay the purchase money to the plaintiffs.

The defendant, by his answer, submitted that the matter of the agreement was not the proper subject of a bill in equity for a specific performance; and claimed the same benefit as if he had demurred to the bill.

Mr. Sugden and Mr. Garratt, for plaintiffs. Mr. Hart and Mr. Treslove, for defendant.

THE VICE-CHANCELLOR. Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money-value of the land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a court of equity will not, generally, decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market-price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as, with the damages, he may purchase the same quantity of the like stock or goods.

In *Taylor v. Neville*, cited in *Buxton v. Lister*, 3 Atk. 383, specific performance was decreed of a contract for the sale of 800 tons of iron, to be delivered and paid for in a certain number of years and by instalments; and the reason given by Lord Hardwicke, is that

such sort of contracts differ from those that are immediately to be executed. And they do differ in this respect, that the profit upon the contract being to depend upon future events, cannot be correctly estimated in damages where the calculation must proceed upon conjecture. In such a case to compel a party to accept damages for the non-performance of his contract, is to compel him to sell the actual profit which may arise from it, at a conjectural price. In *Ball v. Coggs*, 1 Brown, Pare Cas. 140, specific performance was decreed in the house of lords of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundred weight of brass wire manufactured by the defendant during the life of the plaintiff. The same principle is to be applied to this case. Damages might be no complete remedy, being to be calculated merely by conjecture; and to compel the plaintiff in such a case to take damages would be to compel him to sell the annual provision during his life for which he had contracted, at a conjectural price. In *Buxton v. Lister*, Lord Hardwicke puts the case of a ship carpenter purchasing timber which was peculiarly convenient to him by reason of its vicinity; and also the case of an owner of land covered with timber contracting to sell his timber in order to clear his land; and assumes that as, in both those cases, damages would not, by reason of the special circumstances be a complete remedy, equity would decree a specific performance.

The present case being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts, it appears to me that, upon the principle established by the cases of *Ball v. Coggs*, and *Taylor v. Neville*, a court of equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel this purchaser to take such damages would be to compel him to sell these dividends at a conjectural price.

It is true that the present bill is not filed by the purchaser, but by the vendor, who seeks, not the uncertain dividends, but the certain sum to be paid for them. It has, however, been settled, by repeated decisions that the remedy, in equity must be mutual; and that, when a bill will lie for the purchaser, it will also lie for the vendor. Vide *Withy v. Cottle*, 1 Sim. & S. 174. *Hamblin v. Dinneford*, 2 Edw. 531.

0 *Suffice* **HODGES v. KOWING et ux.**

(18 Atl. 979, 58 Conn. 12.)

Supreme Court of Errors of Connecticut.
April 15, 1889.

Appeal from superior court, Fairfield county; Fenn, Judge.

Suit by P. H. Hodges against E. W. Kowing and wife for specific performance of a contract for sale of land. Judgment for plaintiff, and defendants appeal.

D. B. Lockwood and E. W. Seymour, for appellants. T. W. Wheeler and H. J. Curtis, for appellee.

BEARDSLEY, J. On the 17th day of August, 1887, the defendants entered into the following contract with the plaintiff: "Stratford, August 17th, 1887. We agree to purchase of P. H. Hodges his place in Stratford, Conn., containing fifteen acres, more or less, for the sum of nine thousand five hundred dollars; to pay six thousand cash, and three thousand five hundred on bond and mortgage for one year; to take title immediately, and possession on the first of January, 1888, and have paid him one hundred dollars on account. **EDWIN W. KOWING. ELIZA KOWING.**" No writing relating to the contract was signed by the plaintiff. The court below, upon the petition of the plaintiff, decreed that the defendants should specifically perform the contract, from which decree they appeal to this court. They claim that under the statute of frauds the plaintiff was not bound by the contract, not having signed any memorandum of it, and hence that it should not, in equity at least, be enforced against them, and make this claim the ground of one of their reasons of appeal. The statute requires only that the written agreement shall be "signed by the party to be charged therewith." The defendants rely upon certain cases as authority for their claim, and among others upon the cases of *Benedict v. Lynch*, 1 Johns. Ch. 370, and *Lawrenson v. Butler*, 1 Schoales & L. 13. Both of these cases are in accord with the claim of the defendants; but the former case is opposed to the numerous decisions in the state of New York on the same subject, and the latter case to nearly all the English decisions. In the case of *Clason v. Bailey*, 14 Johns. 484, Chancellor KENT, after reviewing the New York decisions, says that "it is sufficient if the agreement be signed by the party to be charged." In the same opinion he reviews the English decisions up to that time, and adds: "There is nothing to disturb this strong and united current of authority but the observation of Lord Redesdale in *Lawrenson v. Butler*, 1 Schoales & L. 13, who thought that the contract ought to be mutual, and that if one party could not enforce it the other ought not." The authority of *Lawrenson v. Butler* seems not to have been recognized in England. The more recent decisions in that country are referred to in 1 Benj. Sales, §§ 254, 255. There is still some conflict in the decisions in this country, but the weight of au-

thority is that the statute of frauds is satisfied by the signature to the contract of the party sought to be charged only, whether the suit to enforce it be at law or in equity, and whether it relates to the sale of real or personal estate. *Clason v. Bailey*, 14 Johns. 484; *McCrea v. Purmort*, 16 Wend. 460; *Richards v. Green*, 23 N. J. Eq. 536; *Railroad Corp. v. Evans*, 6 Gray, 33; *Sutherland v. Briggs*, 1 Hare, 34. We think that there is not sufficient ground for this reason of appeal.

Another reason of appeal is "that the specific execution of the contract should not have been decreed, because it is too uncertain to be enforced, inasmuch as it could not be understood from the writing itself without the necessity of resorting to parol proof." No objection seems to have been made to the contract when it was offered in evidence, and therefore the objection now made, that it is void upon its face, comes too late to be entitled to consideration. But the claim, if seasonably made, would have been unfounded. The defendants do not specify in their reasons of appeal, or in their brief, the particulars in which they claim that the contract is deficient in certainty. We suppose their claim to be that the statement of the location of the land is too indefinite to satisfy the requirement of the statute of frauds. If the only description of the land had been "fifteen acres, more or less, in the town of Stratford," there would have been force in this claim, though according to the decisions of courts of high authority such a description might have been applied to the land intended by it by extrinsic evidence. In the case of *Hurley v. Brown*, 98 Mass. 545, the only description in the contract of the property agreed to be conveyed was "a house and lot on Amity street." The court admitted evidence that there was only one house and lot on Amity street which the defendant had a right to convey, and that the parties had been in treaty for the purchase and sale of it, and that the subject-matter of the contract might be thus identified. See, also, *Mead v. Parker*, 115 Mass. 413; *Robeson v. Hornbaker*, 3 N. J. Eq. 60. In the present case the court finds that the plaintiff owned no other real estate in Stratford, and that the same was occupied by him as a homestead and residence. But we think that the description of the land in this contract is so definite as not to require a resort to extrinsic evidence to identify it, other than such as is always necessary to apply a description of real estate to the premises described. The language of the contract is: "We agree to purchase of P. H. Hodges his place at Stratford, containing fifteen acres, more or less." The import of the word "place" in this connection is reasonably certain. Its popular and correct meaning, as thus used, is the place where one resides; his homestead. *Webst. Dict., in verbum*. The court finds that the plaintiff told the defendants, before they signed the contract, that the place contained about 15 acres, and that this statement was made in good faith. The

defendants assign as a reason of appeal that "there was not about fifteen acres of land." It is enough to say that the court does not find that there were not 15 acres in the place, but evidently declined to make such a finding. The defendants introduced the recitals in two deeds as evidence of the quantity of land in the place. One was the deed to the plaintiff of the land, in which was added to the description of the quantity of land the words "more or less," and the other was a conveyance of a small strip of the land to a railroad company, specifying the quantity conveyed. Except for the words "more or less" in the deed to the plaintiff, it would have appeared that there was a fraction of an acre less than 15 acres in the piece. The court, referring to this evidence, says: "There was no evidence as to the exact quantity of land except the recital in said deeds." It properly regarded those recitals as inconclusive evidence. The remaining reason of appeal is that the plaintiff had adequate remedy at law. The defendants claim that the equitable jurisdiction of the courts in this state was restricted by the provision in the old statute last found in Revision 1875, p. 413, § 5, that courts of equity shall "take cognizance only of matters in which adequate relief cannot be had in the ordinary course of law," and that that provision is still in force. It is unnecessary to inquire whether that provision has not, as the plaintiff claims, been since repealed by the practice act passed in 1879, because, in our view, it did not have the restrictive effect claimed for it. A similar claim was made by the defendant in the case of *Munson v. Munson*, 30 Conn. 425, and the court say the provision referred to "is simply an affirmation of a well-settled rule of equity." The rule of equity is thus stated by Judge SWIFT: "It is a leading principle that equity will not

interpose where there is an adequate remedy at law. It is not sufficient that there is a remedy, but it must be as complete and beneficial as the relief in equity." 2 Swift, Dig. c. 1, § 1. In the action at law for the breach of the contract the plaintiff could only recover the excess, if any, of the sum agreed to be paid for the land above its market value when the contract was to be performed. Such a remedy is manifestly inadequate, and courts of equity, therefore, hold, as a general rule, that when a contract for the sale of real estate has been fairly entered into, the party contracting to sell, as well as the party contracting to buy, is entitled to have it specifically performed. The cases on this question are all one way. It is true courts of equity have, in the exercise of their discretion, refused to apply the rule in certain cases where it would be productive of hardship or inconvenience. The court did so in the case of *Whitney v. City of New Haven*, 23 Conn. 624. In that case the city had contracted to purchase from the plaintiff land and water-rights for the purpose of providing a water supply, and afterwards voted to abandon the project contemplated by the purchase. The court dismissed the bill for a specific performance, but remark as follows in their opinion: "As a general rule, where the purchaser of real estate can come into a court of equity, to obtain a deed of it, the vendor can come there to get his money, which was agreed to be paid; but the rule is not universally true, and it should not be applied, we think, where it will do unnecessary mischief to one of the parties." In the present case the contract appears to have been fairly made, and is subject to the general rule of equity. There is no error in the judgment complained of. The other judges concurred.

PORTER v. FRENCHMAN'S BAY & MT. D. LAND & WATER CO.

(24 Atl. 814, 84 Me. 195.)

Supreme Judicial Court of Maine. Jan. 15, 1892.

Report from supreme judicial court, Hancock county.

Bill in equity by Margaretta B. Porter against Frenchman's Bay & Mt. Desert Land & Water Company, to which respondent demurred. On report. Demurrer sustained, and bill dismissed.

Deasy & Higgins, for plaintiff. Hale & Hamlin, for defendant.

LIBBEY, J. Bill in equity, praying for decree for a specific performance of a contract in writing, made by the defendant with the plaintiff, for the purchase of a lot of land in the village of Sorrento.

It comes before this court on a demurrer to the bill by the defendant, and the question to be determined is whether, upon the allegations in the bill, this court has jurisdiction in equity to decree a specific performance. We think it clear that in a proper case the court has jurisdiction to decree specific performance of a contract in writing for the conveyance of land, in a bill brought by the vendor or by the vendee. Rev. St. § 6, c. 77, cl. 3. But the court in this state does not take jurisdiction in equity when the plaintiff has a plain, adequate, and complete remedy in an action at law. *Milliken v. Dockray*,

80 Me. 82, 13 Atl. 127; *Bachelder v. Bean*, 76 Me. 370; *Alley v. Chase*, 83 Me. 537, 22 Atl. 393.

And we think it must appear by the allegations in the bill, where an action at law may be maintained, that the remedy by it is not plain, adequate, and complete; for it is a well-established rule of equity pleading that the bill must contain allegations showing that the court has equity jurisdiction. *Story, Eq. Pl. §§ 10, 34*; *Jones v. Newhall*, 115 Mass. 244, 252, 253.

In this case, we think it perfectly clear that the plaintiff has a right to maintain an action at law for a breach of the contract. That being so, to show jurisdiction in equity, there should be some allegations in the bill showing that the remedy at law would not be adequate and complete. There is nothing of the kind in this bill. After setting out the contract, it alleges that the plaintiff was in possession of the land, and has continued to be in possession of the land, to the time of the filing of the bill; no allegation that her action in regard to the land was in any way changed by the making of the contract; no allegation that anything had been done by either party, in consequence of the making of the contract, which could not be taken into consideration in the assessment of the plaintiff's damages.

Demurrer sustained. Bill dismissed, with costs.

PETERS, C. J., and WALTON, VIRGIN, EMMERY, and WHITEHOUSE, JJ., concurred.

BUMGARDNER et al. v. LEAVITT et al.

(13 S. E. 67, 35 W. Va. 194.)

Supreme Court of Appeals of West Virginia.
March 31, 1891.

Appeal and supersedeas from circuit court,
Wood county.

Loomis & Tavener, for appellants. Barna
Powell and Okey Johnson, for appellees.

LUCAS, P. This suit originated by the filing of a bill in chancery by H. E. Bumgardner, a married woman, and H. F. Bumgardner, her husband, against C. P. Leavitt and others, in the circuit court of Wood county. The female plaintiff alleges that the defendant Leavitt induced her to invest \$1,000 in the steam-boat General Dawes, the proposed cost of which was \$7,500. It was understood that the boat was to be put in a joint-stock company, in which the plaintiff H. E. Bumgardner was to have shares in proportion to the money she had advanced, as aforesaid. The plaintiff exhibits with her bill an agreement as follows: "This article of agreement, made and entered into this the 14th day of July, 1884, between C. P. Leavitt, county of Wood, and state of West Virginia, and H. E. Bumgardner of Hockingport, Athens Co., Ohio, witnesseth, that the said C. P. Leavitt, in case of misunderstanding, or not being able to agree, or in case of death of Herman Bumgardner, agent, said Leavitt agrees to take the said stock of Mrs. Bumgardner at not exceeding cost, or, if boat depreciates in value, at fair cash valuation. The said Mrs. H. E. Bumgardner agrees to give said C. P. Leavitt the refusal over any other purchaser. The said stock referred to above is stock in the steamer General Dawes. [Signed] C. P. Leavitt." And there is further exhibited the following notice: "To Chas. P. Leavitt—Sir: I propose to sell you my stock in the Farmer's Trans. Co. in accordance with your contract of July 14, 1884, at cost, or, if the boat has depreciated in value, at its fair cash valuation. Your early attention is called to this matter, the contingency having arisen under which you bound yourself to take said stock. [Signed] H. E. Bumgardner, by H. F. Bumgardner, Ag't. March 31, 1887." The bill supplements the above-written agreement, signed by C. P. Leavitt, by stating that it was a part of the consideration that the husband, H. F. Bumgardner, was to have regular employment on said steam-boat, of which said C. P. Leavitt was to be master. It is further alleged that all of the interests, including the stock owned by Leavitt, (which was a large majority of it,) as well as that owned by H. E. Bumgardner, was capitalized into a corporation known as the Farmer's Transportation Company, or conveyed to said company. The steamer was valued at \$7,600 at that time, and 760 shares of capital stock of the par value of \$10 per share were issued, of which 100 shares were given to said H. E. Bumgardner,

and 1½ shares to her husband, in order that he might be represented in the company. It is further alleged that C. P. Leavitt took charge as master, and pursuant to the agreement gave H. F. Bumgardner employment, but that they soon disagreed, and said H. F. Bumgardner was discharged. Plaintiffs proceed to aver that since such disagreement they have at all times been ready to give said Leavitt the preference of purchasing said stock, and have urged him to buy said stock according to his agreement, but he has steadily and persistently refused to do so, until the 31st day of March, 1887, when the above notice was written and served. They charge that there has been no depreciation in the value of the boat, but that it has been increased in size and capacity at a large expense, and its value enhanced in consequence. It is further alleged that one E. W. Petty, who is made a defendant, had attached the 101½ shares of stock in the circuit court of Wood county in an action at law against H. F. Bumgardner. It is further alleged that the plaintiffs were largely indebted to J. W. Arnold and L. H. Arnold, both of whom were made defendants, and that the female plaintiff executed a lien upon the said 100 shares of stock to secure said indebtedness. By an agreement and compromise between the plaintiffs and said E. W. Petty his debt is reduced to \$422, which it is agreed shall be paid him out of the proceeds arising from the sale of said 101½ shares of stock; and by like agreement with J. W. and L. H. Arnold, they are to receive the residue of the proceeds of said sale as a compromise, and in full settlement of the indebtedness due them from the plaintiffs. Plaintiff H. E. Bumgardner, it is alleged, has always been ready, and has offered, and now offers, to specifically perform the said agreement on her part, by assigning and transferring said 101½ shares of the stock free and unincumbered, as of the 31st day of March, 1887. The prayer of the bill is that the court will declare the plaintiff to be entitled to a specific performance and execution of the said agreement, with interest on the said amount from March 31, 1887; second, that the court will decree that the amount ascertained to be due said H. E. Bumgardner from said C. P. Leavitt may be paid over to said E. W. Petty and said J. W. and L. H. Arnold, as above set out; and, thirdly, for all proper accounts and general relief. The bill was demurred to by Leavitt, but the demurrer was overruled, whereupon C. P. Leavitt filed his answer, in which he admits the agreement as set out in the bill, so far as it goes, but he denies it was ever understood or contemplated that the said H. F. Bumgardner should have the right, at any time he might thereafter see fit, to require respondent to buy the stock of said H. E. Bumgardner, and to require respondent to pay therefor the original cost, but in truth it was intended to give respondent refusal and right to buy said stock at any time, provided he paid therefor as much as any other bidder,

and provided, furthermore, that respondent so desired. He alleges that the boat is not worth more than \$2,500, about one-third of what she cost at the time said stock was issued; and that the present value of said 101 $\frac{1}{2}$ shares in the bill mentioned is not worth more than \$333.33 $\frac{1}{3}$ at the outside. He denies that the stock has ever been tendered him, or that either of the plaintiffs have ever proffered the same at anything like a fair cash valuation. He admits that on or about the — day of July, 1887, he offered them \$850 for the stock, although he knew that they had immediately before that offered it to another party at \$800. He alleges that it had been assigned by H. E. Bumgardner to Mrs. J. W. Arnold, to secure payment of a debt, and the certificate was then held by one L. N. Tavener, as attorney for said Arnold, who had notified the secretary of the corporation, and requested a transfer on the books. Respondent sets out also that the certificate was incumbered by a lien of said E. W. Petty, and he pleads that the plaintiffs had not title to said stock, and so could not carry out the agreement. Respondent further alleges that his said offer of \$850 was made in good faith, and he was ever ready from the time he offered in 1887 to buy said stock to take the same, but his offer was not accepted, nor was there ever tendered to respondent the said stock at any time, nor could it be, since they had parted with the title. He denies that he ought in equity to be compelled to pay for the stock, which cannot be delivered, and is incumbered to the full amount of its value. J. W. Arnold and L. H. Arnold filed their joint and separate answer, in which they admit all that is said in the bill about the mortgage or pledge of the stock to them, and admit that they have agreed that out of the proceeds arising from the sale E. W. Petty should be first paid, and that they would accept the residue of the proceeds in full satisfaction of their lien, and that they have accordingly authorized L. N. Tavener, Esq., their attorney, to execute their release, in order that said H. E. Bumgardner may execute to said defendant C. P. Leavitt an unincumbered transfer of said 100 shares of stock in fulfillment of said H. E. Bumgardner's contract on her part, as set out in Exhibit No. 1 of the bill. E. W. Petty likewise answers, and admits all the averments of the bill as to his lien upon the stock by attachment, and also the agreement with reference to his payment out of the proceeds of sale.

A vast amount of testimony was taken, very little of which had anything to do with the case, the bulk of it seeming to be predicated upon some extraneous controversies as to the earnings of the boat, and Leavitt's settlement with the corporation and stockholders. On the 10th of December, 1888, the case came on to be finally heard, and the court decreed that H. E. Bumgardner was entitled to specific execution of the contract; that demand was made by her on the 31st day of March, 1887; and

that the 101 $\frac{1}{2}$ shares of stock were then worth \$866.60; and the said C. P. Leavitt is decreed to pay that amount, with interest from 31st day of March, 1887, aggregating the sum of \$954.76, which he is to pay, with interest thereon from the date of decree. The money is to be distributed to the Arnolds and Petty in accordance with their respective liens, and agreements with reference to the same. The decree then proceeds to direct "that L. N. Tavener, who is authorized in a writing filed in the papers in this cause to release the lien of said J. W. Arnold and L. H. Arnold upon 100 shares of the stock aforesaid, to execute said release of said lien, and, in case said L. N. Tavener shall fail or refuse to execute said release within ten days from this date, then Barna Powell, who is hereby appointed a special commissioner for the purpose, is authorized and directed to execute a release of the lien of said J. W. Arnold and L. H. Arnold, as aforesaid, upon the 100 shares of stock held in the name of H. E. Bumgardner and filed with the papers in this cause, which certificate of 100 shares, as well as the certificate of 101 $\frac{1}{2}$ shares now also in the file in this cause, are to be delivered to said C. P. Leavitt upon payment by him, or some one for him, to the defendants Petty and Arnolds and plaintiffs, the sum hereinbefore decreed by him to be paid." Leave was given the plaintiffs to sue out execution. From this decree the defendant Leavitt has appealed to this court.

The first and pivotal question to be decided in this case is whether the court of chancery had jurisdiction to decree specific performance. If not, the bill should have been dismissed on demurrer. In the first place, regarding the defendant Leavitt, as having for a consideration obtained the refusal of, or, as we may call it, the option on, this stock, could he have maintained a bill for specific performance against Mrs. H. E. Bumgardner in case she had refused to let him have the stock, and had insisted on selling it to some one else? This is an important question, because, if such relief could be granted to the purchaser were he to apply, the seller, who has given the purchaser such preference or option, is entitled to like relief by reason of the operation of the principle of mutuality of right and remedy. The general doctrine upon this subject is thus stated by Mr. Pomeroy: "It is not then sufficient in general that a valid and binding agreement exists, and that an action at law for damages will lie in favor of either party for a breach by the other; the peculiarly distinctive feature of the equitable doctrine is that the remedial right to a specific performance must be mutual." See *Moore v. Fitz Randolph*, 6 Leigh, 175. This is a general rule, namely, that the right to a specific execution of a contract, so far as the question of mutuality is concerned, depends upon whether the agreement itself is obli-

gatory on both parties, so that upon the application of either against the other the court would grant a specific performance. *Duvall v. Myers*, 2 Md. Ch. 401. Says Mr. Pomeroy: "It is a familiar doctrine that if the right to the specific performance of a contract exists at all, it must be mutual. The remedy must be alike attainable by both parties to the agreement." *Pom. Spec. Perf.* § 165. In the present case it appears that the defendant Leavitt, being the owner of about three-fourths of the stock in a steamboat, entered into an agreement with a married woman with reference to \$1,000 of the same stock. It is true that the contract was signed by him alone. The circumstance that it was signed by him alone is not material, since it is admitted by both parties that she entered into the contract, and was to be bound by it. *Wat. Spec. Perf.* §§ 268, 270. Neither is the fact that she was a married woman material in this state, since, by our married woman's act, which went into operation in 1869, (see Code, c. 66,) a married woman may not only take and hold personal property, such as stocks, but, being such a stockholder, she may vote the same in any organized company; consequently she had the right of disposition and the power to sell or contract to sell. It is also true that, according to her statement, personal services entered into a part of the consideration of the contract, and it is a rule almost universal that a contract for personal services cannot be enforced against the party promising such services, and hence for the want of the requisite mutuality specific execution will not be enforced against the opposite party, unless the services have been actually performed, and the contract to that extent been executed, as was the case here. *Pom. Spec. Perf.* § 310.

These obstacles being disposed of, we may inquire, had Mrs. Bumgardner persisted in selling this stock to a third party, contrary to her agreement, could Leavitt have asked the court of chancery to interfere by injunction, and to compel her to transfer the stock to him upon payment of the price stipulated in the agreement? The question of specific performance of contracts for the delivery of stock is frequently treated by the text-writers in an empirical and unsatisfactory manner, as if there were something peculiar in this character of personal property, which rendered it impossible to classify it under any general rule. Mr. Fry, for example, does not hesitate to say positively that a contract for the sale of stock will not be specifically enforced, although he afterwards admits that railway shares form an exception. *Fry, Spec. Perf.* §§ 24, 27. Mr. Pomeroy's treatment of the subject is equally unsatisfactory. See *Pom. Spec. Perf.* §§ 17-19. The true principle would seem to be that, as a general rule, courts of equity will not enforce specific performance of contracts for the delivery of shares of stock, but when

a purchaser has bargained for such shares, or taken an option upon them, because they have for him a unique and special value, the loss of which could not be adequately compensated by damages at law, the chancellor, in the exercise of a sound discretion, may decree specific execution. This principle we find laid down and insisted upon in the more recent work of Mr. Waterman, (1881.) "The same principles," he says, "govern in contracts for the sale of stock as in the sale of other property,—that is, if a breach can be fully compensated in damages, equity will not interfere; while it will do so when, notwithstanding the payment of the money value of the stock, the plaintiff will still lose a substantial benefit, and thereby remain uncompensated. If a contract to convey stock is clear and definite, and the uncertain value of the stock renders it difficult to do justice by an award of damages, specific performance will be decreed." *Wat. Spec. Perf.* § 19. Among the many other cases cited in support of this proposition is the leading case of *Doloret v. Rothschild*, decided by Sir John Leach, vice-chancellor, in 1824, 1 Sim. & S. 590, in which it is said that a bill will lie for the specific performance of a contract for the purchase of government stock, where it prays for the delivery of certificates which give the legal title to the stock. There are many other cases, however, both in England and America, which sustain the correct principle as laid down above, but which it is unnecessary to cite. In the present case the purchaser of the refusal of or option upon the stock in the steamboat was dealing for an article which he could not go upon the market and buy, and which no one could deliver to him but the holder, with whom he bargained. The shares of stock evidently had for him a peculiar value, which could not be compensated by mere damages, such as would be recovered at law. Their possession would enable him to control the company, and to retain his position as master of the vessel. For the same reason, therefore, that a contract for railway shares will frequently be specifically performed, viz., whenever such shares are being purchased for the purposes of organization and control, I think a court of equity would have interfered in this case in favor of C. P. Leavitt, had he filed a bill praying for its intervention. It follows, therefore, upon the ground of mutuality of remedy and reciprocity of obligation, that such a bill could be maintained by Mrs. Bumgardner. There is another ground quite as apparent as that stated above, and that is that the legal title to this stock had passed into the hands of a third party, who is properly made a co-defendant. In the case cited above of *Doloret v. Rothschild*, 1 Sim. & S. 590, the vice-chancellor remarks: "I consider also that the plaintiff, not being the original holder of the scrip, but merely the bearer, may not be able to maintain any

action at law upon the contract, and that, if he has any title, it must be in equity." So in the present case the plaintiffs are in a situation in which a court of equity sees its way clearly to administer complete and adequate remedial justice to all parties interested, whereas, if they were remitted to a court of law, if relief could be afforded at all, it could only be done by resorting to several actions, perhaps no less than three. Upon the general principle, therefore, of avoiding circuity of action, and affording relief where the remedy at law is inadequate, it was proper for the court of equity to exercise its jurisdiction. Whenever the remedy at law would be incomplete and inadequate because the court of law cannot give a conditional or modified judgment, and would be unable to preserve the benefit of the agreement to all the parties interested, equity has jurisdiction to enforce the agreement. In the case of *Summers v. Bean*, the general principle is thus declared by Judge Moncure, (13 Grat. 412:) "Generally an adequate remedy may be had at law for the breach of a contract concerning any other personalty than slaves, and therefore, as a general rule, a court of equity will not enforce the execution of such a contract. But sometimes an adequate remedy at law cannot be had for the breach of such a contract, and then its specific execution will be enforced in equity." As it was said in *May v. Le Claire*, 11 Wall. 218, in order to oust the equity jurisdiction, the remedy at law must be "as effectual and complete as the chancellor can make it." The same principle is recognized by all the text-writers. See *Fry, Spec. Perf. § 18; Pom. Spec. Perf. § 29*. Mr. Waterman says tersely: "If, however, the remedy at law would be wholly

inadequate or impracticable, specific performance will be decreed." *Wat. Spec. Perf. § 17*. For these reasons, therefore, we think there was no error in overruling the demurrer to the plaintiffs' bill. Upon the merits, although there was, as we have said, a great deal of unnecessary testimony taken, the plaintiffs' case might have rested, and no doubt did rest, upon the testimony of the defendant C. P. Leavitt himself. Out of the 168 questions propounded to him, of which some were frivolous, and nearly all impertinent, he is asked on the 103d question whether he did not offer Mrs. Bumgardner \$850 for her stock, in order to get rid of Bumgardner, to which he replies: "Yes; I wanted to get rid of him. Here is one of the clerks right here who asked him what he would take for it at different times." 104th question: "Did you not make a proposition to buy the stock on account of your obligation under that contract? Answer. Oh, yes; several times. I guess the clerk here knows that I made offers at different times through Mr. Ritchie, and Mr. Baringer can testify to the same thing." The defendant further testifies that these offers were made in March, 1887, or a little after that time, and that the negotiations would have been concluded, except for some trivial and inconsequential dispute about matters foreign to the subject-matter. To take the defendant, therefore, at his own word, and fix the value of the stock at a price only differing by a few dollars from what he himself offered, with interest from the time of his offer, was a judgment of the circuit court of which he has no right to complain, and we think, therefore, that the decree complained of should be in all respects affirmed.

WELTY v. JACOBS et al.

(49 N. E. 723, 171 Ill. 624.)

Supreme Court of Illinois. Feb. 14, 1898.

Appeal from appellate court, First district.

Bill in equity by George M. Welty to restrain H. R. Jacobs from refusing to perform a contract for the use of a theater, and to enjoin Ulysses D. Newell from the use and occupation of the same. From the decree of the appellate court (64 Ill. App. 285), affirming the decree of the superior court of Cook county, in favor of defendants, plaintiff appeals. Affirmed.

Bulkley, Gray & More, for appellant. James E. Purnell, for appellee H. R. Jacobs. Partridge & Partridge, for appellee U. D. Newell.

CARTER, J. This was a bill for an injunction filed December 28, 1895, in the superior court of Cook county, by the appellant, in which he alleged that he was a theatrical manager and proprietor; that on April 9, 1895, he entered into a written contract with H. R. Jacobs, manager, and representing M. J. Jacobs, proprietor, of the Alhambra Theater, in Chicago, to play his company in the "Black Crook" at such theater for seven consecutive nights, commencing December 29, 1895; that Jacobs was to furnish the house, well cleaned, lighted, and heated, together with the stock, scenery, and equipments contained therein, stage hands, stage carpenter, fly men, regular ushers, gas man, property man, janitor, ticket seller, doorkeepers, orchestra, house programmes, licenses, billboards, bill posting, distribution of printed matter, usual newspaper advertisements, and the resources of the theater in stage furniture and properties not perishable; that Welty was to furnish a company of first-class artists, to the satisfaction of Jacobs, together with special scenery, calcium lights, etc., and also, 10 days in advance, certain printing, prepaid and free from all charges, consisting of a variety of bills, etc.; that appellant was to receive 60 per cent. of the gross receipts up to \$5,000, and 70 per cent. on all over \$5,000; that if the company should not prove satisfactory to Jacobs, whose judgment was to be conclusive, or if the company should prove not to be as represented, then Jacobs should have the right to cancel the contract by giving appellant at least one week's notice, by mail or otherwise; that appellant's company was not to appear at any other house in the city prior to the date of the performance specified; that if, by any unforeseen accident, fire, or for any reason whatever, Jacobs could not furnish the house for said performance the contract was to become null and void. The bill further alleged that appellant had kept and performed all his covenants; that he had tendered the printing as required, and that he was ready to furnish

a satisfactory company; that he had received no notice from Jacobs that his company was not satisfactory nor as represented, and had been given no notice of the termination of his contract as therein provided; that within the then last 30 days Jacobs had entered into a contract with U. D. Newell for the Alhambra Theater for the same week that appellant's contract provided for; that Newell claims to be the manager of another company, also engaged in producing the "Black Crook"; that Jacobs and Newell were combining and confederating to injure and defraud appellant, as Newell had agreed to produce the play for a less percentage than appellant; that appellant had 40 performers under contract, and would be obliged to pay them their salaries whether they performed or not, and that he could procure no other place for his performance during said time, and would be compelled to remain idle, at great expense; that the money value of his contract could not be determined, either actually or approximately, in any other manner than by carrying out and fully performing it according to its conditions; that Jacobs and Newell had announced their intention of keeping appellant out of the possession and use of said theater; that appellees were financially irresponsible. The bill prays for an order enjoining appellees from hindering appellant and his company from taking possession of the Alhambra Theater, its appurtenances and stage property, and from hindering, delaying, interfering with, or preventing appellant from producing said play in accordance with said contract, and also restraining appellees from using or occupying said theater, its stock, scenery, and equipments, during said period of seven days, and from allowing any other person or company to use or occupy the same; and also restraining and enjoining appellees from refusing to furnish to appellant, during such period, the usual and necessary light, heat, music, regular stage hands, stage carpenter, etc., and for general relief. The injunction was granted, and served on appellees December 28, 1895. On December 30, 1895, a rule was entered on appellees to show cause why they should not be punished for contempt of court in violating this injunction. The next day an order was entered modifying the injunction so as to permit Newell to produce the play at the Alhambra, and Jacobs was ordered to pay into court 60 per cent. of the entire receipts received by him at the Alhambra for the week, and to pay to Newell 30 per cent. of such receipts, and the cause was continued to January 3, 1896. On that day both appellees answered, replication was filed, and Newell moved for a dissolution of the injunction. Appellee Jacobs in his answer admitted the making of the contract with appellant, but denied that appellant's company was satisfactory or as represented, and alleged that he had notified appellant thereof, and had canceled the con-

tract; denied all combination to injure appellant; admitted that he had made a contract with Newell for the same week he had formerly contracted to appellant; denied that appellant had furnished the printing as required; and that he was without remedy except in a court of equity. Appellee Newell in his answer alleged that he had been informed that appellant's contract had been canceled; that on November 29, 1895, he had made a contract with Jacobs to play the Tompkins Black Crook Company in the Alhambra for seven successive nights, beginning December 29, 1895, the contract being in all particulars like appellant's, except as to the percentage of receipts; that as early as December 27th he had removed to the Alhambra a number of articles belonging to his company and had taken possession of the same; alleged various communications and negotiations between all the parties to this suit from December 16th until the bill was filed; that, becoming alarmed that Jacobs would close up the Alhambra entirely during that week, he (Newell) had procured an injunction from the circuit court on December 27, 1895, and had it served on Jacobs the same day, restraining Jacobs from closing up the theater during said week and excluding his company from presenting their play; charges appellant with laches and bad faith in suppressing all information in regard to such first injunction, and alleged that appellant's contract was in violation of the statutes, which forbid any amusement or diversion on Sunday, so that specific performance could not be enforced.

The cause was heard by the court, and a decree entered finding that the injunction had been violated by appellees, and that under the order modifying the injunction there had been paid into court \$1,134.75; that the equities were with the appellees; and that the appellant had a complete and adequate remedy at law, and that the injunction was improvidently issued; and the bill was therefore dismissed, and the money ordered returned to Jacobs. Appellant appealed, and asked that the money be retained in the clerk's hands pending the appeal, which was allowed, and the money ordered left with the clerk until the final determination on appeal. The appellate court affirmed the decree, and appellant has further appealed to this court.

There was no sufficient proof that Jacobs canceled his contract with Welty on any of the grounds stipulated in it, and the question is not whether Jacobs was justified in violating the contract, but whether his bill of complaint for equitable relief can be sustained or he should be remitted to his action at law. Strictly speaking, the bill was not one for specific performance, but for injunction only. It is clear from its allegations and the authorities bearing upon the question that specific performance of the contract could not be decreed. It is not, and

cannot be, contended that appellant could have been compelled, by any writ the court could have issued, to occupy the theater with his company of actors and give the performances contracted for, any more than a public singer or speaker can be compelled specifically to perform his contract to sing or speak. Negative covenants not to sing or perform elsewhere at a certain time than a designated place have been enforced by the injunctive process, but further than this such contracts have not been specifically enforced by the courts, by injunction or otherwise. *Lumley v. Wagner*, 1 De Gex, M. & G. 604; *Daly v. Smith*, 38 N. Y. Super. Ct. 158. In *Lumley v. Wagner* there was an express covenant not to sing elsewhere than at the complainant's theater, and the injunction was placed on that ground.

But it is urged that negative covenants may be implied as well as expressed, and, when necessarily implied from the terms of the contract, they will be enforced in like manner; citing the following cases: *Montague v. Flockton*, L. R. 16 Eq. 189; *Great Northern Ry. Co. v. Manchester, S. & L. Ry. Co.*, 5 De Gex & S. 138; *Chicago & A. Ry. Co. v. New York, L. E. & W. R. Co.*, 24 Fed. 516; *Singer Sewing-Mach. Co. v. Union B. & E. Co.*, Holmes, 253, Fed. Cas. No. 12,904; 2 High, Inj. (2d Ed.) § 1150; *Fredricks v. Mayer*, 13 How. Prac. 566. While there was a negative covenant in the contract under consideration against Welty, it is not important to consider whether or not appellant might have been enjoined from performing elsewhere than at Jacobs' theater at the time in question, for it is manifest he could not have been compelled to perform at said theater. Before a contract will be specifically enforced there must be mutuality in the contract, so that it may be enforced by either; and, as this contract was of such a nature that it could not have been specifically enforced by appellee Jacobs, it should not be so enforced by appellant. *Lancaster v. Roberts*, 144 Ill. 223, 33 N. E. 27; *Fry*, Spec. Perf. §§ 440, 441; *Wat. Spec. Perf.* § 196; *Cooper v. Pena*, 21 Cal. 411.

But it is urged that courts of equity will by injunction restrain the violation of contracts of this character in many cases where they cannot decree specific performance, and the following among other cases are referred to: *Western Union Tel. Co. v. Union Pac. Ry. Co.*, 3 Fed. 423-429; *Wells, Fargo & Co. v. Oregon R. & Nav. Co.*, 15 Fed. 561, and 18 Fed. 517; *Wells, Fargo & Co. v. Northern Pac. R. Co.*, 23 Fed. 469. Without determining whether there may not be exceptional cases not falling within the general rule, we think the rule is as stated in *Chicago M. G. L. & F. Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616, and the authorities there quoted. It was there said (page 60, 130 Ill., and page 619, 22 N. E.): "The bill of complaint in this case, though not strictly a bill for the specific performance of a con-

tract, is in substance a bill of that kind. In 3 Pom. Eq. Jur. § 1341, it is said: 'An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrine and rules. It may be stated, as a general proposition, that whenever the contract is one of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit.'" It is plain that, as a general rule, to enjoin one from doing something in violation of his contract is an indirect mode of enforcing the affirmative provisions of such contract, although such an injunction may often fall short of accomplishing its object. It is obvious from what has been said and from the authorities that to enjoin appellee Jacobs, as prayed in the bill, from refusing to furnish the usual and necessary light, heat, music, regular stage hands, stage carpenter, ushers, equipments, etc., provided for in the contract, would be the same, in substance, as to command him to furnish them,

and without them the use of the theater building would seem to be of little use. It is practically conceded by counsel for appellant that this part of the contract could not be specifically enforced as prayed, or otherwise, in equity; but it is conceded that this part of the contract is merely incidental to the more important part of it, which was the right to occupy and use the theater and its furnishings, and give therein the performances provided for, and to exclude from a like occupation and use the other appellee, Newell, and that the injunction was proper for that purpose. This would have been an indirect method of enforcing a part performance of the contract, and courts will not enforce specific performance of particular stipulations separated from the rest of the contract, where they do not clearly stand by themselves, unaffected by other provisions. *Baldwin v. Fletcher*, 48 Mich. 604, 12 N. W. 873. Even if such a decree might have been obtained, we are satisfied the sound legal discretion of the court was not violated in refusing it, or in dissolving the injunction after it was granted. Appellant's remedy, if any he had, was at law. The judgment of the appellate court is affirmed. Judgment affirmed.

JONES v. NEWHALL.

(115 Mass. 244.)

Supreme Judicial Court of Massachusetts.
Suffolk. June 20, 1874.

Bill by Leonard S. Jones against Benjamin B. Newhall to enforce specific performance of a contract for the purchase of all the interest of complainant in the Worthington Land Associates, and all the right and interest of Jones in any property belonging to the Dorchester Land Association, the share of said Jones consisting of 14 shares of stock of said land association, together with two certain mortgages. Decree for plaintiff. Case reported to the full court. Bill dismissed.

R. D. Smith & A. E. Jones, for plaintiff.
A. C. Clark, for defendant.

WELLS, J. Jurisdiction in equity is conferred upon this court by Gen. St. c. 113, § 2, to hear and determine "suits for the specific performance of written contracts by and against either party to the contract, and his heirs, devisees, executors, administrators and assigns." The power extends alike to written contracts of all descriptions, but its exercise is restricted by the proviso, "when the parties have not a plain, adequate and complete remedy at the common law." This proviso has always been so construed and applied as to make it a test, in each particular case, by which to determine whether jurisdiction in equity shall be entertained. If the only relief to which the plaintiff would be entitled in equity is the same in measure and kind as that which he might obtain in a suit at law, he can have no standing upon the equity side of the court, unless his remedy at law is doubtful, circuitous, or complicated by multiplicity of parties having different interests. *Charles River Bridge v. Warren Bridge*, 6 Pick. 376, 396; *Sears v. Boston*, 16 Pick. 357; *Wilson v. Leishman*, 12 Metc. (Mass.) 316, 321; *Hilliard v. Allen*, 4 Cush. 532, 535; *Pratt v. Pond*, 5 Allen, 59; *Glass v. Hulbert*, 102 Mass. 24, 27; *Ward v. Peck*, 114 Mass. 121.

In contracts for the sale of personal property jurisdiction in equity is rarely entertained, although the only remedy at law may be the recovery of damages, the measure of which is the difference between the market value of the property at the time of the breach and the price as fixed by the contract. The reason is that, in regard to most articles of personal property, the commodity and its market value are supposed to be substantially equivalent, each to the other, so that they may be readily interchanged. The seller may convert his rejected goods into money; the purchaser, with his money, may obtain similar goods; each presumably at the market price; and the difference between that and the contract

price, recoverable at law, will be full indemnity. *Jones v. Boston Mill Corp.*, 4 Pick. 507, 511; *Adderley v. Dixon*, 1 Sim. & S. 607; *Harnett v. Yielding*, 2 Schoales & L. 549, 553; *Adams*, Eq. 83; *Fry*, Spec. Perf. §§ 12, 29.

It is otherwise with fixed property like real estate. Compensation in damages, measured by the difference in price as ascertained by the market value and by the contract, has never been regarded in equity as such adequate indemnity for nonfulfillment of a contract for the sale or purchase of land as to justify the refusal of relief in equity. When that is the extent of the right to recover at law, a bill in equity is maintainable, even in favor of the vendor, to enforce fulfillment of the contract, and payment of the full amount of the price agreed on. *Old Colony Railroad v. Evans*, 6 Gray, 25.

Although the general subject is within the chancery jurisdiction of the court, yet inadequacy of the damages recoverable at law is essential to the right to invoke its action as a court of chancery in any particular case. The rule is the same whether applied to the contracts for the sale of real or of personal estate. The difference in the application arises from the difference in the character of the subject-matter of the contracts in respect to the question whether damages at law will afford full and adequate indemnity to the party seeking relief. If the character of the property be such that the loss of the contract will not be fairly compensated in damages based upon an estimate of its market value, relief may be had in equity, whether it relates to real or to personal estate. *Adderley v. Dixon*, 1 Sim. & S. 607; *Duncuft v. Albrecht*, 12 Sim. 189, 199; *Clark v. Flint*, 22 Pick. 231; *Story*, Eq. Jur. § 717; *Adams*, Eq. 83; *Fry*, Spec. Perf. §§ 11, 23, 30, 37.

The property in question in this case appears to be of such a character. It is not material, therefore, whether the interest of the plaintiff is in the nature of realty or of personalty. But the relief he seeks is not such as to require the aid of a court of equity. At the time this bill was filed the only obligation on the part of the defendant to be enforced either at law or in equity was his express promise to pay a definite sum of money as an installment towards the purchase of certain property from the plaintiff. That promise is supported by the executory agreement of the plaintiff to convey the property, contained in the same instrument, as its consideration; but in respect of performance the several promises of the defendant are separable from the entirety of the contract, and each one may be enforced by itself as an assumpsit. The plaintiff is not obliged to sue in damages upon his contract as for a general breach. He may recover at law the full amount of the install-

ment due. In equity he can have no decree beyond that. He cannot come into equity to obtain precisely what he can have at law. *Howe v. Nickerson*, 14 Allen, 400, 406; *Jacobs v. Peterborough & S. R. Co.*, 8 Cush. 223; *Gill v. Bicknell*, 2 Cush. 355; *Russell v. Clark*, 7 Cranch, 69.

The plaintiff has no occasion for any order of the court in regard to performance by himself. At most, all that is necessary for him to do in order to recover his judgment at law, is to offer a conveyance of a portion of his interest corresponding to the amount of the installment due.

We do not regard the fact, stated in the report, that the defendant "also refused to pay an assessment then due, or about to become due," for which he was bound by the contract to provide, and hold the plaintiff harmless; because that is immaterial upon demurrer, there being no allegation in the bill in reference to it. And besides, there would be sufficient remedy at law for such a breach, if it were sufficiently alleged and proved.

If the plaintiff will be compelled to bring several actions for his full remedy at law, it is because he has a contract payable in installments; that is, he may have several causes of action. But he may sue them severally, or he may join them all in one suit, when all shall have fallen due, at his own election. He is not driven into equity to escape the necessity of many suits at law.

It is true, as the plaintiff insists, that a different rule exists in the English courts of chancery, and that in numerous cases, not unlike the present, relief in equity has there been granted by decree for payment of a sum of money due by contract, although equally recoverable at law. The maxim, which, as we apply it, makes the want of adequate remedy at law essential to the right to have relief in equity in each case, has always been attached to chancery jurisdiction. But in the English courts it has been rather by way of indicating the nature and origin of the jurisdiction, and defining the class of rights or subjects to which it attaches, than as a constant limit upon its exercise. Courts of chancery were created to supply defects in proceedings at common law. *Story*, Eq. Jur. §§ 49, 54. Their jurisdiction grew out of the exigencies of the earlier periods in the judicial history of the country, and was from time to time enlarged to meet those exigencies. Its limits, having become defined and fixed by usage, have not contracted as the jurisdiction of the common-law courts was extended. It has always been held that jurisdiction once acquired in chancery, over any subject or class of rights, is not taken away by any subsequent enlargement of the powers of the courts of common law, nor by reason of any new modes of remedy that may be afforded by those courts. *Story*, Eq. Jur. § 64i; *Snell*,

Eq. 335; *Slim v. Croucher*, 1 De Gex, F. & J. 518.

Hence arose a wide range of concurrent jurisdiction, within which chancery proceeded to administer appropriate remedies, without regard to the question whether a like remedy could be had in the courts of law. *Colt v. Woollaston*, 2 P. Wms. 154; *Green v. Barrett*, 1 Sim. 45; *Blain v. Agar*, 2 Sim. 289; *Cridland v. De Mauley*, 1 De Gex & S. 459; *Evans v. Bicknell*, 6 Ves. 174; *Burrows v. Lock*, 10 Ves. 470. One of its maxims was that there must be mutuality of right to avail of that jurisdiction. Accordingly, if the contract or cause of complaint was such that one of the parties might require the peculiar relief which chancery alone could afford, it was frequently held that the principle of mutuality required that jurisdiction should be equally maintained in favor of the other party, who sought and could have no other relief than recovery of the same amount of money due or measure of damages as would have been awarded by judgment in the court of law. *Hall v. Warren*, 9 Ves. 605; *Walker v. Eastern Counties Ry. Co.*, 6 Hare, 594; *Kenney v. Wexham*, 6 Madd. 355.

In contracts respecting land there is an additional consideration for maintaining jurisdiction in equity in favor of the vendor as well as the vendee, which is doubtless much more influential with the English courts than it can be here; and that is the doctrine of equitable conversion. It is referred to as a reason for the exercise of jurisdiction at the suit of the vendor, in *Cave v. Cave*, 2 Eden, 139; *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. Cas. 331; *Fry*, Spec. Perf. § 23.

In Massachusetts, instead of a distinct and independent court of chancery, with a jurisdiction derived from and defined and fixed by long usage, we have certain chancery powers conferred upon the court of common law, whose jurisdiction and modes of remedy as a court of law had already become extended much beyond those of English courts of common law, partly by statutes and partly by its own adaptation of its remedies to the necessities which arose from the absence of the court of chancery. This difference in the relations of the two jurisdictions would alone give occasion for different rules governing their exercise. *Black v. Black*, 4 Pick. 234, 238; *Tirrell v. Merrill*, 17 Mass. 117, 121; *Baker v. Biddle*, *Baldw.* 394, *Fed. Cas. No.* 764.

The successive statutes by which the equity powers of this court have been conferred or enlarged have always affixed to their exercise the condition that "the parties have not a plain, adequate, and complete remedy at the common law." This has been construed as referring "to remedies at law as they exist under our statutes and according to our course of practice." *Pratt v. Pond*,

5 Allen, 59. It has also been repeatedly held that, in reference to the range of jurisdiction conferred, the several statutes were to be construed strictly. *Black v. Black*, and *Charles River Bridge v. Warren Bridge*, *ubi supra*. No reason or necessity remains for the maintenance of concurrent jurisdiction, except for the sake of a more perfect remedy in equity when the plaintiff shall establish his right to it. And such we understand to be the purport and intent of our statutes upon the subject. *Milkman v. Ordway*, 106 Mass. 232; *Angell v. Stone*, 110 Mass. 54.

A similar restriction upon the equity jurisdiction of the federal courts is so construed with great strictness. *Oelricks v. Spain*, 15 Wall. 211, 228; *Grand Chute v. Winegar*, Id. 373; *Phoenix Mut. Life Ins. Co. v. Bailey*, 13 Wall. 616; *Parker v. Winnipiseogee Lake Cotton & Woollen Co.*, 2 Black, 545; *Baker v. Biddle*, *Baldw.* 394, *Fed. Cas. No.* 764. See, also, *Woodman v. Freeman*, 25 Me. 531; *Piscataquis F. & M. Ins. Co. v. Hill*, 60 Me. 178.

Even in courts of general chancery powers and of independent organization, while the power to entertain bills relating to all matters which in their nature are within their concurrent jurisdiction is maintained, yet the usual course of practice is to remit parties to their remedy at law, provided that be plain and adequate, unless for some reason of peculiar advantage which equity is supposed to possess, or some other cause influencing the discretion of the court. *Kerr, Fraud & M.* 45; *Blsp. Eq.* § 200; also, *Id.* § 37; *Snell, Eq.* 334; *Clifford v. Brooke*, 13

Ves. 131; *Whitmore v. Mackeson*, 16 *Beav.* 126; *Hammond v. Messenger*, 9 *Sim.* 327; *Hoare v. Bremridge*, *L. R.* 14 *Eq.* 522, 8 *Ch. App.* 22.

The doctrine of *Colt v. Woollaston*, 2 *P. Wms.* 154, and *Green v. Barrett*, 1 *Sim.* 45, though not expressly overruled, has been questioned (*Thompson v. Barclay*, 9 *Law J. Ch.* 215, 219), and does not seem to govern the usual practice of the courts. See cases above cited, and *Newham v. May*, 13 *Price*, 749.

But, independently of statute restrictions, the objection that the plaintiff may have a sufficient remedy or defense at law in the particular case is a matter of equitable discretion, rather than of jurisdictional right; and is therefore not always available on demurrer. *Colt v. Netterville*, 2 *P. Wms.* 304; *Ramshire v. Bolton*, *L. R.* 8 *Eq.* 294; *Hill v. Lane*, *L. R.* 11 *Eq.* 215; *Barry v. Croskey*, 2 *Johns. & H.* 1.

According to the practice in this commonwealth, on the other hand, under the statutes relating to the exercise of jurisdiction in equity, a bill is demurrable, not only if it show that the plaintiff has a remedy at law, equally sufficient and available, but also if it fail to show that he is without such remedy. *Pool v. Lloyd*, 5 *Metc. (Mass.)* 525, 529; *Woodman v. Saltonstall*, 7 *Cush.* 181, *Pratt v. Pond*, 5 *Allen*, 59; *Clark v. Jones*, Id. 379; *Metcalf v. Cady*, 8 *Allen*, 587; *Mill River Loan Fund Ass'n v. Clafin*, 9 *Allen*, 101; *Com. v. Smith*, 10 *Allen*, 448; *Bassett v. Brown*, 100 *Mass.* 355, 105 *Mass.* 551, 560. The demurrer, therefore, must be sustained, and the bill dismissed.

FOTHERGILL v. ROWLAND.

(L. R. 17 Eq. 132.)

Master of the Rolls. Nov. 4, 1873.

Demurrer.

The plaintiffs in this case, Richard Fothergill and Ernest Thomas Hankey, were ironmasters, carrying on the Aberdare Ironworks. The defendant Richard Rowland was lessee of the Newbridge Colliery.

The bill alleged that the plaintiffs had for some time been accustomed to purchase coals of the defendant Rowland, and that at the time of making the agreement hereinafter mentioned there was a subsisting contract, under which Rowland was supplying the plaintiffs from 1871 to the 4th of January, 1872, with a quantity of coal from the said colliery.

That at the time of the making of the agreement of the 6th of December, 1871, the Newbridge Colliery was only opened upon one seam of coal, called "the No. 3 seam," and was only partially opened on that seam; that Rowland was anxious to extend the openings in the seam, and had made representations to that effect to the plaintiffs, and that he (Rowland) was short of capital for extending his works, and that, with a comparatively small outlay, the colliery would produce nearly 300 tons of coal a day, and that if a siding could be had on the Taff Vale Railway, near the Taff Vale Ironworks, he (Rowland) would be able to deliver the coal with greater facility and a considerable reduction of cost.

That the plaintiffs were then in a position to consume at the ironworks a much larger quantity of coal than they had previously taken, and were disposed to make an arrangement with Rowland to supply him with capital to enable him to extend his colliery, and also to make an arrangement with the Taff Vale Railway Company for the construction of a siding, provided that Rowland would enter into a contract of sale to the plaintiffs of all the coal which the said colliery would produce, for a lease of five years, provided that the quantity then supplied should not be less than a stated minimum.

That negotiations for an arrangement upon this footing resulted in an agreement, come to at a meeting, between the plaintiffs and Rowland on the 6th of December, 1871, by which they agreed that Rowland should sell to the plaintiffs, and that the plaintiffs should buy the whole of the get of the coal of the No. 3 seam of the said colliery for five years, the quantity not to be less than that then delivered to the Taff Vale Ironworks, unless the coal should fail, at 6s. per ton, provided that the Taff Vale Railway Company would provide a siding to which Rowland should forthwith make a road, and that the plaintiffs should lend to Rowland £1,000 to aid him in opening the colliery and that this agreement was reduced to writing

in the form of a pencil memorandum signed by Rowland, and about the same time the plaintiffs agreed with Rowland that, besides the coal of the said No. 3 seam, another vein should be included in the contract, and, at the option of the plaintiff Fothergill, any other vein of coal within the colliery should be included.

That the said agreements were reduced to writing by a memorandum in the form of a letter of the 4th of January, 1872, addressed to Rowland and confirmed by him in writing, and another memorandum subscribed thereto of the 5th of January, 1872, which were as follows:

"Dear Sir: I have been excessively occupied since our interview last month, and have not found time to sit down and write in detail that which we mutually agreed upon beyond the simple sale of coal described in the pencil memorandum we drew up together in the following terms:

"6 Dec. 1871.

"Sold R. F., Esq., M. P., the whole of the get of the No. 3 coal out of the Newbridge Colliery property for five years, the quantity not to be less than at present delivered to his Taff Vale works; unless the coal should fail, at 6s. per ton payment as usual."

"To which I desire now to add that we arranged, when so required, that you would deliver the said coal into our wagons on a siding of the Taff Vale Railway at such a reduction in price as you could obtain off the cost in comparison with the delivery into the Taff Vale works, provided that the Taff Vale Railway Company would provide such siding (which you had not been able to obtain), and to which you would forthwith make a road; in reference to which I am glad to inform you that I have seen Mr. Fisher, and obtained his consent to his company providing the needful siding, a most valuable concession in prospect of the possibly very large quantities of coal you talked of flooding me with. I also promised to lend you £1,000, to aid you in opening and developing the said colliery at the rate of £5 per cent. per annum interest, to be taken in such proportions monthly as you require in exchange for your acceptances at six months' date, all which please confirm, and I remain,

"Yours faithfully,

"Rich. Fothergill."

"5th Jan. 1872.

"It is understood between us that besides the No. 3 coal named herein that the Forest Vach vein is included in the foregoing contract, and, further, that any other vein of coal worked shall be included at the option of Mr. Fothergill or representatives.

"Rich. Fothergill.

"Richd. Rowland."

That in part performance of the said agreement Rowland had commenced to deliver coal from the said colliery to the ironworks; that

the plaintiffs had advanced to him the sum of £1,000, which he had employed in extending the colliery; and that the siding was constructed by the Taff Vale Railway Company under the arrangement made with them by one of the plaintiffs.

That after January, 1872, coal of the description yielded by the colliery increased very much in value, and that Rowland had appealed to the plaintiffs to make some modification in the contract, which they had refused, though they had made an allowance by way of gift to the amount of one-third of the contract price; but that no variations in the contract had been assented to by the plaintiffs.

That coal of the description yielded by the colliery had advanced from 6s. to 13s. per ton.

That the plaintiffs had discovered that Rowland, in violation of the terms of his agreement, was selling coal from the said No. 3 seam to other persons than the plaintiffs; and that the deliveries were greatly below the minimum quantities specified in the contract.

That in August, 1873, the plaintiffs discovered that Rowland had entered into an agreement with the defendants Spickett, Price, Bassett, and Meyer, for the sale to them of the colliery; and that such agreement was entered into for the purpose of evading the performance on the part of Rowland of the agreement between the plaintiffs and himself, and of depriving the plaintiffs of their rights in the premises.

The plaintiffs prayed, first, for an injunction to restrain the defendants from selling, assigning, or disposing of or interfering with the colliery, except subject to the agreement between the plaintiffs and Rowland; and from selling, disposing of or interfering with any coal gotten or to be gotten out of the said colliery, except for the purpose of the performance of the agreement; and, secondly, that it might be declared that the plaintiffs were entitled to the whole of the get of the seam of coal No. 3, and of the Forest Vach vein of the colliery, and also, at the option of the plaintiffs, to the whole of the get of any other seam of coal worked at the colliery during the period of five years, upon the terms of the said agreement embodied in the memorandum of the 6th of December, 1871, and the 4th and 5th of January, 1872.

The defendants demurred to the bill.

Sharp & Ullithorne, agents for Simons & Plews, Merthyr Tydvil, for plaintiffs. I. H. Wrentmore, W. Kelly, and Mr. Gosling, for defendants.

SIR G. JESSEL, M. R. I feel no doubt whatever on the question, therefore I think it is my duty to give a decision. I never did approve, when at the bar, and I do not approve now, when on the bench, of the practice of not deciding a substantial question when it is fairly raised between the parties and argued, simply because it is raised by demurrer. It is a great benefit to all parties

to have the question in the case speedily and cheaply determined, and the practice of demurring ought, if possible, to be encouraged.

The question is one which I am sorry to have to decide against the plaintiffs. No honest man, whether on the bench or off it, can approve of the conduct of the defendants. The first defendant, Rowland, has entered into a contract bona fide for valuable considerations to sell a quantity of coal to be raised from his mine to the plaintiffs. He has received the advantages of the contract, and because coal has risen in value and he can get a better price elsewhere, he does not choose to perform his contract. Such conduct ought not to meet with the approval of anybody. Then the question I have to determine is, whether the plaintiffs have come to the right court to obtain that which the law will undoubtedly give them, namely, compensation in some shape or other for the loss they have sustained by this breach of contract. It appears to me, as the law now stands, a court of equity cannot give them any relief.

The first question is, what is the contract for? In my view of the contract it is one for the sale of coals, that is, coals gotten, the get of coal, the severed chattel, and it has no relation whatever to a contract for real estate. That point really was not argued by Mr. Fry, although Mr. Marten did touch upon it. I think it must be assumed, therefore, to be a simple contract for the sale of a chattel of a very ordinary description not alleged to be a peculiar coal, or coal that cannot be got elsewhere. On the contrary, as I read the bill, there is coal that can be got elsewhere of the same description, only at a higher price. The result is that the plaintiffs will incur an amount of damage to be measured by the market price which they may have to pay for the coal of the same description as the coal agreed to be supplied by the defendant Rowland.

It is said, however, that, although you can ascertain the market price as regards all the past nondelivery, you cannot ascertain exactly the market price as to future deliveries. To say that you cannot ascertain the damage in a case of breach of contract for the sale of goods, say in monthly deliveries extending over three years (which is the case here, for there are three years unexpired of the contract), is to limit the power of ascertaining damages in a way which would rather astonish gentlemen who practice on what is called the other side of Westminster Hall. There is never considered to be any difficulty in ascertaining such a thing, therefore I do not think it is a case in which damages could not be ascertained at law.

That being so, what is there to distinguish this from any ordinary contract for the sale of goods? We have been told it has some connection with the colliery. I suppose coals must necessarily have connection with a colliery, and it happens that the person who sold the coal to be produced from a giv-

en colliery was also at that time the owner of the colliery. I apprehend there is no difficulty about entering into a contract for the sale of coal coming from a particular colliery; by persons not owners of that colliery; that is the common practice. The coals not being delivered, and there being no means of obtaining their delivery without compelling the defendant Rowland to raise them, it has been admitted before me that this is a contract of which you cannot obtain a specific performance in a court of equity.

Therefore any relief to be obtained by the plaintiffs in the shape of compensation must be obtained at law, and I do not understand that the plaintiffs, coming here for an injunction which they ask, are willing to abandon their claim to compensation at law in the shape of damages.

Then it is said, assuming this contract to be one which the court cannot specifically perform, it is yet a case in which the court will restrain the defendants from breaking the contract. But I have always felt, when at the bar, a very considerable difficulty in understanding the court on the one hand professing to refuse specific performance because it is difficult to enforce it, and yet on the other hand attempting to do the same thing by a roundabout method. If it is right to prevent the defendant Rowland from selling coal at all, he not having stipulated not to sell coal, but having stipulated to sell all the coal he can raise to somebody who has promised valuable consideration,—why is it not right to compel him to raise it and deliver it? It is difficult to follow the distinction, but I cannot find any distinct line laid down, or any distinct limit which I could seize upon and define as being the line dividing the two classes of cases—that is, the class of cases in which the court, feeling that it has not the power to compel specific performance, grants an injunction to restrain the breach by the contracting party of one or more of the stipulations of the contract, and the class of cases in which it refuses to interfere. I have asked (and I am sure I should have obtained from one or more of the learned counsel engaged in the case every assistance) for a definition. I have not only not been able to obtain the answer, but I

have obtained that which altogether commands my assent, namely, that there is no such distinct line to be found in the authorities. I am referred to vague and general propositions,—that the rule is that the court is to find out what it considers convenient, or what will be a case of sufficient importance to authorize the interference of the court at all, or something of that kind.

That being so, and not being able to discover any definite principle on which the court can act, I must follow what Lord St. Leonards says, in *Lumley v. Wagner*, 1 De Gex, M. & G. 604, is the proper conduct for a judge, in not extending this jurisdiction. I am not, however, entirely without assistance from authority, because it appears to me that this very case has been put, though only by way of illustration, by a very great judge, Lord Cottenham, in *Heathcote v. Railway Co.*, 2 Macn. & G. 112, where he says: "If A. contract with B. to deliver goods at a certain time and place, will equity interfere to prevent A. from doing anything which may or can prevent him from so delivering the goods?" That is the exact case I have to deal with, because I have decided that the contract is a contract for the delivery of goods. Finding the dictum of Lord Cottenham express on the subject, and the plaintiffs' counsel not having been able to produce to me any authority in which there has been such an injunction granted on the sale of goods or any chattel, in a case in which specific performance could not be granted, I think I shall do right in following that authority; and I say, although I say it with much regret, that it is a case in which equity can afford no relief.

With regard to the question of costs, I think it is undesirable to take the technical admission of the facts of the bill, when a person files a demurrer, to be an admission of the truth of the facts against him for the purpose of costs. If there is no remedy at all at law, I think the rule that the costs should follow the result too valuable a one to be tampered with. On these grounds I allow the demurrer, with the usual consequences.

A petition of appeal was presented against this decision, but the case was compromised before it came to a hearing.

DANFORTH et al. v. PHILADELPHIA & CAPE MAY S. L. RY. CO.

(30 N. J. Eq. 12.)

Court of Chancery of New Jersey. Oct. Term, 1878.

Bill for specific performance. Heard on bill and answer.

J. W. Griggs, for complainants. W. A. House, for defendants.

RUNYON, Ch. The bill is filed to obtain a decree for specific performance, by the defendants, of a contract entered into between the complainants, partners in business, and them, on the 19th of December, 1877, by which the former agreed to construct, equip and finish, for the latter, a single-track, narrow-gauge railroad, and telegraph line in connection therewith, from the terminus of the Camden, Gloucester & Mount Ephraim Railway to high-water mark in the city of Cape May, with stations, engine and freight houses, machine and repair-shops, turn-tables, water-stations, &c., &c., and all necessary terminal facilities, for \$2,000,000, payable in the capital stock and first mortgage bonds of the company.

By the contract, the complainants were to complete the work within five months after the bonds were negotiated and sold at a price not less than ninety cents on a dollar of the par value thereof; and it was stipulated that they should not be sold at less than that price without the consent of both parties.

The bill states that the complainants entered on the work, and proceeded with it from the date of the contract to the 20th of February following; that there was, at the latter date, due to them, under the contract, the sum of \$40,000, or thereabouts; that they were then entitled to have an estimate made, but the defendants refused to make it, or to pay them, or to carry out the contract, which the complainants allege would be of great value to them if performed; and, further, that the defendants cannot respond in damages for their refusal to carry out the agreement; and that the complainants could profitably dispose of the bonds and stock stipulated for as payment. The bill prays that the defendants may be decreed to specifically perform the contract generally, and, also, that they may be required to make the estimate before mentioned, and deliver bonds and stock to the complainants for the amount which may be found due them thereon.

The defendants' answer admits the contract and declares their willingness to perform it, but alleges their inability to do so by reason of the provisions of an act of the legislature of this state (a supplement to the general railroad law), approved on the 19th of February, 1878. By one of those provisions the provision of the original act requiring that the articles of association should not be filed until at least \$2,000 of stock for every mile of the

proposed railroad should have been subscribed and ten per cent. paid thereon, was altered so as to require that the entire amount of \$2,000 per mile shall be paid to the treasurer of this state, to be repaid by him to the directors or treasurer of the company in the manner specified in the supplement, as the work of constructing the railroad shall progress. By the other, the provision of the original act which authorized the mortgaging of the road, &c., of the company, to secure the payment of their bonds to an amount not exceeding the amount of the paid-up capital stock, was altered by adding a provision that if any person or persons shall issue such bonds to any greater amount than the amount which at the time of such issue shall have been actually paid up on the capital stock of the company, he, she or they shall be guilty of a misdemeanor, and, on conviction, be punished by fine of not more than \$5,000 or imprisonment at hard labor for not more than three years, or both, at the discretion of the court. These provisions of the supplement were therein expressly made applicable to corporations already organized under the original act. The defendants state that they have expended all the money received by them on account of their capital stock in the work on the road, and that they are not able to comply with the provisions of the supplement, and that, by the terms of the supplement, their charter is forfeited, by reason of their failure to comply with the provisions of that act.

There are several considerations which forbid the granting of the relief prayed for in this suit. If this court would undertake the performance of such a contract as that stated in the bill, a contract for building and equipping a long line of railroad, building station, freight and engine houses, &c., &c. (and the current and great weight of authority is decidedly against it,—*Story, Eq. Jur. § 726; Ross v. Union Pac. R. Co., 1 Woolw. 26, Fed. Cas. No. 12,080; Fallon v. Railroad Co., 1 Dill. 121, Fed. Cas. No. 4,629; South Wales R. Co. v. Wythes, 5 De Gex, M. & G. 880*), the disability of the defendants would be a sufficient reason for refusing. Courts of equity will never undertake to enforce specific performance of an agreement where the decree would be a vain or imperfect act. *Tobey v. County of Bristol, 2 Story, 800, Fed. Cas. No. 14,065*. And the incapacity of the defendant to carry the contract into execution affords a ground of defence in a suit for specific performance. *Fry, Spec. Perf. § 658*.

In this case the defendants are willing to perform their part of the contract if they can lawfully do so. They have never refused to issue their bonds and stock to the complainants in accordance with the terms of the contract, except because of the provisions of the supplement above referred to, under which they apprehend they may have lost their corporate existence, and by which, if their corporate existence be not lost, their directors and officers who should act in the matter

would be liable to severe and ignominious punishment for so doing. P. L. 1878, p. 23. They have not complied with the provisions of the supplement in reference to the amount to be paid in on their capital stock, and have not been able and are not able to do so. Only ten per cent. of the amount of their capital stock has been paid in. Their corporate powers are, according to the supplement, extinct, and the corporation is dissolved. P. L. 1878, p. 22. The complainants, however, insist that the supplement is an unconstitutional law; that it destroys their contract, which existed when it was passed, and which was founded on the faith of the original act; that it deprives them of their vested rights thereunder, and that it should be declared to be unconstitutional, and its provisions, so far as they are subject to that objection, disregarded. But it is in nowise necessary to consider that question; for, if there were no other valid objection, this court would not, under the circum-

stances of the case, declare that the apprehensions, or doubts at least, of the defendants, as to the validity of the supplement, are wholly groundless, and direct them to proceed, notwithstanding the penalties above mentioned, to issue bonds according to the contract and in violation of the prohibition of the supplement; to subject themselves to indictment for misdemeanor and the consequences of conviction. It is enough that the legislature has forbidden them to issue the bonds to induce this court to refuse to order them to issue them. But, further, there is at least doubt whether the company still has a corporate existence.

Though the court might, if the case were free from these difficulties, direct the defendants to make the estimate of work already done prayed for in the bill (*Waring v. Railway Co.*, 7 Hare, 482), yet, for the considerations already presented, that relief must also be denied.

The bill will be dismissed.

**SOUTHERN EXP. CO. v. WESTERN
NORTH CAROLINA R. CO.**

(99 U. S. 191.)

Supreme Court of the United States. Oct.
1878.

Appeal from the circuit court of the United States for the Western district of North Carolina.

This is a bill in equity, filed June 18, 1875, by the Southern Express Company, a corporation of Georgia, against the Western North Carolina Railroad Company, a corporation of North Carolina, W. A. Smith, and Henry Clews, for the specific performance of a contract entered into December 2, 1865, between the railroad company and the complainant.

The bill alleges that the railroad company was organized for the purpose of constructing a railroad from Salisbury, North Carolina, to a point on the Tennessee line; that it completed that portion of its line between Salisbury and Morganton, and put it in running order; that the road-bed, rolling-stock, &c., became dilapidated during the war, and that the company in 1865 was without the means to repair the road and make it safe for the transportation of passengers and freight; that the company, having been unsuccessful elsewhere, applied to the complainant for a loan or advance of \$20,000; that the complainant having agreed to loan or advance that sum in consideration of securing the exclusive privilege of transporting freights over said road as far as Morganton, and of certain other advantages, entered, with the advice and consent of the stockholders of the railroad company, into the following contract with that company:

"This indenture of agreement, made and entered into this second day of December, A. D. eighteen hundred and sixty-five, between the Western North Carolina Railroad Company, as party of the first part, and the Southern Express Company, as party of the second part, witnesseth as follows:

"Whereas the party of the second part has agreed to loan and advance to the party of the first part the sum of twenty thousand (\$20,000) dollars upon the notes of said railroad company, bearing interest at the rate of six per cent per annum, which sum is to be expended in repairs and equipments for said road. And whereas the party of the first part is desirous of securing the services of an efficient and responsible agent for the transaction of all of the express business over its road, and is willing to provide the requisite facilities for the proper transaction of said express business in the manner and upon the terms hereinafter specified:

"Now, therefore, in consideration of said loan and advance, and the rents, covenants, and agreements hereinafter made and provided, said party of the first part hereby agrees and binds itself to grant to the said party of

the second part the necessary privileges and requisite facilities for the transaction of all the express business over the entire length of their road, extending from Salisbury to Morganton, in North Carolina, and furnish such facilities by all its passenger trains running each way over its road as may be necessary to forward without delay all the express matter that may be offered by said party of the second part, and to do all in its power to promote the convenience of said party of the second part in the transaction of its express business, both at way and terminal stations.

"Said party of the second part agrees to load and unload said express matter by its own agents, at its own proper costs and charges, and save harmless said party of the first part against all claims for loss and damage to the express matter of the party of the second part, except that which occurs from the negligence and carelessness of said party of the first part or its agents.

"The said party of the first part agrees to carry free of charge the messengers in charge of express matter and the officers and agents of the said party of the second part passing over the road upon express business. The said party of the second part agrees to pay to the said party of the first part fifty cents per hundred pounds for all express matter carried over the road. An account of the weights of all express matter shall be taken by said party of the first part whenever they shall see fit to do so, and delivered to the agent of the party of the first part, weekly or monthly, as may be desired.

"The accounts for transportation to be made up monthly, and the sum found to be due to said railroad company for transportation, at the rate hereinafter specified, shall be applied monthly toward the payment of said twenty thousand (\$20,000) dollars, until the whole sum, with interest, is paid, after which payments for transportation shall be made by said party of the second part monthly in cash.

"This contract shall remain in force for the full term of one year, from the first day of January, eighteen hundred and sixty-six. If the said sum of twenty thousand (\$20,000) dollars, with interest thereon, shall not have been repaid to the said second party at the expiration of said one year, this contract shall continue in force for a further period, and until the whole of said twenty thousand (\$20,000) dollars, with interest thereon, shall have been repaid. And the said party of the first part hereby covenants and agrees that it will not furnish express privileges over said road to any other parties during the existence of this contract on any more favorable terms than those herein made with the said party of the second part, both as to rate of transportation paid, advance payments, and total amount paid per annum. It is mutually covenanted and agreed by the parties hereto that any other contracts that may now exist, whether verbal or written, for express service

between the parties hereto, shall terminate and cease on the thirty-first day of December, eighteen hundred and sixty-five, at which time this contract shall take effect.

"In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

"Tod R. Caldwell,

"Pres't W. N. C. R. R. Co.

"H. B. Plant,

"Pres't Southern Express Company."

The bill then alleges that the \$20,000 was paid in compliance with the contract, and that shortly thereafter the complainant entered upon the road, transported freight according to the terms of the contract, kept regular accounts and exhibited them to the company, which were always approved, and it continued to act under said contract until July, 1873; that in 1870 the railroad company conveyed to Tod R. Caldwell and Henry Clews, as joint tenants, and to the survivor of each,—the former of whom has since deceased,—all its real and personal property, including its franchises, in trust, to secure a large number of its bonds then about to be issued; that \$1,400,000 of said bonds were sold or hypothecated, and came into the hands of persons unknown to the complainant, but for much less than their value and not by a bona fide sale; that, notwithstanding, the alleged creditors of the company instituted foreclosure proceedings in the circuit court of the United States for the Western district of North Carolina, and in 1873 obtained a decree ordering the sale of all the property of said company; that the defendant, Smith, having in that suit been appointed receiver of the company, forbade the complainant, in July, 1873, from further using the cars of the company, unless upon conditions whereby said contract was virtually surrendered or ignored; that thereupon the complainant was compelled to abandon said railroad, although the money so loaned, with a portion of the interest thereon, is still due and unpaid. It then alleges that the suit is brought with the consent of said court, and with the privilege of making such parties defendant as might be deemed necessary for that purpose; that the trustees in the mortgage to secure the bonds of the railroad company had express notice of the contract when they accepted the trust, and that it was claimed by the complainant as an existing lien; that the substance of said contract had been published separately at the instance of the stockholders of the railroad company, and was well known to its creditors and to the purchasers of its bonds at the time, and especially to the defendant Smith; and that the railroad company having conveyed away its property, and being in part insolvent, the violation of the contract cannot be compensated by any damages which would be recovered at law. The bill therefore prays for a decree compelling the railroad company to specifically perform

its contract, and for such other and further relief as the nature and circumstances of the case may require, and for process against the defendants.

The charter of the railroad company granted in February, 1855, is annexed to the bill and made a part thereof. Its twenty-fifth and twenty-sixth sections are as follows:

"Sect. 25. Be it further enacted, that the said company shall have the exclusive right of conveyance, transportation of persons, goods, merchandise, and produce over the said railroad, to be by them constructed, at such charges as may be fixed on by the board of directors.

"Sect. 26. Be it further enacted, that said company may, when they see fit, farm out their right of transportation over said railroad, subject to the rules above mentioned; and the said company and every one who may have received from it the right of transportation of goods, wares, and merchandise over the said railroad, shall be deemed and taken to be a common carrier, as respects all goods, wares, produce, and merchandise intrusted to them for transportation."

At rule-day in July, 1875, the writ of subpoena was returned executed, and the cause continued until the October term, when it was ordered that the commissioners in possession of the road in the Western district of North Carolina, and Howerton, president of the company, be notified to appear and answer or demur to the bill of complaint at rule-day in January, 1876. The commissioners appeared and demurred. The demurrer was sustained and the bill dismissed. The express company then brought the case here.

Clarence A. Seward, for appellant. A. S. Merrimon, for appellee.

SWAYNE, Justice. The bill avers that it was filed against the receiver appointed by the court below, that he was in possession of the railroad, and that the institution of the suit was by the consent of the court. Without this latter fact the bill could not have been filed or maintained. The suit would have been a contempt of the court which had appointed the receiver, and punishable as such. *Davis v. Gray*, 16 Wall. 203.

The citizenship of the complainant corporation is sufficiently averred. *Express Co. v. Kountz*, 8 Wall. 342. Such a complainant need not prove its existence, unless the fact is directly put in issue by the defendant. *Society for Propagation of Gospel v. Town of Pawlet*, 4 Pet. 480.

To the objection that the requisite corporate power of the complainant is not shown, there are two answers. The contract of a corporation is presumed to be *infra vires*, until the contrary is made to appear. 2 Waite, Act. & Def. 334.

The charter is set out in the record, and forms a part of it. That leaves no room for doubt upon the subject.

Adequate capacity on the part of the railroad company to make the contract is to be presumed in like manner.

No party defendant was necessary but the receiver. He was in the possession of the property and effects of the railroad company, subject to the order of the court, and could have specifically performed the contract, or paid back the money loaned if the court had so directed. The presence of the other parties was immaterial, and the bill might well have been dismissed as to them. *Davis v. Gray*, supra; *Doggett v. Railroad Co.*, 99 U. S. 72.

The contract between the express company and the railroad company was that the latter should give to the former the necessary facilities for the transaction of all its business upon the road, forward without delay by the passenger trains both ways all the express matter that should be offered, do all in its power to promote the convenience of the express company, both at the way and terminal stations, and carry free of charge the messengers in charge of the express matter, and the officers and agents of the express company passing over the road on express business. The consideration for these stipulations was a loan by the express company to the railroad company of \$20,000, to be expended in repairs and equipments for the road, the loan to bear interest at the rate of six per cent per annum, and the payment of fifty cents per hundred pounds for all express matter carried over the road, to be applied in discharge of the loan and interest. The contract was to continue for one year from the first day of January, 1866, and until the principal and interest of the debt should be fully paid. The bill avers that the receiver had refused to carry out the contract, and that the principal of \$20,000 and a part of the interest were unpaid.

The enforcement of contracts not relating to realty by a decree for specific performance is not an unusual exercise of equity jurisdiction. Such cases are numerous in both English and American jurisprudence. They proceed upon the ground that under the circumstances a judgment at law would not meet the demands of justice, that it would be less beneficial than relief in equity, that the damages would not be an accurate satisfaction, that their extent could not be

exactly shown, or that the pursuit of the legal remedy would be attended otherwise with doubt and difficulty.

Judge Story, after an elaborate examination of the subject, thus lays down the general rule: "The just conclusion in all such cases would seem to be that courts of equity ought not to decline the jurisdiction for a specific performance of contracts whenever the remedy at law is doubtful in its nature, extent, operation, or adequacy." 2 Story, Eq. Jur. § 728. See, also, *Stuyvesant v. Mayor*, etc., 11 Paige, 414; *Barr v. Lapsley*, 1 Wheat. 151; *Storer v. Railway Co.*, 2 Younge & C. 48; *Wilson v. Railroad Co.*, L. R. 9 Eq. 28.

But we need not pursue the subject further, because there is one provision of the contract in this case which is fatal to the relief sought. A court of equity never interferes where the power of revocation exists. *Frye*, Spec. Perf. 64.

The contract stipulates that after the first year it shall cease upon the payment of the \$20,000 and interest. This might be made immediately upon the rendition of the decree. The action of the court would thus become a nullity.

There is another objection to the appellant's case which is no less conclusive.

The road is in the hands of the receiver appointed in a suit brought by the bondholders to foreclose their mortgage. The appellant has no lien. The contract neither expressly nor by implication touches that subject. It is not a license as insisted by counsel. It is simply a contract for the transportation of persons and property over the road. A specific performance by the receiver would be a form of satisfaction or payment which he cannot be required to make. As well might he be decreed to satisfy the appellant's demand by money, as by the service sought to be enforced. Both belong to the lien-holders, and neither can thus be diverted.

The appellant can, therefore, have no locus standi in a court of equity.

Both these objections appear by its own showing. It was, therefore, competent and proper for the court below, sua sponte, to dismiss the bill for the want of equity upon its face. *Brown v. Piper*, 91 U. S. 37.

Decree affirmed.

McCAULL v. BRAHAM.

(16 Fed. 37.)

Circuit Court, S. D. New York. March 20, 1883.

In Equity.

A. J. Dittenhoefer, for plaintiff. Howe & Hummel, for defendant.

BROWN, J. This action was brought in the state court to restrain the defendant, Helen Braham, otherwise known as Lilian Russell, from violating her agreement with the plaintiff by singing during the current season in any other employment than at the plaintiff's theater, which the complaint alleges she is about to do. A preliminary injunction having been obtained at the time of the commencement of the action, the cause was removed by the plaintiff to this court before answer; and the defendant now moves upon affidavits to dissolve the injunction. By the agreement in writing between the parties, the defendant agreed to sing in comic opera in the employment of the plaintiff whenever required during the season of 1882 to 1883, commencing on or about September 1, 1882, at a stipulated weekly salary. By article 1 the agreement provides that "the artist is engaged exclusively for Mr. John McCaull, and during the continuance of this engagement will not perform, sing, dance, or otherwise exercise her talent in theater, concert halls, churches, or elsewhere, either gratuitously or for her remuneration or advantage, or for that of any other person or other theater or establishment (although not thereby prevented from fulfilling her engagement with Mr. McCaull) without having first obtained permission in writing of Mr. McCaull; and for each and every breach of this rule the artist shall forfeit one week's salary, or her engagement, at the option of Mr. McCaull; but such forfeiture of one week's salary shall not be held to debar Mr. McCaull from enforcing the fulfillment of this contract in such a manner as he may think fit."

By article 3 it is provided that "no salaries will be paid for any night or days on which the artist may not be able to perform through illness or other unavoidable cause; and the artist absenting herself, except from illness or other unavoidable cause, will forfeit one week's salary, or her engagement, at the option of Mr. McCaull, and will also be held liable for any loss that may be sustained by Mr. McCaull owing to such absence. Illness, to be accepted as an excuse, must be attested by a medical certificate, which must be delivered to Mr. McCaull or his representative as early as possible, and before the commencement of the performance. Should such absence exceed two weeks, the engagement may be canceled at the option of Mr. McCaull."

The defendant entered upon the performance of her engagement at the Bijou Opera House in this city in September, 1882, with

great success, which was continued until prevented from further performance by protracted illness. Having partially recovered, she attempted to renew her appearances, but after three nights' performances, in December, she suffered a relapse from which she did not recover until about the middle of February, 1883.

By the written contract the plaintiff was to furnish all costumes. This was modified, prior to September, by an oral agreement by which the plaintiff was to pay a larger salary and the defendant to furnish her own costumes. Both parties agree as to the modification of the contract to this extent. The defendant contends that in addition to the above the oral contract was further modified by the plaintiff agreeing to pay her weekly salary as at first fixed during the continuance of any illness; that the sum of about \$350, paid to her by the plaintiff during her illness, was paid in pursuance of this modification of the contract; and that since the middle of December the plaintiff has refused to continue such payment during that part of her illness, in violation of the agreement as modified.

The plaintiff denies that the modification of the contract included any agreement to pay her during illness, and asserts that the moneys actually paid her while ill were merely advances on account of future salary to be earned, and so expressly stated at the time. Each party sustains its respective claims in this respect by several witnesses. They leave this branch of the subject in so much doubt that I feel obliged to reject it from consideration, without prejudice to either in regard to their mutual claims in respect to it, since neither party made it a ground of terminating the contract.

Up to the time this action was commenced the defendant had given no notice to the plaintiff terminating the agreement; nor had the plaintiff, as he might have done according to the express provision of the agreement, notified the defendant that it was canceled, owing to her absence beyond two weeks. I must, therefore, hold the agreement as still in force. Contracts for the services of artists or authors of special merit are personal and peculiar; and when they contain negative covenants which are essential parts of the agreement, as in this case, that the artists will not perform elsewhere, and the damages, in case of violation, are incapable of definite measurement, they are such as ought to be observed in good faith and specifically enforced in equity. That violation of such covenants will be restrained by injunction, is now the settled law of England. *Lumley v. Wagner*, 1 De Gex, M. & G. 604; *Montague v. Flockton*, L. R. 16 Eq. 189, 199.

The subject was exhaustively considered by *Freedman, J.*, in the case of *Daly v. Smith*, 49 How. Prac. 150, in whose conclusions, in accordance with the English cases above cited, I fully concur. In the present case it

is, however, urged that the remedy by injunction should not be allowed, on the ground that the plaintiff's damages have been liquidated by the first article of the contract above quoted; namely, that "for each and every breach of this rule the artist shall forfeit one week's salary;" and the cases of *Barnes v. McAllister*, 18 How. Prac. 534; *Nessle v. Reese*, 29 How. Prac. 382; *Mott v. Mott*, 11 Barb. 127, 134; and *Trenor v. Jackson*, 46 How. Prac. 389, are cited in support of this view.

There is no doubt of the general principle that where the damages for the violation of a covenant are either liquidated by the agreement, or may be easily and definitely ascertained, the parties will be left to their remedy at law. But it is clear that in cases of contract like the present, the damages are not capable of being definitely ascertained or measured; and in the cases first above cited, injunctions were for that reason allowed. The only question in this case, therefore, which distinguishes the present agreement from those, is whether the provision for the forfeiture of a week's wages for every violation of article 1 is such a liquidation of the damages as bars the remedy by injunction. In *Barnes v. McAllister* and in *Nessle v. Reese* and *Mott v. Mott*, supra, there was a covenant to pay a specific sum for failure to observe the covenant in these cases; and these sums were held by the court to be strictly liquidated damages.

Where the provision of the contract is in the nature of a penalty, and not liquidated damages, it is well settled that such a provision will not prevent the remedy by injunction to enforce the covenant specifically; and the provision will be construed as a penalty, and not as liquidated damages, where its plain object is to secure a performance of the covenant, and not intended as the price or equivalent to be paid for a nonobservance of it. *Howard v. Hopkyns*, 2 Atk. 371; *Bird v. Lake*, 1 Hem. & M. 111; *Fox v. Scard*, 33 Beav. 327; *Sloman v. Walter*, 1 Brown, C. C. 418; *Jones v. Heavens*, 4 Ch. Div. 636.

Whether the language of the contract is to be construed as a penalty or as liquidated damages is to be determined from its language and its presumed intent to be gathered from the circumstances of the parties and the nature of the agreement. "A penalty," says Lord Loughborough, in *Hardy v. Martin*, 1 Cox, Ch. 26, "is never considered in this court as the price of doing a thing which a man has expressly agreed not to do; but if the real meaning and intent of the contract is that a man should have the power, if he chooses, to do a particular act upon the payment of a certain specified sum, the power to do the act upon the payment of the sum agreed on is part of the express contract between the parties." *Vincent v. King*, 13 How. Prac. 234-238; *Kerr*, Inj. 409.

In *Coles v. Sims*, 5 De Gex, M. & G., Lord

Justice Turner says, upon this point, (p. 1:) "The question in such cases, as I conceive, is, whether the clause is inserted by way of penalty or whether it amounts to a stipulation for liberty to do a certain act on the payment of a certain sum."

That the clause providing for the forfeiture of one week's salary for each violation of this contract was in the nature of a penalty, and designed solely to secure the observance of article 1, is manifest both from the general nature of the employment and the requirements of a manager of opera, as well as the express language of this article; because (1) the stipulation is not for the payment of a certain sum as liquidated damages, but only for the forfeiture of a week's salary; (2) it gives an option to the plaintiff, instead of such forfeiture, to annul the engagement; (3) it declares that such forfeiture shall not disbar the plaintiff from enforcing the fulfillment of this contract in such a manner as he shall think fit, i. e., by any available legal or equitable remedy. As the remedy by injunction is one of the remedies available, this language is equivalent to an express declaration that the provision for the forfeiture of a week's salary for each violation shall not affect his right to a remedy by injunction. This last stipulation would not, indeed, influence the court, provided it was clear that the damages were intended to be liquidated at a specific sum, for which the defendant was to have the option of singing at any other theater. But these several clauses taken together show conclusively that no such thing was intended, and that the sole object was to secure the specific observance of the contract that the defendant should not sing elsewhere; and the plaintiff is therefore entitled to restrain the violation of it. As the season will close on May 15th and the contract then terminate, there are certain equitable conditions which should be observed, and which it is competent for the court, in continuing the injunction, to impose. *Russell v. Farley*, 105 U. S. 433, 438.

The injunction of this court must not be used directly or indirectly to enforce the collection by the plaintiff of his alleged but disputed claim for previous advances, through the nonpayment of salary hereafter earned, at least until his right is legally adjudicated. (2) Considering the short period remaining, the defendant must not be sent to California, where by the contract she might have been taken without salary en route going and returning; nor, having respect to her precarious health, should she be sent to any very distant point; (3) the plaintiff should furnish satisfactory security for the prompt payment weekly for the defendant's services at the rate of \$150 per week, the contract price, from the time the defendant gives notice in writing of her readiness to sing under the contract, so long as she shall continue in readiness to perform her duties.

In case of failure to pay any future salary

earned, the defendant may apply, on two days' notice, to the plaintiff's attorneys for the dissolution of this injunction.

An order may be entered continuing the injunction subject to the above provisions and conditions.

NOTE.

Enjoining Employé from Serving Rival of Employer.—The decisions upon the judicial enforcement of the stipulations common between actors, artists, authors, lecturers, or other professional workers and their employers, that the employé shall not exercise his skill and talent for any other person, are not very numerous, and are somewhat conflicting; but they establish the modern general doctrine to be that the employer is not obliged to submit to a breach of the covenant, and content himself with an action for damages, but, in a proper case, may have an injunction restraining the employé from engaging in any rival service; and this, whether compelling the latter to perform his affirmative engagement to labor for his employer is practicable or not. To reconcile the decisions would be difficult, except upon the explanation that, when suits of this nature were first brought, the inadequacy of the action for damages, as a remedy, was not fully perceived; but that, gradually, as one case after another was presented, it became better understood, and equity judges grew more prompt and willing to exercise their jurisdiction on the ground that employers of public performers cannot well be compensated in damages for departures of artists from their establishments. If an actor, continuing to perform for his general employer, according to his engagement, plays on "off nights" for a rival theater, the question how much the receipts of his employer have been diminished by the opportunity given the public of hearing the favorite elsewhere, is too vague and uncertain to be shown by legal proof. And if, as is frequently the case, he withdraws from his first engagement wholly, and devotes himself to the service of a competitor, the question of damages is rendered still more perplexing by the difficulty of showing what profits the deserted manager would have realized had the performances been continued as agreed; and the latter needs, also, to have some indemnity, difficult to be estimated in money, for his liability to refund for tickets or boxes sold in advance, and for his loss of prestige through failure of his announced entertainments. Obviously courts of justice cannot compel public performers or members of the professions to perform specific services they have promised; there are no means at the command of a tribunal for compelling a person to act, sing, speak, or write, nor is there any standard for determining whether one has done so in good faith and with his best skill. The result, therefore, is that a properly-framed stipulation, in a contract for services of this description, forbidding the employé to serve elsewhere, may be enforced by injunction. Such injunctions are equally obtainable under the codes of procedure, upon complaint in a civil action; or, in states adhering to the old practice, upon bill in equity; or, in the United States circuit court, sitting in equity, if the parties are citizens of different states.

In what cases the fact that the contract of the parties, by liquidating the damages or otherwise, gives the employer a better remedy by action than usual, precludes his resort to injunction, is the question particularly discussed in the text, and nothing need be added to Judge Brown's able and lucid exposition of the principles governing that branch of the subject. This note will indicate the development of the general power of equity to enjoin in these cases.

Early English decisions went upon the theory that although an independent, simple covenant not to undertake specified services may be en-

forced, when reasonable and consistent with public policy, yet in a contract between A. and B. that B. shall act or sing, etc., for A., and shall not perform for any one else, the negative clause is merely incidental to the affirmative; and unless the case is one in which the court can enforce the affirmative stipulation it ought not to enjoin a proposed breach of the negative. These decisions, therefore, generally denied A.'s prayer for an injunction to restrain B. from performing in the employment of C., unless some special ground of equitable jurisdiction over the case existed. The following are illustrative cases: Price agreed to prepare exchequer reports for Clarke to publish, without, however, engaging not to write for any one else. The lord chancellor refused an injunction, saying that as he had no jurisdiction to compel Price, directly, to write reports for Clarke, he ought not to do so indirectly, by forbidding him to write for any one else. *Clarke v. Price* (1819) 2 Wils. Ch. 157. A similar application was denied for the same reason, where the engagement of the Society for the Diffusion of Useful Knowledge with Baldwin's publishing firm was simply to furnish them with certain maps and charts for publication, a thing which the court had no means of compelling directly. *Baldwin v. Society* (1838) 9 Sim. 393. The actor Kean was advertised to play at Drury Lane theater, while there was yet 10 days unexpired of a prior engagement at Covent Garden. The vice-chancellor denied the application of the Covent Garden proprietors to enjoin him, for the same reason, viz., that there was no jurisdiction to compel him to perform his 10 days' service. *Kemble v. Kean* (1829) 6 Sim. 333. Upon examination of a special agreement for mercantile services of defendant, containing a stipulation forbidding his working for any other house, the affirmative stipulations of the contract were pronounced too vague and too onerous towards the employé to allow of decreeing a specific performance, and the court would not enjoin the breach of the negative covenant alone. *Kimberley v. Jennings* (1836) 6 Sim. 340.

Upon the other hand, the case of *Morris v. Colman* (1812) 18 Ves. 437, illustrates the principle that a covenant not to serve may be enforced by injunction where other facts give equitable jurisdiction of the controversy. Colman, noted as a dramatist, became manager of the Haymarket theater, under an agreement in the nature of a copartnership, which contained a clause restraining him from writing dramatic pieces for any other theater. In a suit which arose between the parties interested in the management, the validity of this clause was questioned before Lord Chancellor Eldon. He pronounced it valid and enforceable, it being between partners, and being neither contrary to public policy nor unreasonable as between the parties. The decision has generally been explained in later cases on the ground that the stipulation was one of several in an agreement of copartnership, and that equity has jurisdiction of disputes among partners, though this explanation has been questioned. 2 Phill. 597.

Early American decisions ran in the wake of the English; our courts did not deny the jurisdiction, but were loth to exercise it. De Rivafinoli, while manager of the Italian theater in New York, engaged Corsetti as first bass in operas, the latter agreeing not to make use of his talents in any other theater. But before the opening of the season Corsetti was announced to sail for Cuba, to perform there under another manager. De Rivafinoli then sought an injunction, (and *ne exeat*), which Chancellor Walworth refused, on the ground that under the circumstances the application was premature, for before commencement of the actor's engagement the manager could not have a right of action. On the general question he said, in effect, that while it is theoretically proper that "a bird that can sing and will not sing must be made to sing," yet there is an obstacle to making a vocalist sing by order of the court of

chancery, in the fact that no officer of the court has that perfect knowledge of the Italian language, or possesses that exquisite sensibility in the auricular nerve, which is necessary to the understanding and enjoyment of Italian opera; and it would be difficult for a master to determine whether a defendant sang in faithful performance of his engagement, or ascertain what effect the coercion might produce upon his singing, especially in the livelier airs. *De Riva-finoli v. Corsetti* (1833) 4 Paige, 264. Similar considerations led Edwards, J., to refuse a similar application in *Sanquircio v. Benedetti*, 1 Barb. 314.

The comedian Ingersoll agreed with Hamblin, the manager of the Bowery theater in New York, to play for him for three years, also, not to act except for Hamblin during the term; but an injunction was refused because there was no ground of jurisdiction over the affirmative part of the agreement, while the negative was a mere matter between employer and employé. *Hamblin v. Dinneford* (1835) 2 Edw. Ch. 529. When Burton, the famous comedian of a generation ago, was manager of Front Street theater, Baltimore, he bargained with Burke to withdraw Mrs. Burke's services from the employment of Manager Marshall and bring her to join Burton's company. Marshall then sued for an injunction, which was issued below. On appeal the court held that either of three facts shown, viz., there was no express restrictive clause in the contract between the Burkes and complainant; complainant was prosecuting an action at law; and Mrs. Burke's engagement, if any, would be void as that of a feme covert,—was enough to defeat the suit. *Burton v. Marshall* (1846) 4 Gill, 487. *De Pol v. Sohlike* (1869) 7 Rob. Ecc. 280, was decided after *Lumley v. Wagner* (1 De Gex, M. & G. 604), yet does not mention it, but takes the older doctrine for granted. The opinion assumes, however, that irreparable damage to follow from a breach of a negative covenant may be ground of equitable jurisdiction, and the judge refused to enjoin the danseuse Sohlike from performing for other employers, not for want of power, but because, as the plaintiffs had not a theater in operation in which they could use her services, therefore they could not be irreparably damaged by her dancing elsewhere for the time being. Thus American as well as English courts, down to the middle of our century, were unwilling to enjoin an employé's breach of a collateral promise not to serve elsewhere, unless the affirmative engagement were a proper subject-matter of equitable relief.

Development of the Modern Doctrine.—Since about 1850 a broader and more liberal position has been taken. An advance was distinctly made in *Dietrichsen v. Cabburn*, 2 Phill. 52, and *Rolfe v. Rolfe*, 15 Sim. 88, (both 1846,) in which the rule adverse to enforcing a negative stipulation was distinctly questioned and limited; though these were not cases of professional services, but of contracts for exclusive employment in mercantile duties. The circumstances of a controlling decision, *Lumley v. Wagner*, which soon followed them, were that Manager Lumley engaged Mlle. Johanna Wagner to sing at Her Majesty's Theater, London, for three months, in certain specified operas, at a weekly salary of £100. The agreement, as originally signed, did not in so many words forbid her from singing for any other employer; but a few days afterwards the manager objected to the omission, and Mlle. Wagner's agent then added an article, saying: "Mlle. Wagner engages herself not to use her talents at any other theater, nor in any concert or reunion, public or private, without the written authorization of Mr. Lumley." Notwithstanding this, she did accept (for a higher salary, it was said) an engagement from Manager Gye to sing at the Italian opera, Covent Garden, and Lumley sued for an injunction. It was granted below. *Lumley v. Wagner*, 5 De Gex

& S. 485. On appeal the familiar objection was urged that equity will not enjoin the breach of a negative covenant where it cannot decree performance of the affirmative one to which it is incident. 6 Sim. 333; *Id.* 340; 3 Macn. & G. 393. But Lord Chancellor St. Leonards said that when the reason why the court could not decree specific performance is not that the plaintiff is not entitled to it, but merely the want of means to compel the defendant to perform, he thought the court need not on that account refrain from doing what was within its power, viz., forbidding a performance which will violate the contract. To the objection that there was a remedy at law by action for damages, the lord chancellor replied that such remedy was no better than exists upon covenants not to practice as attorney, surgeon, etc., within certain limits, which are often enforced by injunction. Another objection was that the promise not to sing elsewhere was not in the original agreement; but the chancellor said that the two papers were not independent, but were in effect one contract; and that even if the stipulation not to sing elsewhere had never been made in writing, he thought it was implied in the original contract; in other words, singing for Mr. Gye was a breach of the spirit and meaning of the contract to sing for Mr. Lumley. Another objection was that the injunction would be mischievous, because it would prevent a popular artist from singing at one theater, while the court could not promote her performing at another; hence the tendency would be to prevent the public from hearing her anywhere; but the chancellor said that the artist had no right to complain on this ground; the injunction would merely forbid her doing what she had engaged not to do. The temporary injunction was, therefore, continued. *Lumley v. Wagner* (1852) 1 De Gex, M. & G. 604; 13 Eng. Law & Eq. 252. The opinion embodies an elaborate review of the previous English cases on the extent to which equity may go in enjoining breach of negative covenants of various kinds; and the decision has been generally followed in both countries as establishing the jurisdiction to enforce contracts not to serve in public performances or intellectual work.

A firm of French photographers, Fredricks & Co., employed Constant Mayer as "artist painter" for three years, at an annual salary, to retouch proofs in oil at their New York house, and he engaged not to work for any one else; yet he left them and engaged with Gurney. The question whether the court could grant an injunction was decided in their favor, the judge saying that this remedy is not applicable to all restrictive covenants, for many may be protected by action for damages; but contracts for employment of a great actor, or for services which involve exercise of high powers of mind peculiar to the one person, cannot be treated by ordinary rules, but require the special remedy of injunction. *Fredricks v. Mayer* (1857) 13 How. Prac. 566. But, on the merits of the application under the particular circumstances, the judge denied it; and this was affirmed in *Fredricks v. Mayer*, 1 Bosw. 227.

Annetti Galletti agreed to dance at the Broadway Music Hall, New York, for six months at a weekly salary, and to "exercise her utmost abilities for the promotion of the exhibition." But the agreement did not contain an express clause forbidding her to perform elsewhere; and on account of this omission the employer's motion for an injunction was denied. *Butler v. Galletti* (1861) 21 How. Prac. 465.

Hayes, manager of the Olympic theater in New York, engaged Willio to play at the Olympic for three months, and "not to perform at any other establishment," etc. After playing two months, Willio accepted an offer of a higher salary from a Boston theater. An injunction was granted, the court mentioning, with

approval, the modern doctrine that a definite contract by an actor not to perform at any other theater than his employer's may be enforced; and saying that this remedy is not impaired by the Code of Procedure. *Hayes v. Willio* (1871) 11 Abb. Prac. (N. S.) 167.

Montague, manager of the Globe theater, London, engaged Flockton to act at the Globe, without exacting an express stipulation that he should not act elsewhere. But the vice-chancellor said that such a stipulation was implied. An engagement to perform for a definite term at one theater involves an engagement not to perform during the term at any other theater. When a person agrees to act at a particular theater, he agrees not to act anywhere else as plainly as if a negative clause were inserted. *Montague v. Flockton* (1873) L. R. 16 Eq. Cas. 189; 28 Law J. (N. S.) 581. And the same opinion was expressed, obiter, in *Fechter v. Montgomery*, 33 Beav. 22, where the suit was by *Fechter* as manager; and, *ex parte*, in *Webster v. Dillon*, 3 Jur. (N. S.) 432.

Manager Daly engaged Fanny Morant Smith to play at his theater in New York city during the seasons of 1874, 1875, and 1876, the contract containing a stipulation that she should not act during the term of the contract at any other New York city theater without his written consent; and that if she should attempt to do so, the plaintiff might, "by legal process, or otherwise, restrain her from so performing on payment to her, during such restraint," of one-fourth her salary under the contract. She, however, allowed herself to be advertised to play at a rival establishment, the Union-square theater, and he brought suit for an injunction. The New York superior court pronounced the stipulation not to perform, valid, and proper to be enforced by injunction; saying that, although the clause as to plaintiff's restraining a breach on paying a quarter salary could not give jurisdiction, yet, as the court had jurisdiction without it, the clause might be regarded as a guide in fixing the terms of the injunction. Therefore, the actress was enjoined from playing within the city, provided the manager should punctually pay to her one-quarter of her agreed salary. *Daly v. Smith* (1874) 49 How. Prac. 150. The opinion has been commended for its review of the authorities.

For other cases in which the modern doctrine (of *Lumley v. Wagner*) has been incidentally recognized of discussed, and applied in a way not aiding materially to support it, see *Mapleson v. Bentham*, 20 Wkly. Rep. 176, where the vice-chancellor denied an application by *Mapleson*, lessee of the Royal Italian Opera, to enjoin his first tenor from singing elsewhere; *Wolverhampton, etc., Ry. Co. v. London, etc., Ry. Co.*, L. R. 16 Eq. Cas. 433, involving an agreement relative to use of a railroad; and *Manufacturing Co. v. Cook*, Bost. Law Rep. 547, in which an employé of a manufacturing company was enjoined from breaking his covenant with his employers that he would not for five years disclose their secrets or engage with any other employer; with which latter case compare *Estcourt v. Estcourt Hop Essence Co.*, 32 Law T. (N. S.) 80; reversing same case 31 Law T. (N. S.) 567; *Gower v. Andrew*, 14 Cent. Law J. 50; and *Deming v. Chapman*, 11 How. Prac. 382. Judge Lowell's opinion in *Singer Sewing-machine Co. v. Union Button-hole, etc., Co.*, 1 Holmes, 253, is an instructive discussion of the application of the doctrine to ordinary mercantile contracts, in which a promisor agrees not to deal with any other than the promisee; with which case compare *Bickford v. Davis*, 11 Fed. 549, and *Fothergill v. Rowland*, L. R. 17 Eq. 132. See, also, a note by E. H. Bennett, to *Bowen v. Hall*, 20 Am. Law Reg. (N. S.) 578, 587. The suggestion made at the close of this note, that, since modern equity enjoins a breach of a contract not to

reveal secrets of business (9 Hare, 241; 9 Eng. Law & Eq. 182), of a contract not to write a particular description of book (2 Sim. & S. 1; 18 Ves. 437), of a contract not to practice a particular trade or calling (125 Mass. 258; 16 Vt. 176; 22 Law Rep. 693; 5 Jur. [N. S.] 976; 15 Sim. 88), although in either case the injured party could maintain an action for damages, there is no good reason for refusing an injunction to forbid breaking a contract for exclusive professional services, is forcible and sound. A curious German case is recounted in 26 Alb. Law J. 3. Cases involving a claim of the artist that the manager first broke the contract by assigning the artist to a part or position less desirable than that which the contract assured, or by failing to give due opportunity for appearances, are: *Daly v. Smith*, 49 How. Prac. 150, *Roserie v. Kiralfy*, 12 Phila. 209, and *De Pol v. Sohlke*, 7 Rob. Ecc. 280.

Must there be an Express Negative Contract?—Several English cases support the view that an engagement not to serve elsewhere is fairly to be implied from a contract, in general terms, to perform under one manager or at one establishment. But American judges have generally refused to interfere unless there were an express stipulation forbidding the service sought to be enjoined. In other words, in this country a simple engagement to serve leaves the employé at liberty to take other service, provided he faithfully performs the first engagement. *Burton v. Marshall*, 4 Gill, 487; *Butler v. Galletti*, 21 How. Prac. 465; *Wallace v. De Young*, 98 Ill. 638. But compare *Manufacturing Co. v. Cook*, Bost. Law Rep. 547, 549.

Form of a Restrictive Covenant.—The restrictive clause may well be drawn in the following form—making variations appropriate to the circumstances of the particular case:

And it is further agreed, in consideration of the premises, that the party of the second part (the actor, artist, or other employé) will not, during the term of this agreement, exercise his professional skill and talents as an actor (or artist, etc.) in public, (within the city of New York, or otherwise state the limits to which the restriction is intended to be confined; and the courts are more willing to enforce these restrictions when the locality is limited), either for compensation or gratuitously, and either upon his own account or for another employer or establishment, without the consent in writing of the party of the first part first obtained, under pain of injunction, action for damages, or any other available judicial remedy: provided, however, that the party of the second part may at any time and as often as he thinks fit perform gratuitously at any entertainment charitably given for the burial expenses and relief of the family of a deceased actor, (or otherwise state explicitly any right which the actor desires to reserve.)

Procedure.—Several of the cases indicate that it is proper to join the second employer as co-defendant, and to draw the injunction so as in terms to forbid him to employ the chief defendant, as well as prohibit the latter from performing. *Clarke v. Price*, 2 Wils. Ch. 157; *Lumley v. Wagner*, 1 De Gex. M. & G. 604; *Burton v. Marshall*, 4 Gill, 487; *Hamblin v. Dinneford*, 2 Edw. Ch. 528. Whether the practitioner may have a re-exeat as well as injunction, see *De Rivaflinoli v. Corsetti*, 4 Paige, 264; *Sanguirico v. Benedetti*, 1 Barb. 315; *Hayes v. Willio*, 11 Abb. Prac. (N. S.) 167. What action lies in behalf of an injured manager or other employer against a rival or competitor for inducing artists of his company or employés in his establishment to leave his service, see *Bowen v. Hall*, 20 Am. L. Reg. (N. S.) 578, and note, *Id.* 587.

BENJAMIN VAUGHN ABBOTT.

New York, N. Y.

CLARKE v. PRICE.

(2 Wils. Ch. 157.)

Cases in Chancery. July 21, 22, 1819.

The bill, filed the 15th of June, 1819, stated that in 1814 the defendant George Price, Esq., proposed to compose and write reports of cases argued and determined in the court of exchequer; and the plaintiffs entered into a treaty with him as to the terms upon which the same should be printed and published; and that on the 27th of April, 1814, the following agreement was signed by him: "Memorandum: It is agreed between George Price, Esq., and William Clarke and Sons, as follows: Mr. Price undertakes to compose and write the cases in the court of exchequer, commencing with Easter term, 1814, and to be published periodically; the said William Clarke and Sons to be at the charge of all expenses of paper, printing and advertising, which expenses, when discharged, to divide the profits of the said work equally (that is to say), one moiety to the said George Price, the other to the said William Clarke and Sons; all accounts to be adjusted at Christmas in every year, at the customary trade price and commission: And it is further agreed that Messrs. Clarke shall be at liberty to relinquish the undertaking should they think it advisable."

The bill further stated that, in pursuance of the agreement, Mr. Price composed and wrote divers reports of cases argued and determined in the court of exchequer, and that the plaintiffs printed and published them at their own costs and charges, periodically and in parts; that the first volume consisted of three parts, the first being published in August, 1814, the second in May, 1815, and the third in March, 1816; that on the 2d of March, 1816, a variation in the agreement was made between the plaintiffs and Mr. Price, and that a memorandum thereof was made in writing and signed by Mr. Price, in the words following: "March 2d, 1816. Memorandum of agreement between George Price and William Clarke & Sons: Whereas, by an agreement bearing date the 27th of April, 1814, between the above parties, it was there stipulated that Mr. Price should take the reports in the exchequer, and Messrs. Clarke should print the same, and divide the profits between the respective parties: And whereas the first volume of the Reports in the Court of Exchequer has been printed and published by the said George Price and William Clarke & Sons: And whereas the said George Price is desirous of selling all his copyright and interest in the first volume: In consideration of which, the said William Clarke & Sons agree to give, and the said George Price agrees to accept, of the sum of £166. And the said George Price further agrees to give any further assignment of the copyright, if required from him by the said William Clarke & Sons." That, in pursuance of the second agreement, the plaintiff duly

paid to Mr. Price the £166. That in further pursuance of the agreement of the 27th of April, 1814, Mr. Price continued to write and compose reports of cases argued and determined in the court of exchequer; and that before the publication of the first part of the second volume, and on or about the 11th of November, 1816, a further agreement was made between the plaintiffs and Mr. Price, and a memorandum thereof made as follows: "November 11th, 1816. Memorandum of agreement between George Price, Esq., and William Clarke & Sons: Mr. Price agrees to the following terms for writing and composing the second volume of his Reports in the Exchequer, sale of his copyright, and interest in the said volume; Messrs. Clarke, for the considerations above, to pay to Mr. Price, within one month after the publication of each part, the sum of £6 10s. for each sheet of sixteen pages royal octavo, and in the same proportion for any less quantity than a sheet; Mr. Price to be allowed the sum of £2 on each part for corrections; all above that sum to be paid by Mr. Price, and deducted out of the payment for each part; Mr. Price to give a further assignment, if required, at Messrs. Clarke's expense."

The bill further stated that, in pursuance of the agreements, Mr. Price composed and wrote a second volume of reports of cases argued and determined in the court of exchequer, and which the plaintiffs, at their expense, printed and published in four parts, the first part on the 20th of January, 1817, the second on the 23rd of April, 1817, the third on the 1st of June, and the fourth on the 13th of September, 1817; and that the plaintiffs duly paid the sums of money due to Mr. Price for the copyright of the second volume, according to the three memorandums of agreement. That in June, 1817, the plaintiffs and Mr. Price agreed to make a further variation in the terms of the agreement of the 27th of April, 1814, and on the 19th of June, 1817, the following memorandum was signed: "London, June 19th, 1817. Memorandum: Mr. Price agrees with Messrs. Clarke to receive for his interest in the agreement for the exchequer reports, dated 27th of April, 1814, commencing at the third volume, the sum of £7 per sheet, and £3 per part for corrections; all above that sum to be paid by Mr. Price, and if under £3 the difference to be paid to Mr. Price until the sale shall exceed a thousand, but not to apply to any reprints above that number of the parts already published or to be. Mr. Price agrees to give any further assignment of the copyright and future interest to Messrs. Clarke, at their expense."

The bill further stated that in pursuance of the agreements of the 27th of April, 1814, and the 19th of June, 1817, Mr. Price wrote and composed, and the plaintiffs printed and published, at their expense, the third volume, consisting of four parts, and also two parts of the fourth volume, at the times specified

in the bill, and that they had paid to Mr. Price the sums which by the agreements were due to him in respect of the third volume, and also divers sums on account of the fourth volume.

The bill further stated that Mr. Price had made some contract with the other defendants, Brooke and Sweet, by which he had bound himself to write and compose new volumes of reports of cases argued and determined in the court of exchequer, and in the exchequer chamber, in order and to the intent that the same might be printed and published by Brooke and Sweet; and the plaintiffs insisted that they were entitled to have an assignment duly made to them of all the copyright in such of the reports as he had written and composed, and to be the printers and publishers, and to have an assignment made to them, of the copyright of all such of the said reports as he shall hereafter write and compose, upon making to him such payments as he is entitled to by virtue of the agreements of the 27th of April, 1814, and the 19th of June, 1817.

The bill prayed that the defendant, Mr. Price, might be decreed specifically to perform the said agreements expressed in the said memorandum by permitting the plaintiffs to print and publish the reports of cases in the court of exchequer, so long as he should continue to compose and write the same, upon the terms agreed upon in the said memorandums, respectively, and delivering to the plaintiffs the manuscripts of said reports for that purpose, and by duly making and executing to the plaintiffs an assignment of the copyright of such parts of the said work as had been published, and should thereafter be written and composed, the plaintiffs being ready to pay to him such sums of money as should be justly due to him; also praying an injunction to restrain Mr. Price from printing or publishing, or employing the other defendants, or any other person or persons than the plaintiffs, to print and publish the fifth or any subsequent volume or part of the same work which Mr. Price should thereafter compose and write, and to restrain the other defendants, Brooke and Sweet, from printing and publishing the said work so written and composed, or to be written and composed, or any part thereof.

The answers submitted that, on the true construction of the agreements, Mr. Price was not bound to employ the plaintiffs as the publishers of all future reports to be written by him; that the plaintiffs were informed in October, 1818, of the contract between Mr. Price and the other defendants; that on the 1st of April, 1819, the work was advertised, as being about to be published, and that the defendants had now printed a considerable part of the fifth volume, and had thereby incurred great expense; and that the plaintiffs, having suffered such expense to be incurred,

were not entitled to the assistance of the court.

An injunction having been obtained *ex parte*, on the filing of the bill and on affidavit, a motion was now made to dissolve it.

Mr. Wetherell, J. Wilson, and Mr. Price, for defendants Price and Sweet. Mr. Heald and Mr. Ching, for defendant Brooke. Mr. Shadwell, for plaintiffs.

THE LORD CHANCELLOR. The case of *Morris v. Colman* is essentially different from the present. In that case, *Morris, Colman*, and other persons were engaged in a partnership in the Haymarket Theater, which was to have continuance for a very long period, as long indeed as the theater should exist. *Colman* had entered into an agreement which I was very unwilling to enforce,—not that he would write for the Haymarket Theater, but that he would not write for any other theater. It appeared to me that the court could enforce that agreement by restraining him from writing for any other theater. The court could not compel him to write for the Haymarket Theater, but it did the only thing in its power,—it induced him indirectly to do the one thing by prohibiting him from doing another. There was an express covenant on his part contained in the articles of partnership. But the terms of the prayer of this bill do not solve the difficulty; for, if this contract is one which the court will not carry into execution, the court cannot indirectly enforce it by restraining Mr. Price from doing some other act. This is an agreement which expressly provides that Mr. Price shall write and compose reports of cases to be published by the plaintiffs. In *Morris v. Colman*, there was a decree directing the partnership to be carried on. It could not be put an end to, and it was the duty of the parties to interfere; but I have no jurisdiction to compel Mr. Price to write reports for the plaintiffs. I cannot, as in the other case, say that I will induce him to write for the plaintiffs by preventing him from writing for any other person, for that is not the nature of the agreement. The only means of enforcing the execution of this agreement would be to make an order compelling Mr. Price to write reports for the plaintiffs, which I have not the means of doing. If there be any remedy in this case it is at law. If I cannot compel Mr. Price to remain in the court of exchequer for the purpose of taking notes, I can do nothing. I cannot indirectly, and for the purpose of compelling him to perform the agreement, compel him to do something which is merely incidental to the agreement. It is also quite clear that there is no mutuality in this agreement. I am of opinion that I have no jurisdiction in this case.

Injunction dissolved.

The bill was afterwards dismissed, with costs, for want of prosecution.

LUMLEY v. WAGNER.

(1 De Gex, M. & G. 604.)

The Lord Chancellor, May 22, 26, 1852.

The bill in this suit was filed on the 22d April, 1852, by Benjamin Lumley, the lessee of her Majesty's Theatre, against Johanna Wagner, Albert Wagner, her father, and Frederick Gye, the lessee of Covent Garden Theatre; it stated that in November, 1851, Joseph Bacher, as the agent of the defendants Albert Wagner and Johanna Wagner, came to and concluded at Berlin an agreement in writing in the French language, bearing date the 9th November, 1851, and which agreement being translated into English was as follows:

"The undersigned Mr. Benjamin Lumley, possessor of her Majesty's Theatre at London, and of the Italian Opera at Paris, of the one part, and Mademoiselle Johanna Wagner cantatrice of the Court of his Majesty the King of Prussia, with the consent of her father, Mr. A. Wagner, residing at Berlin of the other part, have concerted and concluded the following contract: First, Mademoiselle Johanna Wagner binds herself to sing three months at the theatre of Mr. Lumley, her Majesty's, at London, to date from the 1st of April, 1852 (the time necessary for the journey comprised therein), and to give the parts following: 1st. Romeo, Montecchi; 2nd. Fides, Prophète; 3rd. Valentine, Huguenots; 4th. Anna, Don Juan; 5th. Alice, Robert le Diable; 6th. An opera chosen by common accord. Second. The three first parts must necessarily be, 1st, Romeo, 2nd, Fides, 3rd, Valentine; these parts once sung, and then only she will appear, if Mr. Lumley desires it, in the three other operas mentioned aforesaid. Third, These six parts belong exclusively to Mademoiselle Wagner, and any other cantatrice shall not presume to sing them during the three months of her engagement. If Mr. Lumley happens to be prevented, by any cause soever, from giving these operas, he is nevertheless held to pay Mademoiselle Johanna Wagner the salary stipulated lower down for the number of her parts as if she had sung them. Fourth, In the case where Mademoiselle Wagner should be prevented by reason of illness from singing in the course of a month as often as it has been stipulated, Mr. Lumley is bound to pay the salary only for the parts sung. Fifth, Mademoiselle Johanna Wagner binds herself to sing twice a week during the run of the three months; however if she herself was hindered from singing twice in any week whatever, she will have the right to give at a later period the omitted representation. Sixth, If Mademoiselle Wagner fulfilling the wishes of the direction, consent to sing more than twice a week in the course of three months, this last will give to Mademoiselle Wagner 50£ sterling for each representation extra. Seventh, Mr. Lumley engages to pay

Mademoiselle Wagner a salary of 400£ sterling per month, and payment will take place in such manner that she will receive 100£ sterling each week. Eighth, Mr. Lumley will pay by letters of exchange to Mademoiselle Wagner at Berlin, the 15th of March, 1852, the sum of 300£ sterling, a sum which will be deducted from her engagement in his retaining 100£ each month. Ninth, In all cases except that where a verified illness would place upon her a hindrance, if Mademoiselle Wagner shall not arrive in London eight days after that from whence dates her engagement, Mr. Lumley will have the right to regard the nonappearance as a rupture of the contract, and will be able to demand an indemnification. Tenth, In the case where Mr. Lumley should cede his enterprise to another, he has the right to transfer this contract to his successor, and in that case Mademoiselle Wagner has the same obligations and the same rights towards the last as towards Mr. Lumley.

Johanna Wagner,
"Albert Wagner."

"Berlin, the 9th November, 1851."

The bill then stated, that in November, 1851, Joseph Bacher met the plaintiff in Paris, when the plaintiff objected to the agreement as not containing a usual and necessary clause, preventing the defendant Johanna Wagner from exercising her professional abilities in England without the consent of the plaintiff, whereupon Joseph Bacher, as the agent of the defendants Johanna Wagner and Albert Wagner, and being fully authorized by them for the purpose, added an article in writing in the French language to the agreement, and which, being translated into English, was as follows:

"Mademoiselle Wagner engages herself not to use her talents at any other theatre, nor in any concert, or reunion, public or private, without the written authorization of Mr. Lumley.

Dr. Joseph Bacher,

"For Mademoiselle Johanna Wagner, and authorized by her."

The bill then stated that the defendants J. and A. Wagner subsequently made another engagement with the defendant F. Gye, by which it was agreed that the defendant J. Wagner should, for a larger sum than that stipulated by the agreement with the plaintiff, sing at the Royal Italian Opera, Covent Garden, and abandon the agreement with the plaintiff. The bill then stated that the defendant F. Gye had full knowledge of the previous agreement with the plaintiff, and that the plaintiff had received a protest from the defendants J. and A. Wagner, repudiating the agreement on the allegation that the plaintiff had failed to fulfill the pecuniary portion of the agreement.

The bill prayed that the defendants Johanna Wagner and Albert Wagner might be restrained from violating or committing any breach of the last article of the agreement;

that the defendant Johanna Wagner might be restrained from singing and performing or singing at the Royal Italian Opera, Covent Garden, or at any other theatre or place without the sanction or permission in writing of the plaintiff during the existence of the agreement with the plaintiff; and that the defendant Albert Wagner might be restrained from permitting or sanctioning the defendant Johanna Wagner singing and performing or singing as aforesaid; that the defendant Frederick Gye might be restrained from accepting the professional services of the defendant Johanna Wagner as a singer and performer or singer at the said Royal Italian Opera, Covent Garden, or at any other theatre or place, and from permitting her to sing and perform or to sing at the Royal Italian Opera, Covent Garden, during the existence of the agreement with the plaintiff, without the permission or sanction of the plaintiff.

The answer of the defendants A. and J. Wagner attempted to show that Joseph Bacher was not their authorized agent, at least for the purpose of adding the restrictive clause, and that the plaintiff had failed to make the stipulated payment by the time mentioned in the agreement. The plaintiff having obtained an injunction from the vice chancellor Sir James Parker on the 9th May, 1852, the defendants now moved by way of appeal before the lord chancellor¹ to discharge his honor's order.

Mr. Bethell, Mr. Malins, and Mr. Martindale, in support of the appeal motion. Mr. Bacon and H. Clarke, contra, in support of the injunction.

THE LORD CHANCELLOR. The question which I have to decide in the present case arises out of a very simple contract, the effect of which is, that the defendant Johanna Wagner should sing at her Majesty's Theatre for a certain number of nights, and that she should not sing elsewhere (for that is the true construction) during that period. As I understand the points taken by the defendants' counsel in support of this appeal they in effect come to this, namely, that a court of equity ought not to grant an injunction except in cases connected with specific performance, or where the injunction being to compel a party to forbear from committing an act (and not to perform an act), that injunction will complete the whole of the agreement remaining unexecuted.

I have then to consider how the question stands on principle and on authority, and in so doing I shall observe upon some of the cases which have been referred to and com-

mented upon by the defendants in support of their contention. The first was that of *Martin v. Nutkin*, 2 P. Wms. 266, in which the court issued an injunction restraining an act from being done where it clearly could not have granted any specific performance; but then it was said that that case fell within one of the exceptions which the defendants admit are proper cases for the interference of the court, because there the ringing of the bells, sought to be restrained, had been agreed to be suspended by the defendant in consideration of the erection by the plaintiffs of a cupola and clock, the agreement being in effect the price stipulated for the defendant's relinquishing bell-ringing at stated periods; the defendant having accepted the benefit, but rejected the corresponding obligation, Lord Macclesfield first granted the injunction which the lords commissioners, at the hearing of the cause, continued for the lives of the plaintiffs. That case therefore, however it may be explained, as one of the exceptional cases, is nevertheless a clear authority showing that this court has granted an injunction prohibiting the commission of an act in respect of which the court could never have interfered by way of specific performance.

The next case referred to was that of *Barret v. Blagrave*, 5 Ves. 555, which came first before Lord Loughborough, and afterwards before Lord Eldon, 6 Ves. 104. There a lease had originally been granted by the plaintiffs, the proprietors of Vauxhall Gardens, of an adjoining house, under an express covenant that the lessee would not carry on the trade of a victualler or retailer of wines, or generally, any employment that would be to the damage of the proprietors of Vauxhall Gardens. An under-lease having been made to the defendants, who were violating the covenant by the sale of liquors, the proprietors of Vauxhall Gardens filed a bill for an injunction, which was granted by Lord Loughborough. It has been observed in the argument here, that in granting the injunction, Lord Loughborough said: "It is in the nature of specific performance," and that therefore that case also falls under one of the exceptional cases. When that case came before Lord Eldon he dissolved the injunction, but upon a different ground, namely, on that of acquiescence for many years, and in a sense he treated it as a case of specific performance. As far as the words go, the observation of those two eminent judges would seem to justify the argument which has been addressed to me; in effect, however, it was only specific performance, because a prohibition preventing the commission of an act may as effectually perform an agreement as an order for the performance of the act agreed to be done. The agreement in that case being that the house should not be opened for the purposes of entertainment to the detriment of Vauxhall Gardens, the court granted the injunction;

¹ The case was heard by the lord chancellor on a representation that it was intended to confine the argument to the legal question alone, which it was said involved an important point of equity jurisdiction, on which the authorities were conflicting.

that was a performance of the agreement in substance, and the term "specific performance" is aptly applied in such a case, but not in the sense in which it has been used before me.

It was also contended that the plaintiff's remedy, if any, was at law; but it is no objection to the exercise of the jurisdiction by injunction that the plaintiff may have a legal remedy. The case of *Robinson v. Lord Byron*, 1 Brown, Ch. 588, before Lord Thurlow, so very often commented upon by succeeding judges, is a clear illustration of that proposition, because in that case the defendant, Lord Byron, who had large pieces of water in his park, which supplied the plaintiff's mills, was abusing his right by preventing a regular supply to the plaintiff's mill, and although the plaintiff had a remedy at law, yet this court felt no difficulty in restraining Lord Byron by injunction from preventing the regular flow of the water. Undoubtedly there are cases such as that cited for the defendants of *Collins v. Plumb*, 16 Ves. 454, before Lord Eldon, in which this court has declined to exercise the power (which in that instance it was assumed to have had) of preventing the commission of an act, because such power could not be properly and beneficially exercised. In that case the negative covenant, not to sell water to the prejudice of the plaintiffs, was not enforced by Lord Eldon, not because he had any doubt about the jurisdiction of the court (for upon that point he had no doubt), but because it was impossible to ascertain every time the water was supplied by the defendants, whether it was or not to the damage of the plaintiffs; but whether right or wrong, that learned judge, in refusing to exercise the jurisdiction on very sufficient grounds, meant in no respect to break in on the general rules deducible from the previous authorities.

At an early stage of the argument I adverted to the familiar cases of attorneys' clerks, and surgeons' and apothecaries' apprentices, and the like, in which this court has constantly interfered, simply to prevent the violation of negative covenants; but it was said that in such cases the court only acted on the principle that the clerk or apprentice had received all the benefit, and that the prohibition operated upon a concluded contract, and that therefore the injunction fell within one of the exceptional cases. I do not, however, apprehend that the jurisdiction of the court depends upon any such principle. It is obvious that in those cases the negative covenant does not come into operation until the servitude is ended, and therefore that the injunction cannot be required or applied for before that period.

The familiar case of a tenant covenanting not to do a particular act was also put during the argument; but it was said that in such a case the jurisdiction springs out of the relation of landlord and tenant, and that the

tenant having received the benefit of an executed lease, the injunction operates only so as to give effect to the whole contract. That, however, cannot be the principle on which this court interferes, for, beyond all doubt, where a lease is executed containing affirmative and negative covenants, this court will not attempt to enforce the execution of the affirmative covenants, either on the part of the landlord or the tenant, but will leave it entirely to a court of law to measure the damages; though with respect to the negative covenants, if the tenant for example has stipulated not to cut or lop timber, or any other given act of forbearance, the court does not ask how many of the affirmative covenants on either side remain to be performed under the lease, but acts at once by giving effect to the negative covenant, specifically executing it by prohibiting the commission of acts which have been stipulated not to be done. So far then each of the cases to which I have referred appears to me to be in direct contravention of the rules which have been so elaborately pressed upon me by the defendants' counsel.

The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff and the other by the defendants, which state of facts may have and in some cases has introduced a very important difference,—but of an act to be done by J. Wagner alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant,—the one being ancillary to, concurrent and operating together with the other. The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract, it is in effect one contract; and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach herself. I am of opinion, that if she had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered.

Wherever this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the

mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other; and although the jurisdiction is not to be extended, yet a judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity.

It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant J. Wagner from performing at any other theatre while this court had no power to compel her to perform at her Majesty's Theatre. It is true, that I have not the means of compelling her to sing, but she has no cause of complaint, if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfill her engagement. The jurisdiction which I now exercise is wholly within the power of the court, and being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce. The effect too of the injunction, in restraining J. Wagner from singing elsewhere may, in the event of an action being brought against her by the plaintiff, prevent any such amount of vindictive damages being given against her as a jury might probably be inclined to give if she had carried her talents and exercised them at the rival theatre; the injunction may also, as I have said, tend to the fulfillment of her engagement, though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly.

Referring again to the authorities, I am well aware that they have not been uniform, and that there undoubtedly has been a difference of decision on the question now revived before me. But, after the best consideration which I have been enabled to give to the subject, the conclusion at which I have arrived is, I conceive, supported by the greatest weight of authority. The earliest case most directly bearing on the point is that of *Morris v. Colman*, 18 Ves. 437. There Mr. Colman was a part proprietor with Mr. Morris of the Haymarket Theatre, and they were partners in that concern, and by the deed of partnership Mr. Colman agreed that he would not exercise his dramatic abilities for any other theatre than the Haymarket. He did not, however, covenant that he would write for the Haymarket, but it was merely a negative covenant that he would not write for any other theatre than the Haymarket. Lord Eldon granted an injunction against Mr. Colman writing for any other theatre than the Haymarket; and the ground on which Lord Eldon assumed that jurisdiction was the subject of some discussion at the bar. It was truly said for the defendants that that was a case of partnership; and it was said, moreover, that Lord Cottenham was mistaken in

the case of *Dietrichsen v. Cabburn*, 2 Phil. Ch. 52, when he said that Lord Eldon had not decided *Morris v. Colman* on the ground of there being a partnership. I agree that the observations, which fell from Lord Eldon in the subsequent case of *Clarke v. Price*, 2 Wils. 157, show that he did mainly decide it on the ground of partnership; but he did not decide it exclusively on that ground. In the argument of *Morris v. Colman*, 18 Ves. 437, Sir Samuel Romilly suggested a case almost identical with the present. He contended that the clause restraining Mr. Colman from writing for any other theatre was no more against public policy than a stipulation that Mr. Garrick should not perform at any other theatre than that at which he was engaged would have been. Lord Eldon, adverting in his judgment to the case put at the bar, said: "If Mr. Garrick was now living, would it be unreasonable that he should contract with Mr. Colman to perform only at the Haymarket Theatre, and Mr. Colman with him to write for the theatre alone? Why should they not thus engage for the talents of each other?" He gives the clearest enunciation of his opinion, that that would be an agreement which this court would enforce by way of injunction.

The late Vice Chancellor Shadwell, of whom I always wish to be understood to speak with the greatest respect, decided in a different way, in the cases of *Kemble v. Kean*, 6 Sim. 333, and *Kimberley v. Jennings*, Id. 340, on which I shall presently make a few observations. In the former case, he observed that Lord Eldon must be understood in the case of *Morris v. Colman*, 18 Ves. 437, to have spoken according to the subject-matter before him, and must there be considered to be addressing himself to a case in which Colman and Garrick would both have had a partnership interest in the theatre. I must, however, entirely dissent from that interpretation. Lord Eldon's words are perfectly plain, they want no comment upon them, they speak for themselves. He was alluding to a case in which Garrick, as a performer, would have had nothing to do with the theatre beyond the implied engagement that he would not perform anywhere else; and I have come to a very clear conclusion that Lord Eldon would have granted the injunction in that case, although there had been no partnership.

The authority of *Clarke v. Price*, 2 Wils. 157, was much pressed upon me by the learned counsel for the defendants; but that is a case which does not properly belong to their argument, because there there was no negative stipulation, and I quite admit that this court cannot enforce the performance of such an affirmative stipulation as is to be found in that case. There the defendant having agreed to take notes of cases in the court of exchequer, and compose reports, for the plaintiff, and having failed to do so, the plaintiff, Mr. Clarke, filed a bill for an injunction, and

Lord Eldon, when refusing the injunction, in effect said, I cannot compel Mr. Price to sit in the court of exchequer and take notes and compose reports; and the whole of his judgment shows that he proceeded (and so it has been considered in later cases) on the ground that there was no covenant, on the part of the defendant, that he would not compose reports for any other person. The expressions in the judgment are: "I cannot, as in the other case" (referring to *Morris v. Colman*, 18 Ves. 437), "say that I will induce him to write for the plaintiff by preventing him from writing for any other person;" and then come these important words, "for that is not the nature of the agreement." Lord Eldon therefore was of opinion, upon the construction of that agreement, that it would be against its meaning to affix to it a negative quality and import a covenant into it by implication, and he, therefore, very properly as I conceive, refused that injunction. That case, therefore, in no respect touches the question now before me, and I may at once declare, that if I had only to deal with the affirmative covenant of the defendant *J. Wagner* that she would perform at her Majesty's Theatre, I should not have granted any injunction.

Thus far, I think, the authorities are very strong against the defendants' contention; but the case of *Kemble v. Kean*, 6 Sim. 333, to which I have already alluded, is the first case which has in point of fact introduced all the difficulties on this part of the law. There Mr. Kean entered into an agreement precisely similar to the present. He agreed that he would perform for Mr. Kemble at Drury Lane, and that he would not perform anywhere else during the time that he had stipulated to perform for Mr. Kemble. Mr. Kean broke his engagement, a bill was filed, and Vice Chancellor Shadwell was of opinion that he could not grant an injunction to restrain Mr. Kean from performing elsewhere, which he was either about to do or actually doing, because the court could not enforce the performance of the affirmative covenant that he would perform at Drury Lane for Mr. Kemble. Being pressed by that passage which I have read from in the lord chancellor's judgment in *Morris v. Colman*, 18 Ves. 437, he put that paraphrase or commentary upon it which I have referred to; that is, he says: "Lord Eldon is speaking of a case where the parties are in partnership together." I have come to a different conclusion, and I am bound to say that, in my apprehension, the case of *Kemble v. Kean* was wrongly decided and cannot be maintained.

The same learned judge followed up his decision in that case in the subsequent one of *Kimberley v. Jennings*, 6 Sim. 340. That was a case of hiring and service, and the vice chancellor there virtually admitted that a negative covenant might be enforced in this court, and quoted an instance to that effect

within his own knowledge. He said: "I remember a case in which a nephew wished to go on the stage, and his uncle gave him a large sum of money in consideration of his covenanting not to perform within a particular district; the court would execute such a covenant, on the ground that a valuable consideration had been given for it." He admits therefore the jurisdiction of the court, if nothing but that covenant remained to be executed. The learned judge however adds, "but here the negative covenant does not stand by itself. It is coupled with the agreement for service for a certain number of years, and then, for taking the defendant into partnership, * * * this agreement cannot be performed in the whole, and therefore this court cannot perform any part of it." Whatever may have been the mutual obligations in that case, which prevented the court from giving effect to the negative covenant, I am not embarrassed with any such difficulties here, because, as I have already shown, both the covenants are on the part of the defendants.

The case of *Hooper v. Brodrick*, 11 Sim. 47, was cited, as an instance in which the court had refused an injunction under circumstances like the present; but, in that case, the lessee of an inn had covenanted to use and keep it open as an inn during a certain time, and not to do any act whereby the license might become forfeited. In point of fact the application was that he might be compelled to keep it open, and the vice chancellor makes this observation: "The court ought not to have restrained the defendant from discontinuing to use and keep open the demised premises as an inn, which is the same in effect as ordering him to carry on the business of an innkeeper; but it might have restrained him from doing, or causing or permitting to be done, any act which would have put it out of his power, or the power of any other person, to carry on that business on the premises. It is not, however, shown that the defendant has threatened, or intends to do, or to cause or permit to be done, any act whereby the licenses may become forfeited or be refused; and therefore the injunction must be dissolved." That therefore is an authority directly against the defendants, because it shows that if there had been an intention to break the negative covenant this court would have granted the injunction.

The case of *Smith v. Fromont*, 2 Swanst. 330, was also relied upon by the defendants, as an instance where the injunction had been refused, but there there was no negative covenant. It was an attempt to restrain, by injunction, a man from supplying horses to a coach for a part of a road, when the party who was applying for the injunction was himself incapable of performing his obligation to horse his part of the road. Lord Eldon, in refusing the injunction and deprecating the interference of the court in such cases, there said: "The only instance I recollect of an

application to this court to restrain the driving of coaches occurred in the case of a person who, having sold the business of a coach proprietor from Reading to London, and undertaking to drive no coach on that road, afterwards established one. With some doubt, whether I was not degrading the dignity of this court by interfering, I saw my way in that case; because one party had there covenanted absolutely against interfering with the business which he had sold to the other." That again is a direct authority, therefore, against the defendants, as Lord Eldon expressly says he had interfered in the case of a negative covenant, although he could not interfere on that occasion because there was no such covenant.

Some observations have been made upon a decision of my own in Ireland, in the case of *Gervais v. Edwards*, 2 Dru. & W. 80; that decision I believe to be right, but it is quoted to show that I was of opinion that this court cannot interfere to enforce specific performance, unless it can execute the whole of an agreement. I abide by the opinion I there expressed, and I mean to do nothing in this case which shall in any manner interfere with that opinion. That was properly a case for specific performance, but from the nature of the contract itself there was a portion of it which could not be executed. I said, in effect: I cannot execute this contract which is intended to be binding on both parties; I cannot execute a portion of this contract for one, and leave the other portion of the contract unexecuted for the other; and, therefore, as I cannot execute the whole of the contract, I am bound to execute no part of it. That, however, has no bearing on the present case, for here I leave nothing unperformed which the court can ever be called upon to perform.

In *Hills v. Croll*, 2 Phil. Ch. 60, Lord Lyndhurst refused to enforce an injunction to restrain the violation of a negative covenant. It was a case in which A. had given to B. a sum of money, and B. covenanted that he would buy all the acids he wanted from the manufactory of A., who covenanted that he would supply the acids, and B. also covenanted that he would buy his acids from no other person. Lord Lyndhurst refused to prohibit B. from obtaining acids from any other quarter, both because the covenants were correlative, and because he could not compel A. to supply B. with acids; and if, therefore, he had restrained B. from taking acids from any other quarter, he might have ruined him in the event of A. breaking his affirmative covenant to supply the acids. That case has never been rightly understood. It is supposed that Lord Lyndhurst's decision was based upon a wrong principle; that he followed the authority of *Gervais v. Edwards* and such cases, and that he improperly applied the rule which was in that class of cases properly applied, but under the circumstances of the case before him I think

the rule was not improperly applied.² The next case which has been so much observed upon was that, before Lord Cottenham, of *Dietrichsen v. Cabburn*, 2 Phil. Ch. 52. That was a very simple case, and the question upon what principle it was decided formed the subject of discussion before me. A man, in order to obtain a great circulation of his patent medicine, entered into a contract with a vendor of such articles, giving him a general agency for the sale of the medicine, with 40 per cent. discount, and stipulating that he would not supply anybody else at a larger discount than 25 per cent. He violated his contract and was proceeding to employ other agents with a larger discount than 25 per

² The following, containing all the material portions of Lord Lyndhurst's judgment in *Hills v. Croll*, is taken from the shorthand writer's notes, and has been kindly furnished to the reporters by one of the counsel who was engaged in that cause, and by whom a very full report of the case will be found published, in "Reports of Cases in the Law of Real Property and Conveyancing," volume 1, p. 541:

"THE LORD CHANCELLOR.

"In this case of *Hills v. Croll*, Croll had obtained two patents for the purpose of purifying gas, and the result of the purification of gas was the manufacture of muriate of ammonia and sulphate of ammonia. He entered into a contract with Hills, who is the plaintiff in this suit, and the contract was to this effect: Mr. Croll was to purchase all the acids that he was to use in his process under his patent from Mr. Hills. Mr. Hills, on his side, was to have the right of purchasing all the ammonia that should be produced as the result of those processes, at certain prices as to the one and as to the other. In addition to this, there was a stipulation that, in all the licenses that were granted for using those patents, the parties to whom those licenses were to be granted should be bound to purchase all the acids which were used in the processes from Mr. Hills, and that Mr. Hills should have the same option that he had in the case of Croll, of purchasing from them all the ammonia that should be produced in the course of the processes. It was also stipulated that Mr. Hills should have the option to supply either muriatic acid or sulphuric acid, as he should think proper, regulating his option by the market prices of the muriate of ammonia and the sulphate of ammonia. I think this is the substance of the original agreement between these parties. The agreement was entered into in the month of March, 1841. It was found, on the part of Mr. Croll, that the mode of payment and other arrangements with respect to this agreement were inconvenient, in consequence of which a correspondence takes place between him and Mr. Hills, in the month of September, 1842, and the agreement was modified according to the terms of a letter, dated, I think, in September, written by him. One of the stipulations in the original agreement was that Mr. Hills should be a signing party in all the licenses that were granted by Mr. Croll for the use of the patent. The first stipulation, in the letter of September, was that he should not be required to be a signing party: but it provided that there should be a covenant in all those agreements, a covenant to the effect stated in the original agreement, namely, that the parties to whom the licenses were granted should purchase their acids from Hills, and give Hills the right to purchase the ammonia. Regulations were also made altering the terms on which the acids were to be purchased and the ammonia to be sold. There were some other subordinate stipulations to

cent. An injunction was applied for and was granted. It was said that it was properly granted, because it was a case of partnership. This, however, was not the fact; it was not a case of partnership, but was strictly one of principal and agent; and it was only because there was the negative covenant that the court gave effect to it. It is impossible to read Lord Cottenham's judgment without being satisfied that he did not consider it to be a partnership, though he said it was in the nature of a partnership; and in a popular sense it might be so called, because the parties were there both dealing with respect to the same subject, from which

each was to have a benefit, but in no legal sense was it a partnership.

Up to the period when *Dietrichsen v. Cabburn*, 2 Phil. Ch. 52, was decided, I apprehend that there could have been no doubt on the law as applicable to this case, except for the authority of Vice Chancellor Shadwell; but with great submission it appears to me that the whole of that learned judge's authority is removed by himself by his decision in the later case of *Rolfe v. Rolfe*, 15 Sim. 88. In that case A. B. and C. were partners as tailors. A. and B. went out of the trade on consideration of receiving £1,000 each, and C. was to continue the busi-

which it is not necessary at present to advert. The letter, however, concluded with a stipulation to this effect, that if Mr. Croll was in any particular to depart from the agreement so modified the original agreement was to be enforced. I think those two documents, the original agreement and the letter, formed the substance of the contract between the parties as it existed after September, 1842.

"Some doubt was expressed as to whether or not the contract so modified has been acted upon in that shape. It appears beyond all doubt that it was so acted upon, because the accounts were, from time to time, rendered on the footing of the modified agreement, and it is also clear from the letter of Mr. Hills of the 8th of December, in which he refers expressly to the prices that were regulated by the letter of September, 1842."

His lordship here referred to another question raised in the course of the discussion, namely, whether the second or modified agreement had been put an end to by the operation of the clause providing for the enforcement of the first or original agreement; and, after remarking that it was unnecessary for him for the purpose of the present question to come to any conclusive decision on that point, proceeded as follows:

"Those are the facts of the case for the purpose of raising the narrow question, as it appears to me, which the court has to decide. The bill was filed for the purpose of calling on the court to declare that that agreement should be specifically performed.

"Now there is no principle of the court which I understand to be more clearly established than this, that the court will not decree an agreement to be specifically performed, unless it can execute the whole of the agreement." The question, therefore, in this case will be whether the court has power, from the nature of this agreement, to execute the whole of it,—every part of it. Part of the prayer which is consequent upon a specific performance is that the defendant should be restrained from purchasing acids from anybody but Mr. Hills, and also that he should be restrained from granting licenses, except according to the agreement that was in force between the parties.

Now, then, with respect to the first of these points, there is a stipulation on the part of Hills that he will supply the acids; there is a stipulation on the part of Mr. Croll that he will purchase acids from Hills, and from no other person. Has the court any power whatever to compel Mr. Hills to comply with that? Can the court order Mr. Hills to continue the manufacture of acids for the purpose of supplying Mr. Croll? Can the court call upon him, if he should not manufacture acids, and require him to purchase acids for the purpose of supplying Mr. Croll? It is clear, I apprehend, that the court has no such power. There are cases in which the court will do indirectly

what it cannot do directly. A case commonly cited for that purpose is the case of a nuisance. The court would not compel a party who had erected a wall to the nuisance of another,—would not compel the party by any direct order to pull down that wall; but the court can make an order requiring him not to continue the nuisance, which would have the effect of compelling him to pull down the wall. In the case of *Morris v. Colman*, the court restrained Mr. Colman from writing for any other theatre, inferring from that that the order would compel Mr. Colman, or have the tendency to compel Mr. Colman, to write for the Haymarket Theatre. But in this case the court has no power to compel Mr. Hills to supply acids by ordering him not to supply acids to any other person; that is not the agreement, nor was it ever intended that it should be the agreement. Therefore, unless the court can compel him by a direct order to supply Mr. Croll from time to time with the acids that Mr. Croll requires, it is quite clear that this court cannot execute all the parts of this contract. The court cannot, therefore, compel the party specifically to perform the contract.

It was thrown out in the course of the argument, that this court might compel one party to perform his part of the contract, and leave the other party to his remedy at law. No such principle has ever been acted on in this court; it has been so laid down over and over again, and, in a recent case that was cited at the bar (*Gervais v. Edwards*, 2 Dru. & War. 80), Sir Edward Snyden held that, unless this court can execute every part of the contract, this court will not compel a specific performance of a part. When this cause therefore comes to a hearing, I am of opinion that, according to the facts as they at present stand, and according to the statement of the principle I have mentioned, this court cannot restrain Mr. Croll from purchasing acids elsewhere, because it cannot compel Mr. Hills on his side to furnish all the acids that may be necessary for the manufacture carried on by Mr. Croll. If the court cannot do this, it cannot restrain the parties at the hearing. It is quite clear that upon this interlocutory application the court cannot restrain Mr. Croll from purchasing acids elsewhere. I apprehend therefore that the decision of the vice chancellor, which proceeded on the principle I have stated, and rightly on the grounds I have stated, and which I believe is the principle of this court, and the principle on which the vice chancellor acted as to that part of the case is correct; and equally applies, as it appears to me it does, to that part of the notice of motion with respect to the licenses, because that forms a part of the contract,—the general contract. If the court cannot execute the whole of the contract, it cannot execute the contract in part; therefore I am of opinion that in this case the motion must be refused, and refused with costs.

ness on his own account. A. entered into a covenant that he would not carry on the trade of a tailor, which he had just sold, within certain limits, and C. entered into a covenant that he would employ A. as cutter at a certain allowance. The bill was filed simply for an injunction to prevent A. from setting up as a tailor within the prescribed limits, and the vice chancellor granted that injunction. It was objected that this court could not grant the injunction when there was something remaining to be performed, for that A. had a right to be employed as a cutter, which right this court would not even attempt to deal with or enforce as against C. That case therefore was open to a difficulty which does not occur here; in fact the same difficulty which might have arisen in *Hills v. Croll*, 2 Phil. Ch. 60, before Lord Lyndhurst. But the vice chancellor held that to be no difficulty at all, observing that the bill simply asked for an injunction which he would grant, although he could not give effect to the affirmative covenant to do the act in respect of which no specific performance was asked. His own decisions in *Kemble v. Kean*, 6 Sim. 333, and in *Kimberly v. Jennings*, Id. 340, were pressed upon him; but he observed, "that the bills in the cases cited asked for specific performance of the agreement, and that the injunctions were sought as only ancillary to that relief, but the bill in the present case asked merely for an injunction." He no longer put it on the inability of the court to enforce a negative covenant, but he put it on the form of the pleadings. Whether that form was sufficient to justify his opinion is a question with which I need not deal; but I am very clearly of opinion that the case of *Rolfe v. Rolfe*, 15 Sim. 88, does remove the whole weight of that learned judge's authority on this subject.

It was said in argument that the injunction prayed in *Rolfe v. Rolfe*, 15 Sim. 88, was merely ancillary to the relief; but it will be seen that that was not so, and that the prayer extended only to the injunction, and had nothing to do with relief in the shape of specific performance; and the learned judge himself stated that, if it had gone to that extent, he, following his former decisions, would not have granted the injunction.

From a careful examination of all these authorities I am of opinion that the principles and rules deducible from them are in direct contravention of those principles and rules which were so elaborately pressed upon me during the argument; and I wish it to be

distinctly understood that I entertain no doubt whatever that the point of law has been properly decided in the court below. It was nevertheless, and with some reason, said that, although the point of law should be decided in the plaintiff's favor, still he might be excluded from having the benefit of it on the merits of the case.

His lordship here entered into a minute examination of the statements in the answers and affidavits as to the unauthorized addition of the restrictive clause, and as to the nonfulfillment by the plaintiff of his portion of the agreement. In reference to those points he observed that, whether the clause was originally added with or without authority, the evidence showed a clear acquiescence on the part of the defendants to its remaining in the agreement; that the operation of the agreement had been in the first instance postponed to suit the convenience of the defendants; and that as to the payment of the £300 although the plaintiff could not have come into a court of equity to enforce the contract without having tendered the amount stipulated to be paid, yet it was distinctly proved that it had in fact been paid to the common agent of both parties for the purpose of being handed to the defendants. His lordship concluded by saying that, looking at the merits and circumstances of the case, as well as at the point of law raised, he must refuse this motion with costs.

In the course of the argument, and in order to prove the plaintiff's readiness to perform his part of the contract, an affidavit made by Dr. Bacher was read, which was to the effect that he had written and sent a letter to the defendant J. Wagner, informing her of his having received from the plaintiff the £300, and offering to pay that sum according to her instructions. A letter of the same date as that referred to in the affidavit was admitted to have been received by the defendant J. Wagner, but it was positively denied that it contained any such offer. The letter itself was not forthcoming, and its nonproduction was not accounted for. No copy was kept by Dr. Bacher.

The lord chancellor observed that, when the affidavit, as to the contents of the letter was made, Dr. Bacher could not have known that the letter would not be produced; that the affidavit, therefore, if untrue, was at the imminent peril of exposure by the production of the letter; and that under such circumstances the representation in the affidavit must be taken to be true.

MONTAGUE v. FLOCKTON.

(L. R. 16 Eq. 189.)

May 26, 1873.

This was a motion on behalf of the plaintiff, Henry James Montague, the lessee and manager of the Globe Theater in London, for an injunction to restrain the defendant, Charles Poston Flockton, from acting, or causing his name to be advertised as about to act, at any place other than the plaintiff's theater, or otherwise than for the plaintiff's benefit, for a period of nine months, from the 2d of October, 1872, and in particular from acting at an intended dramatic performance at the Crystal Palace.

In August, 1871, an engagement was proposed to the defendant on behalf of the plaintiff, that the defendant should perform, upon certain terms specified, at the Globe Theater. To this proposal the following answer was returned by the defendant, dated the 16th of August, 1871, and addressed to Mr. Edward English, the plaintiff's agent:

"Dear Sir: I accept the engagement for the Globe Theater, under the management of H. J. Montague, Esq., at a weekly salary of five pounds, and, if required to go into the provinces, traveling expenses paid and 20 per cent. on my London salary. Line of business, old men and character business; to commence on or about 2d October, 1871. For the season of not less than nine months' duration. A fortnight's rehearsal to be given prior to opening, subject to the rules and regulations of the theater.

"[Signed] C. P. Flockton."

During the pendency of the last-mentioned agreement, namely, on the 2d of March, 1872, the plaintiff and the defendant entered into another agreement, which was accepted by the defendant, in these terms:

"I hereby accept the renewal of my engagement with H. J. Montague, Esq., for his next season on the same terms as at present existing between us.

"[Signed] C. P. Flockton."

It appeared that in May, 1872, a notice was posted in the greenroom of the Globe Theater to the effect that the season would close on the 4th of June, on which day all pending engagements would terminate, and the house was accordingly closed upon that day.

A company was then formed by the plaintiff for certain theatrical performances in the provinces, in which the defendant took part, and these performances commenced on the 4th of June, and terminated on the 28th of September, 1872.

The next London season at the Globe Theater commenced in October, 1872, and the defendant, Mr. Flockton, played at the theater as he had previously done till the 10th of March, 1873, when he requested the plaintiff to allow him to perform at the Regent's Park Theater, which was to be

opened in May. Upon this occasion, according to the plaintiff's statement, the defendant said: "I only ask you to lend me, and I shall finish my engagement with you afterwards." The plaintiff declined to accede to the defendant's request, on the ground that he should require his services for the next piece that was to be brought out. On the 2d of April the defendant wrote the following letter to the plaintiff:

"Dear Sir: As you are aware my engagement with you terminated on the 2d of December last, pursuant to our agreement bearing date the 2d of March, 1872, I am desirous to close my connection with your theater, and therefore now give you four weeks' notice in pursuance of such my desire."

The matter was then placed by the plaintiff in the hands of his solicitors, Messrs. Lumley, who wrote to the defendant stating that he had taken a wrong view of the terms of the contract, which did not in fact terminate until nine months after the commencement of the season, in October, 1872; that the defendant was causing Mr. Montague considerable inconvenience and loss, by not attending the rehearsal of a new play soon to be produced, although every reasonable notice had been given him; and they called upon him to be in attendance the following morning at 11 o'clock to rehearse the part assigned to him.

This summons not being attended to by the defendant, the plaintiff was obliged to engage another actor, Mr. Palmer, to perform the part assigned to the defendant.

The plaintiff then discovered that the defendant was negotiating for an agreement to act at a new theater in course of erection in London, before the expiration of the term alleged to be comprised in the agreement of the 2d of March, 1872, and on the 28th of April, 1873, the plaintiff also discovered that the defendant was advertised as intending to act on the 3d of May at the Crystal Palace in the part of Polonius in Hamlet, and consequently this bill was filed for an injunction in the terms already stated.

It was alleged by the defendant that, according to the prevailing custom, the manager had the right of closing the season by notice, and that he had done so. The plaintiff alleged that the notice did not close the season. There was conflicting evidence on this point.

Lumley & Lumley, solicitors for plaintiff. Mr. Oakes, solicitor for defendant.

Mr. Glasse, Q. C., and Mr. E. Cutler, for plaintiff. Mr. Hemming, for defendant.

SIR R. MALINS, V. C., after reading the letter of the defendant, dated the 16th of August, 1871, accepting the engagement to perform for the plaintiff during the season of at least nine months, continued:

The first question is, what is the meaning of that contract? It has been argued that it was an engagement for the season, and that it left the performer at the mercy of the proprietor to terminate the season whenever he thought fit. It is said that Mr. Montague having put up a notice in the greenroom of the theater in the month of May, 1872, notifying that the season's engagements would terminate on the 4th of June then next, that that has put an end to the contract. My opinion is that if an actor engages himself for the season he leaves himself at the mercy (within reasonable limits of construction) of the proprietor of the theater to fix what the season is. But that is not the meaning of this contract; because, while the proprietor, Mr. Montague, engages Mr. Flockton for the season, there is a stipulation, which is for the protection of the performer, that that season is not to be one month, two months, or three months, as the proprietor may think proper, but that, whenever he may choose to terminate his season, that season, for the purpose of paying the actor, is not to be less than nine months. In my opinion, it was absolutely impossible, provided Mr. Flockton performed his part of the contract, for Mr. Montague to evade performing his part of it by paying the stipulated salary for a period of not less than nine months.

This contract, then, being, as I am bound to assume, understood, in the only way it could be understood, by each of the parties, was commenced in or about the month of October, and matters went on satisfactorily on both sides, as I must assume, because in the month of March, five months after the contract had been commenced, and while Mr. Flockton was still performing for Mr. Montague, a proposal was made by Mr. Montague, and was accepted by Mr. Flockton, in these terms: "I hereby accept the renewal of my engagement with H. J. Montague, Esq., for his next season, on the same terms as at present existing between us." Now, what is the meaning of "the next season"? I am perfectly clear that it was a repetition of the old contract; it was to be the next season commencing in October, 1872, lasting for not less than nine months. It follows that, for the season beginning in 1872 and ending in 1873, Mr. Montague, accepting these terms, is bound to pay Mr. Flockton for nine months, and Mr. Flockton is equally bound to perform for Mr. Montague, if Mr. Montague requires him to do so. I am surprised that by any ingenuity Mr. Flockton should have persuaded himself that the meaning of that contract was, as he stated in his letter, that the next season was not the London season, but the country season. The thing is, in my opinion, perfectly absurd. It has nothing to do with the country season; because the original contract was this: He is to have £5 a week if required to go into the prov-

inces; assuming, therefore, that he may be required to go, he will agree to do so, and in that case he is to have his traveling expenses paid, and 20 per cent. additional upon his London salary. The original contract is for a London engagement, with the privilege on Mr. Montague's part of requiring him to go into the provinces, where he would be entitled to 20 per cent. additional and all traveling expenses paid. Therefore, when he says the next season, it is subject to the same stipulation; it is for the London theater, with the right on the part of Mr. Montague to require him to go into the provinces upon those terms. The contention of Mr. Flockton that the next season commenced in the month of June and ended in the month of September is, in my opinion, simply ridiculous. I totally differ from it, and I am clear that it meant the next season, commencing in October and terminating at the earliest at the end of nine months.

Then let us see what was the view of the parties themselves, and how this was acted upon. If it were according to Mr. Flockton's view, how did it happen that he commenced acting for Mr. Montague again in the month of October last, and continued uninterruptedly and amicably, as I understand, to act for him down to the month of April? The object of it is evidently that which is stated by the plaintiff in his affidavit filed the 6th of March; and, as it is not contradicted by Mr. Flockton, I must take it to be perfectly accurate. Mr. Montague says: "On or about the 20th day of March, 1873, I was in my dressing room at the Globe Theater with a friend, and the defendant came in and asked me if I would allow him to go and play a very fine part at the Regent's Park Theater, which it was proposed to open in the month of May, and, he added [now, here is an admission of the whole case], 'Of course, you will lend me for a time only; then I will come back and finish my engagement.' I said, in reply, 'I am sorry, my dear Flockton, I cannot, as I hope to have you in my next piece.' On my saying that, he walked away rather annoyed." That was on the 20th of March. Then what is the next thing he does? I am satisfied from the evidence that, there being a piece then in preparation, it was the intention of Mr. Montague that Mr. Flockton should take a part in it; but, unfortunately, before it came out Mr. Flockton, on the 2d of April, adhering to this most unjustifiable view of the contract, writes to Mr. Montague this letter: "As you are aware my engagement with you terminated on the 2d of December last, pursuant to our agreement bearing date the 2d of March, 1872, I am desirous to cease my connection with your theater, and therefore now give you four weeks' notice in pursuance of such my desire." Now, he knew perfectly well that Mr. Montague was not aware of any such thing as the termination of the agreement in

December, for he knew that the conversation of the 20th of March which occurred between them took an entirely different view of the case, and after making that admission himself to Mr. Montague I cannot conceive that anything could be more unjustifiable than that Mr. Flockton should say, "As you are aware, my engagement with you terminated on the 22d of December last." That was objected to by Mr. Montague, who, I think, acted in perfect good faith. He remonstrated, and, finding his remonstrances were not attended to, he applied to his solicitors. So far from Mr. Montague not performing his part of the contract or being desirous to avoid employing Mr. Flockton in his new piece, as was suggested, Messrs. Lumley wrote a letter to this effect: "Mr. Montague states, further, that you are even now causing him considerable inconvenience and loss by your not attending to the rehearsal of a new play soon to be produced, although every reasonable notice has been given you, and we now call upon you to be in attendance to-morrow on the stage to rehearse the part assigned to you at 11 o'clock, at which hour the company assemble for the purpose of rehearsal." Therefore it is Mr. Flockton who is now repudiating his contract. He is called upon to perform it, but he adheres to his refusal, and seeks an engagement, first at the Regent's Park Theater, and secondly at the Crystal Palace. Now, unless theatrical managers are to be completely at the mercy of their performers, the performers are not to be suffered to break their engagements whenever they think fit. I can readily believe, if Mr. Flockton had requested Mr. Montague to allow him to perform the part of Polonius in Hamlet at the Crystal Palace, that his request would have been acceded to, and this suit would not have been instituted; but that was not all that Mr. Flockton wanted. In setting his contract at defiance, it is perfectly clear his object was not simply to perform at the Crystal Palace, but also to perform at the Regent's Park Theater, either because he could get a better salary or be enabled to play a higher class of characters, which perhaps to an actor is as strong an inducement as any money that can be given to him. But he is, in my opinion, entirely wrong.

If he is put upon his contract, he is bound to perform for Mr. Montague for the season; and I am glad to hear from his counsel, Mr. Hemming, that Mr. Flockton expresses his willingness, if the court puts a different construction upon it to his own, to submit to the opinion of the court, and perform his part of the contract.

Now, that being the effect of the agreement between the parties, that is, that Mr. Flockton has bound himself for the whole of the season which commenced in October last for nine months, which, on the one hand, obliges Mr. Montague to pay him his salary

for nine months, and obliges Mr. Flockton, on the other hand, to perform for Mr. Montague for the same period, it is said, in order to avoid this, that he is not bound, because there is no negative stipulation in the contract. I certainly am under the impression that in the case of Lumley v. Wagner, 1 De Gex, M. & G. 604, if there had been no negative stipulation the court would have interfered; and I gather this particularly from the passage in Lord St. Leonard's judgment, Id. 618, where he says: "The agreement to sing for the plaintiff during three months at his theater, and during that time not to sing for anybody else, is not a correlative contract; it is, in effect, one contract, and though, beyond all doubt, this court could not interfere to enforce the specific performance of the whole of this contract, yet, in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theater must necessarily exclude the right to perform at the same time at another theater." It happened that that contract did contain a negative stipulation, and, finding it there, Lord St. Leonard relied upon it; but I am satisfied that if it had not been there he would have come to the same conclusion, and granted the injunction, on the ground that *Mdlle. Wagner*, having agreed to perform at Mr. Lumley's theater, could not at the same time be permitted to perform at Mr. Gye's. But, however that may be, it is comparatively unimportant, because the subsequent authorities have completely settled this point. It appears to me, on the plainest ground, that an engagement to perform for nine months at Theater A. is a contract not to perform at Theater B., or at any other theater whatever. How is a man to perform his duty to the proprietor of a theater if, when he has engaged himself to perform for him, he is to go away any night that he may be wanted to another theater? I must treat Mr. Flockton as if he were the greatest actor in the world, and as if wherever he went the public would run after him; and according to this, if a proprietor engages an actor to perform for him, he is not, because he is only wanted for three nights in the week, to be at liberty to go and perform at any other theater during the other three nights, and thereby take away the advantage of the contract which he has entered into with his employer. That, in my opinion, is utterly inconsistent with the proper construction of the contract. There is no doubt whatever that the proper construction of these contracts is, that where a man or woman engages to perform or sing at a particular theater for a particular period, that involves the necessity of his or her not performing or singing at any other during that time.

That does not rest upon my opinion only, because it was acted upon in *Webster v. Dillon*, 3 Jur. (N. S.) 432. In that case there

was, it seems, no argument on the part of the defendant. I suppose they did not argue it because they found they could make nothing of it. The defendant Dillon, an actor, having agreed to perform at Sadler's Wells Theater in certain characters for twelve successive nights, proposed to perform during the same period at another theater. Mr. Swanston applied for the injunction, and Vice Chancellor Sir W. Page Wood "thought the words of Lord St. Leonards were sufficiently strong to justify his making the order, and he granted an injunction restraining the defendant from acting at any other place than the plaintiff's theater during the ordinary hours of performance there of twelve consecutive nights, commencing on the 20th of April, the plaintiff undertaking to abide by such order as to damages as the court might direct." He fully adopts there the principle that it is not necessary to have a negative covenant in order to prevent the performance at another theater. In *Fechter v. Montgomery*, 33 Beav. 22, I think all men must concur in the reasonableness of the views of the master of the rolls. Mr. Fechter had engaged Mr. Montgomery, who had been a provincial actor, and desired to appear on the London boards to perform Shakespeare's characters, and Mr. Fechter had kept Mr. Montgomery for five months idle, but he paid him his salary. Mr. Montgomery's object was to be occupied; he did not want to be kept idle, he wanted to show his talents to London audiences, and it being clear that Fechter had kept him five months perfectly idle, and, for all that appeared, was likely to keep him idle for another five months, Mr. Montgomery would not submit to it, and broke his engagement. Mr. Fechter then filed a bill for an injunction, and in my opinion the master of the rolls could not have come to any other conclusion than that Mr. Fechter had broken his part of the contract, and therefore he would not enforce it as against Montgomery. The contract there did not contain any negative stipulation that he would not perform except for Mr. Fechter. The master of the rolls in that case says (33 Beav. 26): "But having regard to the situation of the parties, having regard to the nature of a contract of this description, and having regard also to the previous letter of the 21st of June, 1862, written to Mr. Barnett, and the conversation which took place prior to this agreement being entered into, with respect to which conversation there does not appear to me to be much difference on either side, I am of opinion that it was an agreement entered into by Mr. Fechter to employ Mr. Montgomery, during a reasonable time, to act at this theater, and that it was an agreement on the other side that he (Mr. Montgomery) should not perform elsewhere without the consent of Mr. Fechter; there was a mutuality in the agreement entered into on both sides; on the one side, that he should have an opportunity of displaying

what his abilities and talents were before a London audience, and on the other side, that he should not act elsewhere unless with the permission of the plaintiff." There are, therefore, Sir W. Page Wood, when vice chancellor, and the master of the rolls, Lord Romilly, taking precisely the same view, that an engagement to act at one theater is a prohibition against acting at any other. There is also the whole principle involved in the case of *De Mattos v. Gibson*, 4 De Gex & J. 276, which was with regard to a totally different subject undoubtedly, namely, the chartering of a ship. The ship was chartered for a particular voyage, and the charterer proposed to sell her, and employ her in a totally different manner. There the court decided that there was a contract that she should not be employed for any other purpose, and granted an injunction against her being so employed accordingly. I think, therefore, that it is decidedly established, and I should desire, as far as my opinion is of value on the subject, that it should be considered my opinion, that a man agreeing to act in one particular theater during the season is party to a contract that he will act there and not anywhere else. A negative contract is as necessarily implied as if it had been plainly expressed. Then the result is: here is a contract entered into for value. It is said by Mr. Flockton that the plaintiff has refused to perform his part of the contract, and has also refused to allow him to perform. That is explained in the affidavits. It is not attempted to be answered. It is perfectly clear that, in consequence of Flockton having absented himself, and given the notice of the 2d of October, when this new piece was about to be brought out, Mr. Montague was obliged to apply to another actor, a Mr. Palmer, to act in the place of Mr. Flockton, and that, in consequence of the default of Mr. Flockton to perform his contract, he has brought this trouble upon himself. Mr. Montague very properly said: "I have engaged Mr. Palmer. I cannot turn him out. You have brought this upon yourself, and while this piece lasts I cannot employ you to perform in it." But if he had not done that, I am perfectly clear that he would have continued to employ him there, and that the circumstance of his not being employed is entirely in consequence of his attempting to repudiate his own contract.

Under these circumstances, I am clearly of opinion that Mr. Montague has established that Mr. Flockton is under an engagement to perform for him, and, being under that engagement, is not at liberty to perform at any other theater whatever without his permission. I think it is a matter of very great importance for actors to understand, that entering into a contract to perform at Theater A. obliges them to perform there alone, and that they cannot be permitted to perform anywhere else so long as the other party performs his part of the agreement.

I am, therefore, of opinion that Mr. Montague is entitled to the injunction.

Mr. Hemming asked that the injunction might not be extended to prevent Mr. Flockton from fulfilling the engagement he had already entered into to perform once more at the Crystal Palace.

The Vice Chancellor recommended Mr.

Montague to concede this request as a favor.

Mr. Glasse said that Mr. Montague would not object to the defendant's performing once more at the Crystal Palace.

The Vice Chancellor thereupon granted the injunction in the terms of the prayer, but so as not to interfere with Mr. Flockton's playing one more day at the Crystal Palace.

DONNELL v. BENNETT.

(22 Ch. Div. 835.)

Chancery. Feb. 8, 1883.

By an agreement dated the 15th of December, 1882, and made between the plaintiff, J. Donnell, a manure manufacturer, of the one part, and Cormack, a fish curer and fish smoker, of the other part, it was agreed that Cormack should sell and that the plaintiff should buy all parts of fish not used by Cormack in his business of a fish curer and fish smoker at the price of 23s. per ton for the space of two years from the 31st of December, 1882, and in consideration thereof Cormack further agreed that he would not sell during the said space of two years any fish or parts of fish to any other manufacturer whatever; and the plaintiff further agreed that he would take and pay for all fish or parts of fish which Cormack should deliver to him at the said price of 23s. per ton delivered at the plaintiff's works.

It was admitted that the defendant never delivered any fish or parts of fish under the contract to the plaintiff, but that he entered into a contract with the defendant Bennett to deliver all the parts of fish which he did not require in his business to Bennett; it was also admitted that the plaintiff had suffered damage by this breach of contract, and that the defendant Bennett had paid Cormack considerable sums of money to induce him to break his contract with the plaintiff, in order that Bennett might obtain the substantial monopoly of all the refuse of fish in Grimsby or the neighborhood.

This was an action by the plaintiff against Bennett and Cormack as co-defendants asking for an injunction to restrain Cormack from selling any fish to Bennett or any other manufacturers except the plaintiff, and to restrain Bennett from buying any such fish from Cormack.

H. A. Giffard, Q. C., and Mr. Hall, for plaintiff. Cozens-Hardy, Q. C., and Mr. Williamson, for defendants.

Bower, Cotton & Bower, for plaintiff. Williamson, Hill & Co., for defendants.

FRY, J. The question which arises is by no means an easy one. It is difficult because of the state of the authorities upon the point. It appears to me that the tendency of recent decisions, and especially the cases of *Fothergill v. Rowland*, L. R. 17 Eq. 132, and of *Wolverhampton and W. Ry. Co. v. London and N. W. Ry. Co.*, L. R. 16 Eq. 433, is towards this view—that the court ought to look at what is the nature of the contract between the parties; that if the contract as a whole is the subject of equitable jurisdiction, then an injunction may be granted in support of the contract whether it contain or does not contain a negative stipulation; but that if, on the other hand, the breach of the contract is properly satisfied by damages,

then that the court ought not to interfere whether there be or be not the negative stipulation. That, I say, appears to me to be the point towards which the authorities are tending, and I cannot help saying that in my judgment that would furnish a proper line by which to divide the cases. But the question which I have to determine is not whether that ought to be the way in which the line should be laid down, but whether it has been so laid down by the authorities which are binding on me.

Now several cases have been cited by the plaintiff as authorities in favor of his contention. In the first place there is the case of *Dietrichsen v. Cabburn*, 2 Phil. Ch. 52, in which undoubtedly the court enforced by way of injunction a stipulation not to sell except in a particular manner, and there the whole contract was one which could not have been performed specifically by the court. Still more, in *Lumley v. Wagner*, 1 De Gex, M. & G. 604, the court enforced by way of injunction a portion of a contract the whole of which could not have been enforced by way of specific performance; and Lord St. Leonards in considering that case discussed the question whether an injunction ought to be granted in some cases in which specific performance cannot be granted, and he determined that question plainly in the affirmative. He made these observations (Id. 619): "Wherever this court has not proper jurisdiction to enforce specific performance it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other; and although the jurisdiction is not to be extended, yet a judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity." It is plain, therefore, that Lord St. Leonards did not adopt the view which has occurred to me as that towards which the more recent cases have been tending.

That is the way in which the direct authorities stand in cases in which there is a negative clause, and they appear to me to show that in cases of this description where a negative clause is found, the court has enforced it without regard to the question whether specific performance could be granted of the entire contract.

Then it is said by Mr. Cozens-Hardy that in all those cases the negative contract enforced was but a part of a larger contract, and that it was a separable part of that larger contract, and that those cases do not

apply to a case like the present, in which, as he suggests, the negative contract is co-extensive with the positive contract.

Upon that argument two inquiries arise. In the first place, is it true to say that the negative contract is in the present instance coextensive with the positive? In my judgment it is not. The affirmative contract is that the vendor will sell all his fish refuse for two years to the purchaser. The negative contract is that during two years he will not sell any refuse fish to any other manufacturer whomsoever; leaving it open to him so far as regards the negative contract, either not to sell at all, or to sell to some person other than a manufacturer. But in the next place one must inquire whether the authorities support any such distinction as that which has been urged by Mr. Cozens-Hardy. It appears to me that they do not.

In *Lumley v. Wagner*, 1 De Gex, M. & G. 604, the contract was that Mdle. Wagner would sing three months at Her Majesty's Theater in London. The negative contract was that she would not "use her talents at any other theater, nor in any concert or reunion, public or private, without the written authorization of Mr. Lumley." It is quite true that the contract contains certain stipulations as to how many nights she should be required to sing, but it appears to me to be evident that the substantial contract—the affirmative contract—was that she would sing there for three months. Of course she could not be always singing, and therefore the contract must state necessarily some limits as to how often she was to sing, but when she did sing during the three months she was to sing at Her Majesty's Theater; the negative terms were that during the three months she would not sing anywhere else than at Her Majesty's Theater. It appears to me that those two contracts are substantially coextensive. But further than that it is to be borne in mind that Lord St. Leonards does

not dwell on the distinction which is now sought to be drawn, and so far as I am aware no trace of it is to be found in the earlier authorities.

But then comes the case of *Catt v. Tourle*, L. R. 4 Ch. 654, before the Lords Justices, in which *Hills v. Croll*, 2 Phil. Ch. 60, was referred to. Now *Hills v. Croll* was a case which contained an affirmative and negative contract, and Lord Justice Giffard expressly said that if that case is to be taken as laying down that the court is to refuse to act on a negative covenant wherever there is a correlative obligation which it cannot enforce, it does not apply. If it is taken as going that length, it is contrary to the case of *Lumley v. Wagner*, 1 De Gex, M. & G. 604, and must be considered as overruled.

It appears to me, therefore, that that point which has been urged upon me does not receive any sanction from the earlier authorities.

I have come to the conclusion, therefore, upon the authorities, which are binding upon me, that I ought to grant this injunction. I do so with considerable difficulty because I find it hard to draw any substantial or tangible distinction between a contract containing an express negative stipulation and a contract containing an affirmative stipulation which implies a negative. I find it exceedingly difficult to draw any rational distinction between the case of *Fothergill v. Rowland*, L. R. 17 Eq. 132, and the case now before me. But at the same time the courts have laid down that, so far as the decisions have already gone in favor of granting injunctions, the injunction is to go.

It appears to me that this case is within the earlier decisions, and although I should be far from sorry if the court of appeal were to take a different view, I think I am bound here by the authorities, and therefore I grant the injunction till the hearing of the cause.

WM. ROGERS MANUF'G CO. v. ROGERS.

(20 Atl. 467, 58 Conn. 356.)

Supreme Court of Errors of Connecticut. Feb. 17, 1890.

Appeal from superior court, Hartford county; FENN, Judge.

This was a suit to enjoin the violation of a contract between Frank W. Rogers and the Wm. Rogers Manufacturing Company and the Rogers Cutlery Company as follows: "(1) That said companies will employ said Rogers in the business to be done by said companies, according to the stipulations of said agreement, for the period of twenty-five years therein named, if said Rogers shall so long live and discharge the duties devolved upon him by said Watrous as general agent and manager of the business to be done in common by said companies, under the directions and to the satisfaction of said general agent and manager; it being understood that such duties may include traveling for said companies, whenever, in the judgment of said general agent, the interest of the business will be thereby promoted." (2) The said companies agree to pay said Rogers for such services so to be rendered, at the rate of \$1,000 per year for the first five years of such services, and thereafter the same or such larger salary as may be agreed upon by said Rogers and the directors of said companies, said salary to be in full during said term of all services to be rendered by said Rogers, whether as an employe or an officer of said companies, unless otherwise agreed. (3) The said Rogers, in consideration of the foregoing, agrees that he will remain with and serve said companies under the direction of said Watrous, as general agent and manager, including such duties as traveling for said companies, as said general agent may devolve upon him, including also any duties as secretary or other officer of either or both of said companies, as said companies may desire to have him perform at the salary hereinbefore named for the first five years and at such other or further or different compensation thereafter during the remainder of the twenty-five years as he, the said Rogers, and the said companies may agree upon. (4) The said Rogers during said term stipulates and agrees that he will not be engaged or allow his name to be employed in any manner in any other hardware, cutlery, flatware, or hollow-ware business either as manufacturer or seller, but will give, while he shall be so employed by said companies, his entire time and services to the interests of said common business, diminished only by sickness, and such reasonable absence for vacations or otherwise as may be agreed upon between him and said general agent." The complaint was held insufficient, and the plaintiffs appealed.

F. Chamberlin and *E. S. White*, for appellants; *C. R. Ingersoll* and *F. L. Hungerford*, for appellee.

ANDREWS, C. J. Contracts for personal service are matters for courts of law, and equity will not undertake a specific performance. 2 Kent, Comm. 258, note b;

Hamblin v. Dinneford, 2 Edw. Ch. 529; *Sanquirico v. Benedetti*, 1 Barb. 315; *Haight v. Badgeley*, 15 Barb. 499; *De Rivaflinoli v. Corsetti*, 4 Paige, 264. A specific performance in such cases is said to be impossible because obedience to the decree cannot be compelled by the ordinary processes of the court. Contracts for personal acts have been regarded as the most familiar illustrations of this doctrine, since the court cannot in any direct manner compel the party to render the service. The courts in this country and in England formerly held that they could not negatively enforce the specific performance of such contracts by means of an injunction restraining their violation. 3 Wait, Act. & Def. 754; *Marble Co. v. Ripley*, 10 Wall. 340; *Burton v. Marshall*, 4 Gill, 487; *De Pol v. Sohke*, 7 Rob. (N. Y.) 280; *Kemble v. Kean*, 6 Sim. 333; *Baldwin v. Society*, 9 Sim. 393; *Fothergill v. Rowland*, L. R. 17 Eq. 132. The courts in both countries have, however, receded somewhat from the latter conclusion, and it is now held that where a contract stipulates for special, unique, or extraordinary personal services or acts, or where the services to be rendered are purely intellectual, or are peculiar and individual in their character, the court will grant an injunction in aid of a specific performance. But where the services are material or mechanical, or are not peculiar or individual, the party will be left to his action for damages. The reason seems to be that services of the former class are of such a nature as to preclude the possibility of giving the injured party adequate compensation in damages, while the loss of services of the latter class can be adequately compensated by an action for damages. 2 Story, Fq. Jur. § 958a; 3 Wait, Act. & Def. 754; 3 Pom. Eq. Jur. § 1343; *California Bank v. Fresno Canal, etc., Co.*, 53 Cal. 201; *Singer Sewing-Machine Co. v. Union Button-Hole Co.*, 1 Holmes, 253, *Lumley v. Wagner*, 1 De Gex, M. & G. 604; *Railroad Co. v. Wythes*, 5 De Gex, M. & G. 880; *Montague v. Flockton*, L. R. 16 Eq. 189. The contract between the defendant and the plaintiffs is made a part of the complaint. The services which the defendant was to perform for the plaintiffs are not specified therein, otherwise than that they were to be such as should be devolved upon him by the general manager; "it being understood that such duties may include traveling for said companies whenever, in the judgment of said general agent, the interests of the business will be thereby promoted;" and also "including such duties as traveling for said companies as said general agent may devolve upon him, including also any duties as secretary or other officer of either or both of said companies as said companies may desire to have him perform." These services, while they may not be material and mechanical, are certainly not purely intellectual, nor are they special, or unique, or extraordinary; nor are they so peculiar or individual that they could not be performed by any person of ordinary intelligence and fair learning. If this was all there was in the contract it would be almost too plain for argument that the plaintiffs should not have an injunction.

The plaintiffs, however, insist that the negative part of the contract, by which

the defendant stipulated and agreed that he would not be engaged in or allow his name to be employed in any manner in any other hardware, cutlery, flatware or hollow-ware business, either as a manufacturer or seller, fully entitles them to an injunction against its violation. They aver in the complaint, on information and belief, that the defendant is planning with certain of their competitors to engage with them in business, with the intent and purpose of allowing his name to be used or employed in connection with such business as a stamp on the ware manufactured; and they say such use would do them great and irreparable injury. If the plaintiffs owned the name of the defendant as a trade-mark, they could have no difficulty in protecting their ownership; but they make no such claim, and all arguments or analogies drawn from the law of trade-marks may be laid wholly out of the case. There is no averment in the complaint that the plaintiffs are entitled to use, or that in fact they do use, the name of the defendant as a stamp on the goods of their own manufacture, nor any averment that such use, if it exists, is of any value to them. So far as the court is informed, the defendant's name on such goods as the plaintiffs manufacture is of no more value

than the names of Smith or Stiles or John Doe. There is nothing from which the court can see that the use of the defendant's name by the plaintiffs is of any value to them, or that its use as a stamp by their competitors would do them any injury other than such as might grow out of a lawful business rivalry. If by reason of extraneous facts the name of the defendant does have some special and peculiar value as a stamp on their goods, or its use as a stamp on goods manufactured by their rivals would do them some special injury, such facts ought to have been set out so that the court might pass upon them. In the absence of any allegation of such facts we must assume that none exist. The plaintiffs also aver that the defendant intends to make known to their rivals the knowledge of their business, of their customers, etc., which he has obtained while in their employ. But here they have not shown facts which bring the case within any rule that would require an employee to be enjoined from disclosing business secrets which he has learned in the course of his employment, and which he has contracted not to divulge. *Peabody v. Norfolk*, 98 Mass. 452. There is no error in the judgment of the superior court. The other judges concurred.

**METROPOLITAN EXHIBITION CO. v.
EWING.**

(42 Fed. 198.)

Circuit Court, S. D. New York. March 25,
1890.

In Equity. On bill for injunction.

Joseph F. Choate and George F. Duysters,
for plaintiff.

Henry Bacon, for defendant.

WALLACE, J. This action is brought to restrain a threatened breach of contract for the performance of personal services which require special aptitude, skill, and experience. It is a case in which an action at law would not afford the plaintiff an adequate remedy for the breach, and in which the power of the court should be exercised by preventive interposition, if it is found that the contract is such as the plaintiff claims it to be. The circumstances are such that, unless a preliminary injunction is granted, the plaintiff will obtain no effectual remedy, because, before the cause can be brought to final hearing, the time will have passed within which the relief sought would be practically useful, and, if it be then adjudged that the plaintiff is entitled to a permanent injunction, the judgment will be declaratory merely. Although preliminary relief is not to be granted in a case in which it is doubtful whether the plaintiff will be finally successful, yet, where the questions are such that they can be fully considered and as safely decided upon a motion for a preliminary injunction as at final hearing, it is the duty of the court to consider and determine them, and not defer the party invoking its assistance to a time when a decree, if awarded, would be too late.

The contract upon which the plaintiff founds its claim for relief is in form between the New York Base-Ball Club as party of the first part, and the defendant as party of the second part; but there is no reason to doubt that the New York Base-Ball Club was the agent of the plaintiff in entering into the contract, that the plaintiff is the real principal, that the contract was intended to inure for the benefit of the plaintiff, and that the plaintiff is entitled to enforce it against the defendant to the extent that the New York Base-Ball Club could do so. The doctrine is now generally recognized that, while a court of equity will not ordinarily attempt to enforce contracts which cannot be carried out by the machinery of a court, like that involved in the present case, it may nevertheless practically accomplish the same end by enjoining the breach of a negative promise, and this power will be exercised whenever the contract is one of which the court would direct specific performance, if it could practically compel its observance by the party refusing to perform through a decree for specific performance. It is indispensable, where the contract does not relate to realty, that it be one for the breach of which damages

would not afford an adequate compensation to the plaintiff. It must be one in which the plaintiff comes into court with clean hands, and which is not so oppressive as to render it unjust to the defendant to enforce it. It must be one in which there are mutual promises, or which is founded on a sufficient consideration. It must be one the terms of which are certain, and in respect to which the minds of the parties have distinctly met, so that there can be no misunderstanding of their rights and obligations.

The contract is executed as of the date of April 29, 1889. It is a formal document, consisting of 20 articles, by which the New York Base-Ball Club employs the defendant, and the defendant undertakes to perform professional services as a base-ball player for the club for the season (specified in article 2) beginning April 1, 1889, and ending October 31, 1889. Article 20 provides that the salary to be paid the defendant shall be \$2,000, payable semi-monthly. Among other things, the contract provides by different articles that the club may at any time terminate the contract on 10 days' notice to the defendant, whereupon the obligations of both parties are to cease; that the club shall provide the defendant while "abroad" with proper board and lodging, and pay all necessary traveling expenses; that if the defendant, during the term of his employment, be guilty of any excessive indulgence in liquor, or of gambling, or of insubordination, he shall be liable to certain specified penalties; and that, if the club ceases to be a member of the National League of Professional Base-Ball Clubs, either compulsorily or voluntarily, the "defendant shall, if the right of reservation be transferred" by the club to any other club, receive from that club at least the same amount in salary that he receives by the present contract. It contains, also, the following provision: "Article 18. It is further understood and agreed that the party of the first part shall have the right to 'reserve' the said party of the second part for the season next ensuing the term mentioned in paragraph 2, herein provided, and that said right and privilege is hereby accorded to said party of the first part upon the following conditions, which are to be taken and construed as conditions precedent to the exercise of such extraordinary rights or privileges, viz.: (1) That the said party of the second part shall not be reserved at a salary less than that mentioned in the 20th paragraph herein, except by the consent of the party of the second part; (2) that the said party of the second part, if he be reserved by the said party of the first part for the next ensuing season, shall not be one of more than 14 players then under contract,—that is, that the right of reservation shall be limited to that number of players, and no more."

The plaintiff alleges that the defendant was one of 14 players, and no more, so reserved under said contract; that on the 22d

day of October, 1889, plaintiff exercised its option to reserve the defendant for the season of 1890 by giving the defendant due and timely notice, in writing, of its intention to do so; and that, notwithstanding the exercise of this option, the defendant has engaged his services for the season of 1890 to another organization, to act for it as a base-ball player during that season. The plaintiff insists that, by the terms of the contract, it is entitled to the services of the defendant as a base-ball player for the season of 1890 upon the terms and conditions of the contract for the season of 1889, except the condition giving a right to reserve him for a subsequent season.

The case turns upon the meaning and effect of the clause and contract which gives the club the right to reserve the defendant for the season next ensuing. It is plain enough that the option is a right of reservation for the next ensuing season only,—the season ensuing the term mentioned in article 2,—and does not extend beyond the term from April 1, 1890, to October 31, 1890. It is equally plain that the salary for the ensuing season is to be the same as that for the season of 1889, unless the parties mutually consent to a change. But what is the character of the option which the plaintiff is permitted to exercise? What is the right to "reserve" the defendant? If it is the right to retain and have his services as a base-ball player for the season of 1890, when is the right of election to be manifested, and upon what terms are these services to be rendered? Can the club wait until April 1, 1890, before it manifests its intention to exercise the option? Is the club to pay the defendant's board and lodging while he is "abroad," serving the club, during the season of 1890? Can the club discharge him at any time during that season on 10 days' notice? Are the penalties for intoxication, gambling, or insubordination enforceable during the season of 1890? In short, does the contract embody the definite understanding of the parties to it in respect to their reciprocal rights and obligations after the season of 1889 shall have ended? If the term, "the right to reserve," has no defined meaning, and there were no extrinsic sources by which to ascertain the sense in which it is used by the parties, it would be an ambiguous phrase. As applied to a contract for personal services, the right to reserve would convey a very unintelligible conception of the conditions and incidents of the service to be rendered or enjoyed. A contract by which one party agrees, for an equivalent, to reserve himself for another for a stated period, or to reserve himself as a lawyer or doctor or artist or laborer for a specified term, would very inadequately express a promise to devote his professional or manual services exclusively to the other during that period; and the promise of a base-ball player to reserve himself for a particular club for a given season

would hardly, without more, convey any definite meaning of the understanding of the parties. It certainly would not bind him to submit to any special rules or regulations respecting the performance of his services not expressly consented to, or not to be necessarily implied from the nature of the employment and the situation of the contracting parties. If it had been the meaning of the contract to allow the club to renew the engagement of the defendant for a second season upon the same conditions as those for the first season, that intention could have been easily and unequivocally expressed. As it is, it is left wholly to implication, unless the "right to reserve" is a term having a defined and specific signification. This ambiguity suggests such grave doubt as to the meaning of the clause that in two adjudged cases, in which it has been considered by the courts, the judges have thought it too indefinite to be enforceable. In *Exhibition Co. v. Ward*, 9 N. Y. Supp. 779, (in the supreme court of this state,) Mr. Justice O'Brien was of the opinion that the failure to provide for the terms and conditions of the contract for the second season rendered the clause so indefinite and uncertain that it could not be the basis of equitable relief, or that it meant that every player is bound for the ensuing season upon the same terms and conditions as those of the first season, including the signing of a new contract containing the option to reserve. In *Philadelphia Ball Club against Hallman*, in the court of common pleas of Philadelphia, Judge Thayer was of the opinion that the failure to designate the terms and conditions of the new engagement under which the player is to be reserved rendered the contract of reservation wholly uncertain, and therefore incapable of enforcement.

Where the terms employed to express some particular condition of a contract are ambiguous, and cannot be satisfactorily explained by reference to other parts of the contract, and the parties have made other contracts in respect to the same subject-matter, and apparently in pursuance of the same general purpose, it is always permissible to examine all of them together in aid of the interpretation of the particular condition; and, if it is found that the ambiguous term has a plain meaning by a comparison of the several contracts and an examination of their provisions, that meaning should be attributed to it in the particular condition. So, also, if it appears that the term used has an established meaning among those engaged in the business to which the contract has reference, and, unless it is given that meaning, is indefinite and equivocal, it should be treated, in interpreting the contract, as used according to that understanding; and in construing a contract the court is always at liberty to look at the surrounding and antecedent circumstances, and avail itself of the light of any extrinsic facts which will enable

it to view the contract from the standpoint of the parties at the time when it was made. In the present case, it will satisfactorily appear, by resort to these sources of interpretation, that the term "right to reserve" is used in the contract in the sense that obtains in base-ball nomenclature, and that it is intended to signify an option, the character of which was well understood by base-ball clubs and professional players when the present contract was made. Obviously, the right to reserve given by the eighteenth clause of the contract is the same thing as the right of reservation mentioned in that part of the contract which provides that the present club may disband, and transfer its right of reservation to some other club. The agreement is in a form common to all contracts between base-ball clubs organized under what is known as the "national agreement" and professional players, a form which is prescribed by the national agreement. The national agreement is a compact between the various base-ball associations constituting the National League Base-Ball Clubs and the American Association of Base-Ball Clubs, made with a view to regulate the rights and obligations of the members as respects one another. One of its paramount features consists of provisions regulating the privilege of clubs to reserve a stated number of players. The provisions are framed to prevent any club of the National League or the American Association from engaging a player already reserved by another, and to render the player so reserved ineligible for employment by any other club. They require each club, on the 10th day of October in each year, to transmit to all the other clubs a reserved list of players, not exceeding 14 in number, then under contract, and of such players reserved in any prior list who have refused to contract for another year, and declare such players ineligible to contract with any other club. Inasmuch as the parties to the national agreement comprise all, or substantially all, the clubs in the country which employ professional players, this national agreement, by indirection, but practically, affects every professional player, and subordinates his privilege of engaging as he chooses to the option of the club by which he is under reservation. As is stated in a recent publication edited by a prominent professional player: "The most important feature of the national agreement, unquestionably, is the provision according to the club members the privilege of reserving a stated number of players. No other club of any association under the agreement dare engage any player so reserved. To this rule, more than any other thing, does base-ball, as a business, owe its present substantial standing. By preserving intact the strength of the team from year to year, it places the business of base-ball on a permanent basis, and thus offers security to the investment of capital. The reserve rule itself is a usur-

pation of the player's rights; but it is, perhaps, made necessary by the peculiar nature of the ball business, and the player is indirectly compensated by the improved standing of the game. The reserve rule takes a manager by the throat, and compels him to keep his hands off his neighbor's enterprise."

In the contracts between clubs and players as framed prior to November, 1887, there was no provision by which the player consented to the option for reserve on the part of the club. But the contracts did contain a condition that the player should conform to, and be governed by, the constitution and provisions of the national agreement; and the player thereby assented to become ineligible for engagement by any other club of the league during the season of his engagement by a particular club, or while the option of re-engaging him for an ensuing year on the part of that club remained in force. Changes were made from time to time in various features of the national agreement. The players were obliged to inform themselves of the latest changes, in order to understand the precise terms of their contract with the clubs. They became unwilling to consent to a form of contract by which they were to be subjected to conditions not mentioned in the contract itself. In November, 1887, a committee representing the professional players met a committee representing the parties to the national agreement for the purpose of agreeing upon certain changes to be made in the form of the contract. The committees finally agreed that the obnoxious clause in the contract should be omitted, and the clause now found in the eighteenth article should be inserted. This was the origin of the clause giving to the club, by the contract itself, the option of reserve. The clause was manifestly inserted in order to give, by an express condition, the right of reservation to the clubs which theretofore the players had only given by agreeing to be bound by the terms of the national agreement. By ascertaining what that right of reservation was, it can be plainly seen what the parties had in mind in using the term in the present contract. If, when the contract was made, the term had a well-understood definition, there was no necessity to particularize in the contract the conditions or characteristics of the option.

Reference has already been made to the provision of the national agreement requiring each club, on the 10th day of October in each year, to transmit to all the other clubs a reserved list of players, and declaring such players ineligible to contract with any other club. This provision is to be read in connection with another provision of the national agreement, which prescribes that no contract shall be made "for the services of any player by any club for a longer period than seven months, beginning April 1st and terminating October 31st, and no such con-

tract for services to be rendered after the expiration of the current year shall be made prior to the 20th day of October of such year." The two provisions, read together, allow a period of 10 days to intervene between the time when a club can exercise the privilege of placing a player upon its reserved list and the time when it can make a contract with him for services to be rendered in an ensuing year, thus emphasizing a distinction between the right to treat the player as reserved and the contract which is to fix the terms upon which the reservation is to be complete. The effect of these provisions is that, when the club has exercised its privilege of reservation, no other club is permitted to negotiate with the player; but the club which has placed him upon the reserved list, and no other, is then at liberty to enter into a contract with him to obtain his services for an ensuing year. Consequently the right of reservation is nothing more or less than a prior and exclusive right, as against the other clubs, to enter into a contract securing the player's services for another season. Until the contract is made which fixes the compensation of the player and the other conditions of his service, there is no definite or complete obligation upon his part to engage with the club. He agrees that he will not negotiate with any other club, but enjoys the privilege of engaging with the reserving club or not, as he sees fit. Read with this understanding, the clause in question by which the privilege of reserving the defendant is given to the club expresses definitely the terms of the option. If the club exercises the right of reservation, it agrees in advance that the player shall receive at least as large a salary as he has received during the current year, and leaves it open to him to contract on that basis for the next season, or to insist on a larger salary. All the other terms of the engagement are matters of negotiation be-

tween the club and the player. The law implies that the option of reservation is to be exercised within a reasonable time; but when this has been done the right to reserve the player becomes the privilege, and the exclusive privilege, as between the reserving club and the other clubs, to obtain his services for another year if the parties can agree upon the terms. As a coercive condition which places the player practically, or at least measurably, in a situation where he must contract with the club that has reserved him, or face the probability of losing any engagement for the ensuing season, it is operative and valuable to the club. But, as the basis for an action for damages if the player fails to contract, or for an action to enforce specific performance, it is wholly nugatory. In a legal sense, it is merely a contract to make a contract if the parties can agree. It may be that heretofore the clubs have generally insisted upon treating the option to reserve as a contract by which they were entitled to have the services of the player for the next season upon the terms and conditions of the first season, and even requiring him to enter into a new contract containing the option for reservation; and it may be that the players have generally acquiesced in the claims of the clubs. However this may be, the players were not in a position to act independently; and, if they had refused to consent to the terms proposed by the clubs, they would have done so at the peril of losing any engagement. The facts, therefore, are not such as to permit any weight to be given to the acts of the parties as evincing their own construction of the contract.

It follows that the act of the defendant in refusing to negotiate with the club for an engagement for the season of 1890, while a breach of contract, is not the breach of one which the plaintiff can enforce. The motion for an injunction is denied.

ALLEGHENY BASE-BALL CLUB v.
BENNETT.

(14 Fed. 257.)

Circuit Court, W. W. Pennsylvania. November 18, 1882.

In Equity. Bill to enforce compliance with agreement to enter into contract to give personal services.

Bill in equity by the Allegheny Base-ball Club, a corporation of Pennsylvania, against Charles W. Bennett, a citizen of Michigan, to compel the respondent to execute a formal contract to give his exclusive services as a base-ball player to the complainant during the base-ball season of 1883, and also for an injunction to restrain him from executing a like agreement with the Detroit Base-ball Club, and from performing such services for any other person or corporation than the complainant during the season named.

The bill was filed on the fifth day of October, 1882, and was based upon the following written instrument, to-wit:

"It is hereby agreed, this third day of August, 1882, between the Allegheny Base-ball Club and Charles W. Bennett, that said Charles W. Bennett hereby promises and binds himself that between the fifteenth and thirty-first days of October, 1882, he will sign a regular contract of the Allegheny Base-ball Club, a chartered company belonging to the American Association of Base-ball Clubs, which contract shall bind him to give his services as a base-ball player to said club for the season of 1883, and shall bind said Allegheny Club to pay him the sum of \$1,700 for and during such season of 1883; and in consideration of his agreement to sign such a contract in October, the sum of \$100 is now paid to said C. W. Bennett, the receipt of which is hereby acknowledged. Witness our hands and seals this third day of August, 1882.

"The Allegheny Base-ball Club, by

"H. D. McKnight, President. [Seal.]

"C. W. Bennett. [Seal.]

"A. G. Pratt, Witness."

The bill averred substantially that the complainant was engaged in the business of playing base-ball for profit, and that by the expenditure of much time and large sums of money it made preparations for the exhibition of such games, and expected to receive large returns from the same; that the respondent was a skillful player of base-ball, and, in consequence of his agreement with complainant, E. N. Williamson and James F. Galvin, two other skillful players, had entered into a similar agreement with complainant; that respondent had refused to sign the "regular contract" referred to, and had entered into a like contract with the Detroit Base-ball Club; that, accordingly, Williamson and Galvin refused to keep their said engagement with complainant, and that the base-ball season had now so far advanced

that complainant could not secure other players of equal skill with said Bennett, Williamson, and Galvin, whereby complainant "would be seriously damaged, to an amount of not less than \$1,000."

The bill prayed that Bennett be required to sign the "regular contract," and perform his covenants, and also that he be restrained from entering into a similar contract with the Detroit Base-ball Club, or any other association or person, and from playing base ball "for hire," during the base-ball season of 1883, for any other than complainant.

The complainant moved for a preliminary injunction. The motion was argued by James Bakewell, and was opposed by A. Tausig, and was denied. The respondent then filed a general demurrer, on the grounds: (1) That the bill was prematurely brought; (2) that the agreement was a mere preliminary arrangement, anticipating the making of a final contract, and that, therefore, there was no contract before the court capable of specific enforcement; (3) that the agreement was unlimited as to place, and was, therefore, unreasonable and void as against public policy, as covenants in restraint of trade; (4) that the complainant had an adequate remedy at law.

A. Tausig, A. W. Duff, and Marshall Brown, for demurrer.

To maintain a suit there must be a cause of action when such suit is commenced. 55 Ga. 329; 29 Ill. 497; 4 Sneed, 583. One who has anything to do on a particular day has the whole of that day to perform such act, so that suit for a breach of performance cannot be instituted until the next day. 102 Mass. 65; 6 Watts & S. 179; 18 Cal. 378. And, in general, the time within which a contract is to be executed is as much the essence of it as any other part. 6 Wis. 120; 43 Me. 158; 18 Ind. 365; 17 Me. 316; 22 Me. 133.

(1) The present bill for an injunction to restrain the defendant from playing with the Detroit Club, as in violation of the alleged agreement, will not lie for the reason the contract is a mere preliminary arrangement, and not a final agreement. What are the terms of the alleged contract? They provide and contemplate the execution of a regular agreement, in order to bind the parties and render the contract mutual, final, and conclusive. The preliminary contract shows that it was executed with reference to a future and final agreement between the parties. A contract requires mutuality as to all its essential terms, stipulations, and conditions. Is there any allegation upon the face of the bill that a final, regular contract was ever agreed upon between the parties? There is no contract, therefore, capable of being enforced in a court of equity, and the present bill must be dismissed. *Railway Co. v. Wythes*, 5 De Gex, M. & G. 888. Specific performance will not be decreed if it is not clear that the

minds of the parties have come together. *Wistar's Appeal*, 80 Pa. 484.

(2) Specific performance will not be enforced, directly or indirectly, unless the agreement is mutual, its terms certain, its enforcement practicable, and the complainant is without adequate redress in an action at law, (Bisp. Eq. § 377, and cases cited; 10 Wall. 339; 5 De Gex, M. & G. 888;) and it will not be enforced when it is doubtful whether an agreement has been concluded, (14 Pet. 77; 81 Pa. 484;) nor where the duties are continuous and require skill and judgment, (10 Wall. 339.) A court of chancery will not decree the specific performance of a contract, where it would be impossible for the court to enforce the execution of its decree, or where the literal performance, if enforced, would be a vain and idle act. Bisp. Eq. 436.

(3) Even if the alleged contract is legal and binding on the defendant, the demurrer should be sustained, because the plaintiff has an adequate remedy at law. It may have to pay a higher salary to secure a player of Bennett's skill, and the difference would be the measure of damages for breach of contract.

(4) Even if the court should be of the opinion that a contract was executed, full, final, and mutual as to all its terms, conditions, and stipulations, and also of opinion that negative covenants not to exercise a trade, profession, or calling within reasonable limits may be enforced by injunction, such conclusion would have no application to enjoin and restrain the defendant. The contract is unreasonable and void on grounds of public policy, as in cases of covenants in restraint of trade, because it is unlimited. *McClurg's Appeal*, 58 Pa. 51; *Gillis v. Hall*, 2 Brewst. 342; *Catt v. Tourle*, L. R. 4 Ch. App. 654.

(5) The demurrer should be sustained because equity will not indirectly enforce specific performance of a contract for personal services where the services require a succession of acts whose performance cannot be accumulated by one transaction, but will be continuous and require the exercise of special knowledge, skill or judgment. *Pom. Spec. Per.* § 312; *Ford v. Jermon*, 6 Phila. 6; *De Pol v. Sohlke*, 7 Rob. (N. Y.) 280; *Sanquiricio v. Benedetti*, 1 Barb. 315; *Kemble v. Kean*, 6 Sim. 333; *Hills v. Croll*, 2 Phila. 60; *Rolfe v. Rolfe*, 15 Sim. 88; *Fothergill v. Rowland*, L. R. 17 Eq. 132; *Kimberley v. Jennings*, 6 Sim. 340. The personal acts with respect to which courts of equity entertain jurisdiction

to decree specific performance have reference to property of some kind. There is none where a contract for personal services alone has been actively enforced. There are several, however, in which the court has interfered negatively. Thus, in the case of a theater, considered as a partnership, a contract with the proprietors not to write dramatic pieces for any other theater is valid, and a violation of it will be restrained by injunction. *Clark v. Price*, 2 Wils. 157; *Willard, Eq.* 278. But where there is no partnership between the parties, and the defendant has violated his engagement to one theater and formed a conflicting engagement with another, a court of equity will not interfere either actively to compel performance of one contract, or negatively to prevent the performance of the other. *Willard, Eq.* 278; *Kemble v. Kean*, 6 Sim. 333. The cases where injunctions have issued relate (1) to partnership agreements; (2) to property of some kind; (3) to express negative covenants. *Willard, Eq.* 277, 278.

(6) If the court should be of opinion that the alleged contract is complete, mutual, certain, and final, and that under it the plaintiff has no full, complete, and adequate remedy at law, the present bill will not lie for the following reasons: (1) It is prematurely brought. No injury to plaintiff (if any) can arise until the ball season of 1883 commences. As the plaintiff will not be actively engaged under the alleged contract until the regular season of 1883 opens, no damage can result until that time from the act which it is sought to enjoin. (2) There is no right to, or necessity for, an injunction, for it cannot appear, at the present time, that defendant will play ball during the season of 1883, in violation of said alleged contract. *De Rivafinoli v. Corsetti*, 4 Paige, 264; *De Pol v. Sohlke*, 7 Rob. (N. Y.) 283. If the injury be doubtful, eventual, or contingent, equity will not enjoin. *Rhodes v. Dunbar*, 57 Pa. 274; *Huckenstein's Appeal*, 70 Pa. 108. If the alleged injury is only problematical, according as other circumstances may or may not arise, or if there is no pressing need for an injunction, the court will not grant it until a tort has actually been committed. *Kerr, Injunc.* 339.

James Bakewell and J. S. Ferguson, contra.

ACHESON, D. J. (orally). Demurrer sustained and bill dismissed.

MCGOWIN v. REMINGTON.

(12 Pa. 56.)

Supreme Court of Pennsylvania. Sept. 20, 1849.

Appeal from district court, Allegheny county, in equity.

On the 6th September, 1847, Z. W. Remington filed a bill in equity, setting forth that, prior to the grievances complained of, he had been for many years a surveyor and regulator of the streets, lanes, and alleys of the city of Pittsburgh, and other places around said city, and as such had made many plans and plots of ground in said city and throughout said county, and maps of lands and grades of streets and roads, and drafts of surveys of plantations in other counties adjoining, and possessed certain furniture and instruments of surveying, which were of great value to him, a list of which is appended to this bill, and prayed to be made and taken as part thereof,—marked as "Exhibit A."

That on or about 1st April, 1843, intending to engage in other occupations and to remove from Pittsburgh, where he had before resided and had his office for several years, and reposing all confidence in the defendant, the defendant having been for several years under the complainant's tuition and under his service as a surveyor, the complainant, desirous and intending to benefit defendant, who purposed to succeed and follow in the business pursued by the complainant, left in the care and custody of defendant, and for the mere purpose of promoting the interest and business of defendant, all his plots of survey and plans, drafts and property, as set forth in Exhibit A, besides other plots and drafts, which he cannot recollect, that defendant might refer to and use in his said business until they would be required by complainant, he, complainant, expecting some day to resume his old business of surveyor at Pittsburgh, in case he should not succeed in his new occupation.

That complainant, after he had left the said plots, plans, drafts, and property with defendant, went to dwell in Beaver county, and left them in the office which complainant had occupied before and at his said departure from Pittsburgh, and the possession of which said office he gave up to defendant along with the said plots, plans, drafts, and furniture and instruments aforesaid, all which things are of real value to complainant, and very difficult and impossible to replace or procure, and no damages for which in a court of law could compensate.

That complainant had used efforts since to procure his papers, furniture, and instruments, to no purpose, defendant refusing to deliver them up, and now threatening that he will destroy them rather than give them up to complainant.

And complainant believes and is informed that the defendant is now engaged in copying many of said plots, plans, and drafts for his

own use, and to be used by him as a surveyor in and about said city of Pittsburgh and adjoining counties, to the great injury of complainant; and complainant believes that defendant is disposed and is likely to injure, and fraudulently intends to destroy or secrete said plots, plans, drafts, and instruments, so that complainant may not recommence his business.

That complainant returned to Pittsburgh in the spring of this year, and some time in July last went to defendant's office and demanded of defendant the return of his said plots, plans, drafts, and instruments, informing him that he had returned to Pittsburgh and opened an office, and resumed his business as a surveyor; defendant refused to deliver them to complainant, and said there were some of them he, defendant, could not get along without.

The bill then went on to propound interrogatories to the defendant touching the several allegations of fact before made, and prayed that McGowin be decreed to deliver up to the plaintiff the said plots, etc., and any copies thereof made since demand. The bill further prayed an injunction to restrain McGowin from copying, and from destroying, or injuring, or secreting said plots, etc., and a subpoena to answer. The exhibit, marked A, contained a detailed list of plots, drafts, furniture, instruments, etc., demanded.

The subpoena issued forthwith, and September 9, a bond having been filed, application was made for an injunction, which was awarded and issued. 4th October rule to plead, answer or demur by first Monday in November. 29th October demurrer filed, which was overruled 22d December, and a second special injunction awarded. 3d January, 1848, answer filed, and motion to dissolve injunction.

The answer was to the following effect: It admitted that Remington was a surveyor, and as such had in his possession plans, plots, maps, etc., such as were specified in the bill, with certain exceptions, particularized in a schedule of explanations; that he removed to Beaver, and that respondent occupied his office after he left. The answer affirmed that the plans, etc., were greatly overrated in value, and have no such peculiar characteristics as to make them subjects of equity jurisdiction, by reason of their unique and original description; that most, if not all of them, could be supplied or substituted from other offices, and from private individuals, and from the public records of the county and state, being generally copied, and mostly from papers unofficial and unauthenticated. It affirmed that the plans, etc., belonged, some of them to the respondent, some to other persons, and denied the demand for them, etc.

The complainant filed a replication, and took evidence of his having made the demand mentioned in his bill. On 13th January, 1849, the cause having been heard on the bill, answer, exhibits, and proofs, and on

argument of counsel, the court ordered and decreed that the clerk of the court do deliver to the complainant the papers, maps, and plans, which have been placed by order of the court in his custody, and it is ordered and decreed further that the defendant deliver unto Read Washington, Esq., one of the masters in chancery, all the plots, plans, drafts, furniture, and instruments, left in defendant's possession as set forth in the bill of complainant, and which are not now in the possession of the clerk of this court, and also of any copies thereof which may have been made by respondent since the day of the demand thereof stated in the bill, and that the master have power, and is hereby required to ascertain by interrogatories to be exhibited in writing to defendant, whether there are any of the said plans, maps, plots, drafts, furniture, or instruments disclosed in said bill in his possession undelivered, and that the master require defendant to answer thereto upon oath, and to inquire upon interrogatories of defendant, to be administered to him under oath, what copies of or copying from said papers he may have made, and whether the same have been delivered up; and that said master make report (if required by further order) to this court thereof.

And further ordered that the injunction heretofore issued be continued and made perpetual, and that the said master deliver to the complainant the said plans, plots, drafts, furniture, and instruments which may be placed in his hands by virtue of this decree.

And further ordered that the costs and fees in this suit be taxed by the clerk, and that the bill thereof be immediately paid by the defendant into court.

On 20th January, 1849, defendant appealed from this decree, and 20th June following decree was made for a specific delivery, for refusing obedience to which a rule for attachment was taken, and on 4th September respondent appealed. In this court these exceptions were taken:

(1) Want of jurisdiction over subject-matter of the bill.

(2) The bill presents no sufficient ground for the interference of a court of equity in Pennsylvania.

(3) The courts of law have adequate remedies.

(4) The decree covers some descriptions of property which are not the subject of equity jurisdiction under any state of facts.

Craft & McCandless, for appellant. Mr. Dunlop, for appellee.

BELL, J. The defendant having failed to sustain, by proof, his allegation of sale or gift of the articles sought to be recovered by this bill, the contest in this court is reduced to two questions: First, whether the bill presents sufficient grounds to warrant the interference of a court of equity, in this state, under the statute conferring equitable

jurisdiction? Secondly, whether that portion of the decree which covers the surveying instruments and furniture described in the exhibits annexed to the bill can be sustained?

As to the first point, the defendant insists that the only remedy is at law. Though the action of replevin is, with us, a broader remedy than in England, lying in all cases where one man improperly detains the goods of another, it is in no instance effective to enforce a specific return of chattels, since a claim of property and bond given is always sufficient to defeat reclamation, no matter what may be the eventual issue of the contest. As, therefore, our common-law tribunals are as powerless for such a purpose, as the similar English courts, the propriety of exerting the equitable jurisdiction now invoked must depend with us on the same reasons that are deemed sufficient to call it into action there. Here, as there, the inquiry must be whether the law affords adequate redress by a compensation in damages, where the complaint is of the detention of personal chattels. If not, the aid of a court of chancery will always be extended to remedy the injury, by decreeing a return of the thing itself.

The precise ground of this jurisdiction is said to be the same as that upon which the specific performance of an agreement is enforced, namely, that fruition of the thing, the subject of the agreement, is the object, the failure of which would be but illy supplied by an award of damages. *Lowther v. Lowther*, 13 Ves. 389. In the application of this rule some difficulty has been experienced. The examples afforded by the English books are usually those cases, where, from the nature of the thing sought after, its antiquity, or because of some peculiarity connected with it, it cannot easily, or at all, be replaced. Of these may be instanced the title deeds of an estate and other muniments of property,—valuable paintings (*Lowther v. Lowther*, supra); an antique silver altar piece (*Duke of Somerset v. Cookson*, 3 P. Wms. 389); an ancient horn, the symbol of tenure, by which an estate is held (*Pusey v. Pusey*, 1 Ves. 273); heirlooms (3 Ves. & B. 18); and even a finely carved cherry-stone (*Amb. 77*). Such articles as these are commonly esteemed not altogether, or perhaps at all, for their intrinsic value, but as being objects of attachment or curiosity, and, therefore, not to be measured in damages by a jury, who cannot enter into the feelings of the owner. So too the impossibility, or even great difficulty, of supplying their loss, may put damages out of the question as a medium of redress. But these are not the exclusive reasons why chancery interferes, for there may be cases in which the thing sought to be recovered is susceptible of reproduction or substitution, and yet where damages could not be so estimated as to cover present loss or compensate its future consequent inconvenience. And I take it

this is always so, where, from the nature of the subject or the immediate object of the parties, no convenient measure of damages can be ascertained; or, where nothing could answer the justice of the case but the performance of a contract in specie. Of this *Buxton v. Lister*, 3 Atk. 384, furnishes an example in the analogous instance of a contract for the sale of personalty,—contracts, which are most commonly left to be dealt with at law. It was a bill to enforce the performance of an agreement for the purchase of several large parcels of growing wood, to be severed by the defendants, who were to have eight years to dispose of it, and to pay for it in six yearly installments. Lord Hardwicke was, at first, extremely reluctant to entertain the bill, but after discussion came to the conclusion that, though relating to a personal chattel, it was such an agreement that the plaintiff might come into chancery for a specific performance. He instanced the case of *Taylor v. Neville*, which was a bill for the performance of articles for the sale of eight hundred tons of iron, to be paid for in a certain number of years, by installments, where the decree prayed for was made; and proceeded to observe: "Such sort of contracts as these differ from those that are immediately to be executed. There are several circumstances which may concur. A man may contract for the purchase of a great quantity of timber, as a ship carpenter, by reason of the vicinity of the timber; and this is on the part of the buyer. On the part of the seller, suppose a man wants to clear his land in order to turn it to a particular sort of husbandry; there nothing can answer the justice of the case but the performance of the contract in specie." Similar in principle is the case of *Falls v. Reid*, 13 Ves. 70, where the plaintiffs prayed the restoration of an engraved silver snuffbox, used for many years by a society, as the symbol of their association; and *Nutbrown v. Thomson*, where a tenant brought a bill against his lessor, who, under the pretense of the tenant's covenant, had repossessed himself of the land, and seized upon the stock of cattle, which by the lease the tenant was to enjoy for seven years. The objection was that the tenant's remedy, if he was entitled to one at all, was at law, in damages. But how, asked Lord Eldon, are damages to be estimated in such a case? The direction to a jury must be to give, not the value of the chattels, but their value to the tenant! A similar question may well be propounded in our case. By what standard would you measure the injury the plaintiff may sustain in futuro from being deprived, even for a brief period, of the use of papers essential to the prosecution of his business? Their intrinsic value might, perhaps, be ascertained by an estimate of the labor necessary to their reproduction, admitting the means to be at hand, and within the power of the

plaintiff. But how could a tribunal ascertain the probable loss which, in the meantime, might be sustained? The present pecuniary injury might be little or nothing, and so possibly of the future; or it might be very great, depending upon the unascertainable events of coming time, as these may be influenced by the misconduct of the defendant. These considerations show, I think, the case is not one for damages. Besides, as many of the maps, plans, surveys, and calculations are said to be copies of private papers, we are by no means satisfied they could be replaced at all. Certainly not without permission of the owners; a risk to which the plaintiff ought not unnecessarily to be exposed. If to these reflections we add the fact that some of these documents are the original work of the plaintiff, of value as being predicated upon data possibly no longer accessible, a wrong is perpetrated which a chancellor ought not to hesitate in relieving. It is enough for this purpose that a perfect relief at law is not apparent. The thing to be guarded against is, not the invasion of the defendant's rights, for he stands here absolutely without any, except the common interest every citizen has in preserving the proper line of distinction that divides the jurisdiction and limits the powers of the several courts. What is to be avoided is an unnecessary trespass upon the province of the common-law tribunals, and this is to be tested by the simple query whether they offer a full remedy for the wrong complained of?

But there is another ground upon which this proceeding may be sustained. In *Falls v. Reid*, the snuffbox was deposited with the defendant, as a member of the society, upon certain terms, to be redelivered upon the happening of certain events. Lord Rosslyn held that under these facts, the defendant was a depository on an express trust which, upon a common ground of equity, gave the plaintiff title to sue in that court; and in this he was supported by Lord Eldon, in the subsequent case of *Nutbrown v. Thornton*. According to the proof in our case, the papers and documents claimed were left with the defendant under the express understanding that they were to be redelivered whenever the plaintiff should see fit to resume the business of his then profession in this city. It is then the case of direct confidence violated,—a spell sufficiently potent to call into vigorous activity the authority invoked.

As to the second question, it is perhaps enough to say that, when once a court of equity takes cognizance of a litigation, it will dispose of every subject embraced within the circle of contest, whether the question be of remedy or of distinct yet connected topics of dispute. If the jurisdiction once attaches from the nature of one of the subjects of contest, it may embrace all of them, for equity abhors multiplicity of suits. Thus, in the case last cited, the chancellor ruled

that where a person is found wrongfully in possession of a farm, over which the court had undoubted power, and also in possession of the stock upon it, at the same time and under the effect of the same wrong, the court will undoubtedly make him account for and deliver back the whole. In the case at bar the surveying instruments and office

furniture stand in the same category with the maps, drafts, etc., were delivered to the defendant at the same time, and are withheld by an exertion of the same wrong. In short, they enter into and make part of the same transaction, and may, therefore, be the objects of the same measure of redress.

Decree affirmed.

PROSPECT PARK & C. I. R. CO. v. CONEY ISLAND & B. R. CO.

(39 N. E. 17, 144 N. Y. 152.)

Court of Appeals of New York. Dec. 11, 1894.

Appeal from supreme court, general term, Second department.

Action by the Prospect Park & Coney Island Railroad Company against the Coney Island & Brooklyn Railroad Company for specific performance. From a judgment of the general term (21 N. Y. Supp. 1046) reversing a judgment for plaintiff, it appeals. Reversed.

George W. Wingate, for appellant. William N. Dykman, for respondent.

BARTLETT, J. The parties to this action entered into a contract June 1, 1882, and the plaintiff seeks to compel its specific performance. The special term rendered judgment for plaintiff; the general term reversed the judgment; and the plaintiff comes here under the usual stipulation in case of affirmation. The reversal was for error both of law and fact, and, the failure to insert a certificate that the case contains all the evidence having been cured by the amendment of the return by the supreme court, we are called upon to review the facts as well as the law.

At the time of making the contract, the plaintiff owned a steam surface railroad, usually known as "Culver's Coney Island Railroad," which extended from Coney Island to a depot at the corner of Ninth avenue and Twentieth street, in the city of Brooklyn, and adjoining Greenwood Cemetery; the plaintiff also owned certain horse-car railroads, which were entirely distinct from the steam railroad, extending from the depot to Fulton ferry; the plaintiff also owned a charter entitling it to construct a horse-car line from the depot to Hamilton Ferry and other points. The defendant, at the time of executing the contract, was operating certain horse-car lines which ran from Hamilton, Fulton, and other ferries, and from the East River bridge, to Ninth street and Ninth avenue, and through Ninth avenue to Fifteenth street, on Fifteenth street to Coney Island avenue, and thence to Coney Island. These lines were operated wholly by horses. By the contract the plaintiff granted the defendant the right to use its tracks on Ninth avenue from Fifteenth street to the depot at Ninth avenue and Twentieth street, free of charge, for 21 years from June 1, 1882. The defendant covenanted to run during the spring, summer, and fall months, to plaintiff's depot, cars to connect with the ferries and all plaintiff's trains to and from Coney Island. The plaintiff agreed to furnish defendant necessary terminal facilities at the depot. This contract was obviously advantageous to both parties.

The plaintiff secured passengers to Coney Island from defendant's lines, and the defendant greatly increased its travel by having a direct connection with steam transit to Coney Island. The defendant's horse-car line to Coney Island could not successfully compete with plaintiff's steam route. The plaintiff provided defendant with the necessary terminal facilities as required, and the contract was acted upon by both parties until the month of October, 1889. At that time there was a change in defendant's management, and the company contracted for an electrical equipment from the Parade Ground to Coney Island, commonly known as the "Trolley System." The plaintiff, in May, 1890, finding that defendant was not running cars to the depot as required by the contract, requested performance, and was advised that the defendant was under no obligations to run the cars, and did not intend to do it. This action was commenced the following October.

It is insisted by the defendant that the adoption of the trolley system is, in contemplation of law, a use of steam, under the clause in the contract which provides that if the defendant shall use steam as a motive power between Ninth avenue and Fifteenth street, in the city of Brooklyn and Coney Island, either party can terminate the contract on six months' notice, and that the correspondence and answer in this case are equivalent to notice, and the contract no longer exists. We agree with the special term that the electrical system adopted by the defendant cannot be regarded as the use of steam as a motive power. *Hudson River Tel. Co. v. Watervliet Turnpike & Ry. Co.*, 135 N. Y. 393, 402, 32 N. E. 148. It would be in disregard of the natural and obvious meaning of language to hold otherwise. We cannot agree with the general term that the use of the words "steam as a motive power" was only another form of referring to rapid transit, by whatever means accomplished. To so hold would be to make a new contract for the parties.

The defendant insists, further, that by reason of certain acts of plaintiff, and by changes in the surrounding circumstances, it would be inequitable and unjust to enforce a specific performance of the contract. This leads us to consider some additional facts disclosed by the record.

On the 9th of December, 1885, plaintiff leased to the Atlantic Avenue Railroad Company all its franchises to construct and operate horse-car railroads in the city of Brooklyn, and on May 27, 1887, in pursuance of chapter 282 of the Laws of 1886, conveyed said rights and interests absolutely. The lease and conveyance were made expressly subject to the contract in question, and reserved all the defendant's rights thereunder. They also required the Atlantic Avenue Railroad Company to operate the Vanderbilt Avenue Railroad Company as had been previ-

ously done by the plaintiff. The defendant made no objection to this transfer until after its refusal to perform the contract. Defendant urges that it was greatly damaged by the fact that the Atlantic Avenue Railroad Company had completed, under the franchise obtained from plaintiff, a horse-car line to the Hamilton ferry. We are unable to perceive how defendant has suffered any damage, in view of the fact that it purchased with full knowledge of plaintiff's franchise, and its desire to dispose of the same. It appears by the uncontradicted evidence that defendant sought to purchase of plaintiff this franchise to complete a route to the Hamilton ferry either just before or about the time the contract was executed.

The defendant further contends that the plaintiff, under a proper construction of the contract, was not at liberty to sell out its street-car interests, although not restrained by any positive provision. This contention is based mainly on the alleged fact that the Atlantic Avenue Railroad Company is an active rival of defendant, and did not have the same motive to deal fairly with defendant that plaintiff had while seeking to build up its Coney Island business. The principal complaint against the Atlantic Avenue Railroad Company is based upon the manner in which it performed the contract in regard to defendant's terminal facilities at the depot, corner Ninth avenue and Twentieth street. The evidence does not satisfy us that there was any persistent effort to delay the cars of defendant at that point, or to prevent passengers from the steam road selecting from the cars in waiting the one in which to ride, without undue interference. We think the contract was substantially performed by plaintiff and its grantee in regard to terminal facilities of defendant, and, even if this were not the case, the defendant could have compelled the observance of its contract rights in every particular by resort to the court. The fact already referred to, that defendant continued to act under the contract for more than four years after this lease to the Atlantic Avenue Railroad Company, without objection, must be taken very strongly against it in a court of equity. It seems to us very clear that when the management of defendant was changed in October, 1889, and the road from the Parade Ground to Coney Island was operated by electricity, it at once became an active and successful rival of the plaintiff in securing passengers to and from Coney Island, and had every motive to rid itself of the contract, if it could be legally done. We agree with the learned trial judge that while it is impossible, under the state of the proofs, to determine to what extent plaintiff has been damaged by defendant's adoption of the trolley system, yet it is clear that it has suffered considerable loss. It is, of course, entirely legitimate for defendant to secure to itself whatever share of the Coney Island travel it can by the exercise of

proper business methods, but we are unable to perceive any reason, under the proofs as presented, why defendant should be released from the obligations of a contract entered into in good faith by both parties, and that has been practically construed by years of performance. It may very well be that, under a contract having 21 years to run, there may be such a change of conditions as will affect unfavorably the one party or the other; but this offers no reason for refusing specific performance, unless subsequent events have made performance by the defendant so onerous that the enforcement would impose great hardship and cause little or no benefit to the plaintiff. *Trustees v. Thacher*, 87 N. Y. 316, 317; *Murdfeldt v. Railroad Co.*, 102 N. Y. 703, 7 N. E. 404. In the case at bar the plaintiff, we think, would be benefited by defendant running the transfer car in Ninth avenue from Fifteenth street to its depot at Twentieth street. On the other hand, it may be assumed that the defendant, by cheaper fare, and its ability to carry passengers to Coney Island without transfer, will be able to secure its full share of the passengers to and from the seashore. The result of compelling the specific performance of this contract will be to afford the general public an opportunity, when traveling over the line of defendant from the ferries, to make choice of the route they will take to Coney Island when arriving at Ninth avenue and Fifteenth street. While it may be somewhat to the disadvantage of defendant to perform its contract, under the present circumstances, when active competition exists between plaintiff and defendant, yet that fact presents no legal reason for discharging it from the obligations of its contract.

As a final point, the learned counsel for the defendant insists that equity will not enforce the specific performance of a contract having some years to run, which requires the exercise of skill and judgment, and a continuous series of acts. While there is some conflict in the cases, and all are not to be reconciled, yet the great weight of authority permits specific performance in the case at bar. The special term enjoined the defendant from operating any of its cars unless it performs its contract with the plaintiff. The provisions of this contract are neither complicated nor difficult, and are such as a court of equity can enforce, in its discretion. A few of the cases may be referred to, as illustrating the power vested in a court of equity to compel the specific performance of contracts similar to the one at bar. In *Storer v. Railroad Co.*, 2 *Younge & C. N. R.* 48, the court compelled the defendant to construct and forever maintain an archway and its approaches. The court said there was no difficulty in enforcing such a decree. In *Wilson v. Railway Co.*, 1 *L. R.* 9 *Eq.* 28, the defendant was compelled to erect and maintain a wharf. See, also,

Greene v. Railroad Co., L. R. 13 Eq. 44. In *Wolverhampton & W. R. v. London & N. W. R. R.*, L. R. 16 Eq. 433, the agreement between the two companies was that the defendant should work the plaintiff's line, and, during the continuance of the agreement, develop and accommodate the local and through trade thereof, and carry over it certain specific traffic. The bill was filed to restrain the defendant from carrying a portion of the traffic which ought to have passed over the plaintiff's line by other lines of the defendant. The point was made that the court could not undertake to enforce specific performance, because it would require a series of orders and a general superintendence to enforce the performance, which could not conveniently be administered by a court of justice. The injunction issued, and Lord Selborne said (page 438): "With regard to the argument that, upon the principles applicable to specific performance, no relief can be granted, I cannot help observing that there is some fallacy and ambiguity in the way in which, in cases of this character, those words 'specific performance' are used. * * * The common expression, as applied to suits known by that name, presupposes an executory, as distinct from an executed, agreement. * * * Confusion has sometimes arisen from transferring considerations applicable to suits for specific performance, properly so called, to questions as to the propriety of the court requiring something or other to be done in specie. * * * Ordinary agreements for work and labor to be performed, hiring and service, and things of that sort, out of which most of the cases have arisen, are not, in the proper sense of the word, cases for 'specific performance'; in other words, the nature of the contract is not one which requires the performance of some definite act, such as the court is in the habit of requiring to be performed by way of administering superior justice, rather than to leave the parties to their remedies at law. * * * The question is whether, the defendants being in possession, they are not at liberty to depart from the terms on which it was stipulated that they should have that possession." The American cases are equally clear. In *Lawrence v. Railway Co.*, 36 Hun, 467, the defendant was, among other things, to erect a depot at which all trains were to stop. Specific performance was decreed; the court holding that although, under

the agreement, the defendant could not be compelled to run trains upon its road, yet it might properly be enjoined from running any regular trains which did not stop at the station. The objection that the judgment in this case involves continuous acts, and the constant supervision of the court, is well met by the reasoning in *Central Trust Co. v. Wabash, St. Louis & P. Ry. Co.*, 29 Fed. 546, being affirmed as *Joy v. St. Louis*, 138 U. S. 1, 47, 50, 11 Sup. Ct. 243, where Judge Blatchford wrote the opinion. As to inconvenience, or circumstances which affect the interest of one party alone, constituting a reason why performance should not be decreed, the case of *Marble Co. v. Ripley*, 10 Wall. 339, 358, furnishes a clear discussion of the general principles involved. The rule established by the above and kindred cases is that a contract is to be judged as of the time at which it was entered into, and, if fair when made, the fact that it has become a hard one by the force of subsequent circumstances or changing events will not necessarily prevent its specific performance. See, also, *Stuart v. Railway Co.*, 15 Beav. 513; *Mortimer v. Capper*, 1 Brown, Ch. 156; *Jackson v. Lever*, 3 Brown, Ch. 605; *Paine v. Meller*, 6 Ves. 349; *Paine v. Hutchinson*, L. R. 3 Eq. 257; *Telegraph Co. v. Harrison*, 145 U. S. 459, 472, 473, 12 Sup. Ct. 900. A large number of other cases might be cited, sustaining the power of the court to decree the specific performance of this contract, but we do not deem it necessary. There can be no well-founded doubt as to the power of the court in the premises, and the important question is whether, in the exercise of a wise discretion, and in view of all the circumstances, specific performance should be decreed. After a most careful consideration of this case, we have reached the conclusion that the plaintiff is entitled to have the contract specifically performed. The order of the general term is reversed, and the judgment of the special term is affirmed, with costs in all the courts. All concur, except ANDREWS, C. J., who dissents on the ground that plaintiff, having established a rapid-transit road, although the propulsion is by electricity, has met the condition of the contract which entitled it to terminate such contract, or at least has placed itself in such a position that a court of equity will not enforce specific performance. Ordered accordingly.

WILLARD v. TAYLOE.

(8 Wall. 557.)

Supreme Court of the United States. Dec., 1869.

Appeal from the supreme court of the District of Columbia.

This was a suit in equity for the specific performance of a contract for the sale of certain real property situated in the city of Washington, in the District of Columbia, and adjoining the hotel owned by the complainant, Willard, and known as Willard's Hotel.

The facts out of which the case arose were as follows:

In April, 1854, the defendant leased to the complainant the property in question, which was generally known in Washington as "The Mansion House," for the period of ten years from the 1st of May following, at the yearly rent of twelve hundred dollars. The lease contained a covenant that the lessee should have the right or option of purchasing the premises, with the buildings and improvements thereon, at any time before the expiration of the lease, for the sum of twenty-two thousand and five hundred dollars, payable as follows: two thousand dollars in cash, and two thousand dollars, together with the interest on all the deferred instalments, each year thereafter until the whole was paid; the deferred payments to be secured by a deed of trust on the property, and the vendor to execute to the purchaser a warranty deed of the premises, subject to a yearly ground-rent of three hundred and ninety dollars.

At the time of this lease gold and silver, or bank bills convertible on demand into it, were the ordinary money of the country, and the standard of values. In 1861 the rebellion broke out, lasting till 1865. In the interval, owing to the influx of people, property in the metropolis used for hotels greatly increased in value, and as was alleged by Tayloe, who produced what he deemed a record to show the fact, the complainant, Willard, assigned an undivided half of the property which had been leased to him as above-mentioned to a brother of his. In December, 1861, the banks throughout the country suspended payments in specie, and in 1862 and 1863, the federal government issued some hundred millions of notes, to be used as money, and which congress declared should be a tender in the payment of debts. Coin soon ceased to circulate generally, and people used, in a great degree, the notes of the government to pay what they owed.

On the 15th of April, 1864, two weeks before the expiration of the period allowed the complainant for his election to purchase—the property having greatly increased in value since 1854, the year in which the lease was made—the complainant addressed a letter to the defendant, inclosing a check, payable to his order, on the Bank of America, in New York, for two thousand dollars, as

the amount due on the 1st of May following on the purchase of the property, with a blank receipt for the money, and requesting the defendant to sign and return the receipt, and stating that if it were agreeable to the defendant he would have the deed of the property, and the trust deed to be executed by himself, prepared between that date and the 1st of May. To this letter the defendant, on the same day, replied that he had no time then to look into the business, and returned the check, expressing a wish to see the complainant for explanations before closing the matter.

On the following morning the complainant called on the defendant and informed him that he had two thousand dollars to make the first payment for the property, and offered the money to him. The money thus offered consisted of notes of the United States, made by act of congress a legal tender for debts. These the defendant refused to accept, stating that he understood the purchase-money was to be paid in gold, and that gold he would accept, but not the notes, and give the receipt desired. It was admitted that these notes were at the time greatly depreciated in the market below their nominal value.¹ On repeated occasions subsequently the complainant sent the same amount—two thousand dollars—in these United States notes to the defendant in payment of the cash instalment on the purchase, and as often were they refused by him. On one of these occasions a draft of the deed of conveyance to be executed by the defendant, and a draft of the trust deed to be executed by the complainant, were sent for examination, with the money.

This last was prepared for execution by the complainant alone, and contained a provision that he might, if he should elect to do so, pay off the deferred payments at earlier dates than those mentioned in the lease. These deeds were returned by the defendant, accompanied with a letter expressing dissatisfaction at the manner in which he was induced to sign the lease with the clause for the sale of the premises, but stating that as he had signed it he "should have carried the matter out" if the complainant had proffered the amount which he knew he had offered for the property, meaning by this statement, as the court understood it, if he had proffered the amount stipulated in gold. No objection was made to the form of either of the deeds.

Soon afterwards the defendant left the city of Washington, with the intention of being absent until after the 1st of May.

On the 29th of April the complainant, finding that the defendant had left the city, and perceiving that the purchase was not about to be completed within the period prescribed

¹ Between the 15th of April and May 1st, 1864, one dollar in gold was worth from one dollar and seventy-three cents to one dollar and eighty cents in United States notes.

by the covenant in the lease, and apprehensive that unless legal proceedings were taken by him to enforce its execution his rights thereunder might be lost, instituted the present suit.

In the bill he set forth the covenant giving him the right or option to purchase the premises; his election to purchase; the notice to the defendant; the repeated efforts made by him to obtain a deed of the property; his offer to pay the amount required as the first instalment of the purchase-money in United States notes, and to execute the trust deed stipulated to secure the deferred payments, and the refusal of the defendant to receive the United States notes and to execute to him a deed of the premises. It also set forth the departure of the defendant from the city of Washington, and his intended absence beyond the 1st of May following, and alleged that the appeal was made to the equitable interposition of the court, lest on the return of the defendant he might refuse to allow the complainant to complete the purchase, and urge as a reason that the time within which it was to be made had passed. The bill concluded with a prayer that the court decree a specific performance of the agreement by the defendant, and the execution of a deed of the premises to the complainant; the latter offering to perform the agreement on his part according to its true intent and meaning.

The bill also stated some facts, which it is unnecessary to detail, tending to show that the acquisition of the property in question was of especial importance to the complainant.

The answer set up that the complainant, even on his own showing, had no case; that there was no proper tender; that even if the complainant once had a right to file a bill in his sole right—the way in which the present bill was filed—he had lost this right by the transfer of the half to his brother; that the complainant had not demanded an execution even of the contract which he himself set forth, but by the drafts of the trust deed sent to Tayloe, and which was the trust deed of which he contemplated the execution, he proposed to pay, at his own option, the whole purchase-money before the expiration of the ten years, and thus would interfere with the duration of that security and investment in the identical property leased, which had been originally contemplated and provided for; thus subjecting the defendant to risk and expense in making a new investment. The answer concluded with an allegation, that “by the great national acts and events which had occurred when the complainant filed his bill, and which were still influencing all values and interests in the country, such a state of things had arisen and now existed, as according to equity and good conscience ought to prevent a decree for specific performance in this case, upon a demand made on the last day of a term of ten years, even

if in strict law (which was denied) the complainant was entitled to make such demand.”

Both Tayloe and Willard were examined as witnesses. The former testified, that when the lease was executed he objected to a stipulation for a sale of the premises, and that Willard said it should go for nothing. Willard swore that he had said no such thing.

The court below dismissed the bill, and Willard took the present appeal.

Curtis, Poland & Howe, for appellant. Cox & McPherson, contra.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court.

The covenant in the lease giving the right or option to purchase the premises was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and being under seal must be regarded as made upon a sufficient consideration, and, therefore, one from which the defendant was not at liberty to recede. When accepted by the complainant by his notice to the defendant, a contract of sale between the parties was completed. *Railroad Co. v. Bartlett*, 3 Cush. 224; *Welchman v. Spinks*, 5 Law T. (N. S.) 385; *Warner v. Willington*, 3 Drew. 523; *Railroad v. Evans*, 6 Gray, 25. This contract is plain and certain in its terms, and in its nature and in the circumstances attending its execution appears to be free from objection. The price stipulated for the property was a fair one. At the time its market value was under fifteen thousand dollars, and a greater increase than one-half in value during the period of ten years could not then have been reasonably anticipated.

When a contract is of this character it is the usual practice of courts of equity to enforce its specific execution upon the application of the party who has complied with its stipulations on his part, or has seasonably and in good faith offered, and continues ready to comply with them. But it is not the invariable practice. This form of relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case. The jurisdiction, said Lord Erskine (12 Ves. 332), “is not compulsory upon the court, but the subject of discretion. The question is not what the court must do, but what it may do under [the] circumstances, either exercising the jurisdiction by granting the specific performance or abstaining from it.”

And long previous to him Lord Hardwicke and other eminent equity judges of England had, in a great variety of cases, asserted the same discretionary power of the court. In *Joynes v. Statham*, 3 Atk. 388, Lord Hardwicke said: “The constant doctrine of this

court is, that it is in their discretion, whether in such a bill they will decree a specific performance or leave the plaintiff to his remedy at law." And in *Underwood v. Hitchcox*, 1 Ves. Sr. 279, the same great judge said, in refusing to enforce a contract: "The rule of equity in carrying agreements into specific performance is well known, and the court is not obliged to decree every agreement entered into, though for valuable consideration, in strictness of law, it depending on the circumstances."

Later jurists, both in England and in the United States, have reiterated the same doctrine. Chancellor Kent, in *Seymour v. Delancy*, 6 Johns. Ch. 222, upon an extended review of the authorities on the subject, declares it to be a settled principle that a specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court upon a view of all the circumstances; and Chancellor Bates, of Delaware, in *Godwin v. Collins*, recently decided, upon a very full consideration of the adjudged cases, says, that a patient examination of the whole course of decisions on this subject has left with him "no doubt that, as a matter of judicial history, such a discretion has always been exercised in administering this branch of equity jurisprudence."

It is true the cases cited, in which the discretion of the court is asserted, arose upon contracts in which there existed some inequality or unfairness in the terms, by reason of which injustice would have followed a specific performance. But the same discretion is exercised where the contract is fair in its terms, if its enforcement, from subsequent events, or even from collateral circumstances, would work hardship or injustice to either of the parties.

In the case of *City of London v. Nash*, 1 Ves. Sr. 12, the defendant, a lessee, had covenanted to rebuild some houses, but, instead of doing this, he rebuilt only two of them, and repaired the others. On a bill by the city for a specific performance Lord Hardwicke held that the covenant was one which the court could specifically enforce; but said, "The most material objection for the defendant, and which has weight with me, is that the court is not obliged to decree a specific performance, and will not when it would be a hardship, as it would be here upon the defendant to oblige him, after having very largely repaired the houses, to pull them down and rebuild them." In *Faine v. Brown* (cited in *Ramsden v. Hylton*, 2 Ves. Sr. 306) similar hardship, flowing from the specific execution of a contract, was made the ground for refusing the decree prayed. In that case the defendant was the owner of a small estate, devised to him on condition that if he sold it within twenty-five years one-half of the purchase-money should go to his brother. Having contracted to sell the property, and refusing to carry out the contract under the pretence that he was intoxi-

cated at the time, a bill was filed to enforce its specific execution, but Lord Hardwicke is reported to have said that, without regard to the other circumstance, the hardship alone of losing half the purchase-money, if the contract was carried into execution, was sufficient to determine the discretion of the court not to interfere, but to leave the parties to the law.

The discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity. No positive rule can be laid down by which the action of the court can be determined in all cases. In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for if that result would follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate that result. If that result can be thus obviated, a specific performance will generally in such cases be decreed conditionally. It is the advantage of a court of equity, as observed by Lord Redesdale in *Davis v. Hone*, 2 Schoales & L. 348, that it can modify the demands of parties according to justice, and where, as in that case, it would be inequitable, from a change of circumstances, to enforce a contract specifically, it may refuse its decree unless the party will consent to a conscientious modification of the contract, or, what would generally amount to the same thing, take a decree upon condition of doing or relinquishing certain things to the other party.

In the present case objection is taken to the action of the complainant in offering, in payment of the first instalment stipulated, notes of the United States. It was insisted by the defendant at the time, and it is contended by his counsel now, that the covenant in the lease required payment for the property to be made in gold. The covenant does not in terms specify gold as the currency in which payment is to be made; but gold, it is said, must have been in the contemplation of the parties, as no other currency, except for small amounts, which could be discharged in silver, was at the time recognized by law as a legal tender for private debts.

Although the contract in this case was not completed until the proposition of the de-

fendant was accepted in April, 1864, after the passage of the act of congress making notes of the United States a legal tender for private debts, yet as the proposition containing the terms of the contract was previously made, the contract itself must be construed as if it had been then concluded to take effect subsequently.

It is not our intention to express any opinion upon the constitutionality of the provision of the act of congress, which makes the notes of the United States a legal tender for private debts, nor whether, if constitutional, the provision is to be limited in its application to contracts, made subsequent to the passage of the act. See *Hepburn v. Griswold*, 8 Wall. 603. These questions are the subject of special consideration in other cases, and their solution is not required for the determination of the case before us. In the view we take of the case, it is immaterial whether the constitutionality of the provision be affirmed or denied. The relief which the complainant seeks rests, as already stated, in the sound discretion of the court; and, if granted, it may be accompanied with such conditions as will prevent hardship and insure justice to the defendant. The suit itself is an appeal to the equitable jurisdiction of the court, and, in asking what is equitable to himself, the complainant necessarily submits himself to the judgment of the court, to do what it shall adjudge to be equitable to the defendant.

The kind of currency which the complainant offered, is only important in considering the good faith of his conduct. A party does not forfeit his rights to the interposition of a court of equity to enforce a specific performance of a contract, if he seasonably and in good faith offers to comply, and continues ready to comply, with its stipulations on his part, although he may err in estimating the extent of his obligation. It is only in courts of law that literal and exact performance is required. The condition of the currency at the time repels any imputation of bad faith in the action of the complainant. The act of congress had declared the notes of the United States to be a legal tender for all debts, without, in terms, making any distinction between debts contracted before, and those contracted after its passage. Gold had almost entirely disappeared from circulation. The community at large used the notes of the United States in the discharge of all debts. They constituted, in fact, almost the entire currency of the country in 1864. They were received and paid out by the government; and the validity of the act declaring them a legal tender had been sustained by nearly every state court before which the question had been raised. The defendant, it is true, insisted upon his right to payment in gold, but before the expiration of the period prescribed for the completion of the purchase, he left the city of Washington, and thus cut off the possibility of any other tender than

the one made within that period. In the presence of this difficulty, respecting the mode of payment, which could not be obviated, by reason of the absence of the defendant, the complainant filed his bill, in which he states the question which had arisen between them, and invokes the aid of the court in the matter, offering specifically to perform the contract on his part according to its true intent and meaning. He thus placed himself promptly and fairly before the court, expressing a willingness to do whatever it should adjudge he ought in equity and conscience to do in the execution of the contract.

Nothing further could have been reasonably required of him under the circumstances, even if we should assume that the act of congress, making the notes of the United States a legal tender, does not apply to debts created before its passage, or, if applicable to such debts, is, to that extent, unconstitutional and void.

In the case of *Chesterman v. Mann*, 9 Hare, 212, it was held by the court of chancery of England, that where an underlessee had a covenant for the renewal of his lease, upon paying to his lessor a fair proportion of the fines and expenses to which the lessor might be subjected in obtaining a renewal of his own term from the superior landlord, and on any increased rent upon such renewal, and there was a difference between the parties as to the amount to be paid by the underlessee, he might apply for a specific performance of the covenant, and submit to the court the amount to be paid. So here in this case, the complainant applies for a specific performance, and submits the amount to be paid by him to the judgment of the court.

We proceed to consider whether any other circumstances have arisen since the covenant in the lease was made, which render the enforcement of the contract of sale, subsequently completed between the parties, inequitable. Such circumstances are asserted to have arisen in two particulars; first, in the greatly increased value of the property; and second, in the transfer of a moiety of the complainant's original interest to his brother.

It is true, the property has greatly increased in value since April, 1854. Some increase was anticipated by the parties, for the covenant exacts, in case of the lessee's election to purchase, the payment of one-half more than its then estimated value. If the actual increase has exceeded the estimate then made, that circumstance furnishes no ground for interference with the arrangement of the parties. The question, in such cases, always is, was the contract, at the time it was made, a reasonable and fair one? If such were the fact, the parties are considered as having taken upon themselves the risk of subsequent fluctuations in the value of the property, and such fluctuations are not allowed to prevent its specific enforcement. *Wells v. Railway Co.*, 9 Hare, 129; *Low v.*

Treadwell, 12 Me. 441; *Fry*, Spec. Perf. §§ 235, 252. Here the contract, as already stated, was, when made, a fair one, and in all its attendant circumstances, free from objection. The rent reserved largely exceeded the rent then paid, and the sum stipulated for the property largely exceeded its then market value.

The transfer, by the complainant to his brother, of one-half interest in the lease, assuming now, for the purpose of the argument, that there is, in the record, evidence, which we can notice, of such transfer, in no respect affects the obligation of the defendant, or impairs the right of the complainant to the enforcement of the contract. The brother is no party to the contract, and any partial interest he may have acquired therein, the defendant was not bound to notice. The owners of partial interests in contracts for land, acquired subsequent to their execution, are not necessary parties to bills for their enforcement. The original parties on one side are not to be mixed up in controversies between the parties on the other side, in which they have no concern.

If the entire contract had been assigned to the brother, so that he had become substituted in the place of the complainant, the case would have been different. In that event, the brother might have filed the bill, and insisted upon being treated as representing the vendee. The general rule is, that the parties to the contract are the only proper parties to the suit for its performance, and, except in the case of an assignment of the entire contract, there must be some special circumstances to authorize a departure from the rule.

The court, says Chancellor Cottenham, in *Tasher v. Small*, 3 Mylne & C. 69, "assumes jurisdiction in cases of specific performance of contracts, because a court of law, giving damages only for the non-performance of the contract, in many cases, does not afford an adequate remedy. But in equity, as well as at law, the contract constitutes the right, and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining, as nearly as possible, in the same situation as the defendant had agreed that he should be placed in. It is obvious, that persons, strangers to the contract, and, therefore, neither entitled to the rights nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it."

When the complainant has received his deed from the defendant, the brother may claim from him a conveyance of an interest in the premises, if he have a valid contract for such interest, and enforce such conveyance by suit; but that is a matter with which the defendant has no concern.

It seems that the draft of the trust deed,

to secure the deferred payments, sent to the defendant for examination, was prepared for execution by the complainant alone, and contained a stipulation that he might, if he should so elect, pay off the deferred payments at earlier dates than those mentioned in the covenant in the lease; and it is objected to the complainant's right to a specific performance, that the trust deed was not drawn to be executed jointly by him and his brother, and that it contained this stipulation. A short answer to this objection is found in the fact, that the parties had disagreed in relation to the payment to be made, and until the disagreement ceased no deeds were required. It is admitted that the form of the trust deed was not such a one as the defendant was bound to receive, but as it was sent to him for examination, good faith and fair dealing required him to indicate in what particulars it was defective, or with which clauses he was dissatisfied. Whether it was the duty of the complainant or defendant to prepare the trust deed, according to the usage prevailing in Washington, is not entirely clear from the evidence. There is testimony both ways. The true rule, independent of any usage on the subject, would seem to be that the party who is to execute and deliver a deed should prepare it. It is, however, immaterial for this case, what rule obtains in Washington. Until the purchase-money was accepted, there was no occasion to prepare any instrument for execution. So long as that was refused the preparation of a trust deed was a work of supererogation. Besides, the execution of the trust deed by the complainant was to be simultaneous with the execution of a conveyance by the defendant. The two were to be concurrent acts; and if the complainant was to prepare one of them, the defendant was to prepare the other, and it is not pretended that the defendant acted in the matter at all.

The objection to the trust deed, founded upon the omission of the name of the complainant's brother as a co-grantor, does not merit consideration. All that the defendant had to do was to see that he got a trust deed, as security for the deferred payments, from the party to whom he transferred the title.

The defendant states in his testimony that when the lease was executed he objected to the stipulation for a sale of the premises, and that the defendant told him that it should go for nothing. And it has been argued by counsel that this evidence should control the terms of the covenant. The answer to the position taken is brief and decisive. First, nothing of the kind is averred in the answer; second, the testimony of the defendant in this particular is distinctly contradicted by that of the complainant, and is inconsistent with the attendant circumstances; and third, the evidence is inadmissible. When parties have reduced their con-

tracts to writing, conversations controlling or changing their stipulations are, in the absence of fraud, no more received in a court of equity than in a court of law.

Upon a full consideration of the positions of the defendant we perceive none which should preclude the complainant from claiming a specific performance of the contract.

The only question remaining is, upon what terms shall the decree be made? and upon this we have no doubt.

The parties, at the time the proposition to sell, embodied in the covenant of the lease, was made, had reference to the currency then recognized by law as a legal tender, which consisted only of gold and silver coin. It was for a specific number of dollars of that character that the offer to sell was made, and it strikes one at once as inequitable to compel a transfer of the property for notes, worth when tendered in the market only a little more than one-half of the stipulated price. Such a substitution of notes for coin could not have been in the possible expectation of the parties. Nor is it reasonable to suppose, if it had been, that the covenant would ever have been inserted in the lease without some provision against the substitution. The complainant must, therefore, take his decree upon payment of the

stipulated price in gold and silver coin. Whilst he seeks equity he must do equity.

The decree of the court below will, therefore, be reversed, and the cause remanded with directions to enter a decree for the execution, by the defendant to the complainant, of a conveyance of the premises with warranty, subject to the yearly ground-rent specified in the covenant in the lease, upon the payment by the latter of the instalments past due, with legal interest thereon, in gold and silver coin of the United States, and upon the execution of a trust deed of the premises to the defendant as security for the payment of the remaining instalments as they respectively become due, with legal interest thereon, in like coin; the amounts to be paid and secured to be stated, and the form of the deeds to be settled, by a master; the costs to be paid by the complainant.

The CHIEF JUSTICE, with NELSON, J., concurred in the conclusion as above announced,—that the complainant was entitled to specific performance on payment of the price of the land in gold and silver coin,—but expressed their inability to yield their assent to the argument by which, in this case, it was supported.

FISH v. LESER et al.

(69 Ill. 394.)

Supreme Court of Illinois. Sept. Term. 1873.

Appeal from superior court, Cook county; Joseph E. Gary, Judge.

This was a bill for specific performance, filed by John Fish against John Leser and Johanna Leser, his wife. The substance of the material facts is given in the opinion of the court.

Nissen & Barnum, for appellant. Wilkin-son, Sackett & Bean, for appellees.

CRAIG, J. This was a bill, filed in the superior court of Cook county, by John Fish, appellant, against John Leser and Johanna Leser, appellees, to enforce the specific performance of a contract for the sale of a certain lot in Chicago. Upon the hearing of the case, the court entered a decree dismissing the bill and the complainant prosecuted this appeal.

Courts of equity will not always enforce the specific performance of a contract. Such applications are addressed to the sound legal discretion of the court, and the court must be governed, to a great extent, by the facts of each case, as it is presented.

A specific performance will not be decreed unless the agreement has been entered into with perfect fairness, and without misapprehension, misrepresentation or oppression. *Frisby v. Ballance*, 4 Scam. 287; *Underwood v. Hitchcock*, 2 Ves. Sr. 279. The contract must be fair, equitable and just, and the complainant should be prepared to show that it will not be unjust or oppressive on the defendant to have the contract enforced. *Stone v. Pratt*, 25 Ill. 25.

We will, then, examine some of the leading facts in this case, and see if the complainant has brought himself within the principles announced, which are necessary in order to enable him to obtain the relief he asks, in a court of equity.

It appears that the defendants, or one of them, in the fall of 1871, were the owners of the property in question, and had owned and resided upon it for many years. The appellees are foreigners by birth with but little education, and are not well acquainted with our language; they transacted but little business,—indeed, the evidence shows that John Leser has, for several years, been scarcely competent to transact any business; they can write, but are unable to read our writing.

The house in which they resided, on the property in question, together with other property on the same street, was destroyed by the fire of October 9, 1871. Previous to the fire their property was not desirable, and could not readily be sold in the market, on account of the bad repute of other houses on the same street. The fire, however, removed this objection to the street, and property immediately began to advance. Farwell & Co. commenced to build on the same street,

on the next block west, which also caused property to advance. These facts were unknown to the Lesers, but were well known to enterprising business men. Under these circumstances, the Lesers, soon after the fire, were sought out by one John P. White, a real estate agent in the city, who desired to get an agency to sell their property.

This property, at the time of the sale, as near as we are able to judge from the evidence, was worth \$30,000—some of appellees' witnesses place it as high as \$35,000, while appellant's witnesses fix its value at \$21,000 to \$22,000. Burt, who owned the east half of the same lot, testifies he fixed the price of his lot at \$30,000, but withdrew it from market, and would not sell at that price, and his opinion is this lot is worth that amount.

White had several interviews with the Lesers. He wanted to act as their agent; advised them to sell; claimed that property would depreciate rather than increase in value. He never informed them that Farwell & Co., and others, were buying and preparing to build in that neighborhood,—a fact that was well known to business men.

Johanna Leser, in her evidence, says: "White came again; said he had a man to buy the lot, and he would give \$20,000, and we told him we would not sell for that; he said it would not be worth more in ten years. My husband said, if you give me \$21,000 I will sell to you. This he refused. White told me to coax my husband to take \$20,000. I told him I would not. He then said, well, I will not take another step towards selling your lot, and before spring you will offer it to me for \$18,000."

During this time appellant was frequently at White's office, and he and White were negotiating on the lot.

White, in his testimony, says, they had given him verbal authority to sell the lot; that, after having several interviews, he called on them with an offer from appellant of \$20,000 cash for the property. This they did not decide to take, but the next day he called again to see if they would accept the offer he had made them for appellant. He prepared and took with him a paper for them to execute, authorizing him to sell the lot. After discussing the matter some time, they would not accept appellant's offer, but they made this proposition: they would take \$16,000 cash, and the purchaser assume and pay a mortgage of \$5,000 that was on the lot, and pay commissions to White; he informed them he did not believe appellant would give that, but he would make him the offer.

The next day, which was November 1st, White called on John Leser, where he and his two sons were at work, and obtained his signature to a paper, which turned out to be authority to sell the lot, which reads as follows:

"Chicago, Oct. 31, 1871.

"John P. White, real estate agent. In consideration of one dollar, by us received,

we hereby authorize you to sell our lot, being the west half of lot 7, in block 94, in the school section addition to Chicago, for the sum of twenty one thousand dollars (\$21,000) net; you to have all over that amount you can get, for your commissions for such sale. The terms of payment we require is all cash, except the assumption of a mortgage of \$5,000 by the buyer, now upon said lot; we to furnish abstract showing title good in us, subject to the said \$5,000 mortgage. This proposition good for ten days from date hereof.

"Yours, etc.,

"John Leser. [Seal.]

"Johanna Leser. [Seal.]"

White testifies that the paper was read to Leser, and he and his two sons understood what it was. But in this he is contradicted by Leser and his two sons. They swear a portion of it was read in a low tone, but none of them understood it. They did not know that Leser was giving any authority to White to sell the lot; supposed it was a writing that Leser would wait ten days before making a sale, but did not know it was anything further.

White then carried the paper to Johanna Leser, and she, as she testifies, saw her husband had signed it, and not knowing what it was, also executed the paper.

On November 8th White sold the property to appellant, by written contract, as follows:

"Chicago, Nov. 8, 1871.

"Received of John Fish five hundred dollars (\$500) to apply as a payment on the following described real estate, this day bargained and sold to the said Fish, to wit: the west half of lot seven (7), in block ninety-four (94), in the school section addition to Chicago, sold at and for the price or sum of twenty-one thousand dollars (\$21,000), upon the following terms of payment, to wit: the said Fish is to assume and pay a certain mortgage of five thousand (\$5,000) dollars, which is now upon said property, with interest from date hereof, according to its tenor and effect, and the remainder of the purchase money, to wit: fifteen thousand five hundred (\$15,500) dollars, as soon hereafter as we deliver him a good and sufficient deed of conveyance to the said described real estate, with release of dower, free and clear of all liens or incumbrances, except the above mentioned \$5,000 mortgage, which the said Fish assumes; we to furnish an abstract showing title good in us, said abstract to be delivered within ten days from date hereof, and the said deed to be delivered within thirty days from date hereof.

"Witness our hand and seals this day and date first above written.

"John Leser. [Seal.]

"Johanna Leser. [Seal.]

"By John P. White, Their Agent,
"John Fish."

When appellees were notified of the contract, they refused to ratify it.

Can it be said that this contract, which appellant is seeking to enforce, has been entered into with fairness, and without misapprehension? Important facts were artfully concealed from the Lesers by one who claimed to be their agent, and if they had been known, it cannot be pretended the authority would have been given to sell.

The fact is apparent, the Lesers, who were weak-minded and unacquainted with business,—terror-stricken with the great fire which, in a moment, swept away the home they had occupied for years,—were overreached by a shrewd real estate dealer, who acted in the interest of another, under the guise of a friend and agent of them.

The contract can neither be said to be fair, equitable, or just. To take from them property worth \$30,000 for \$21,000, when considered in connection with the other facts disclosed by this record, is an outrage that a court of equity cannot for a moment tolerate or sanction.

There is, however, another principle which, when applied to this case, forbids a court of equity from decreeing a specific performance of this contract. An agent employed to sell, cannot himself become the purchaser; or an agent employed to buy, cannot be the seller. And, upon the same principle, it is held that a contract made by one who acts as the agent of both parties may be avoided by either principal. Story, Ag. § 211.

Before this written authority to sell was given, White came to the Lesers with a proposition from appellant of \$20,000, and urged them to accept it. His commissions were to come from appellant. As soon as he executes the contract of sale, he goes with appellant to the recorder's office and has it placed on record. Under his counsel and advice, appellant makes a tender of the purchase money. He takes appellant to an attorney for advice, and introduces him; nor does he stop at this. He offers to pay appellees' counsel their fees, not to exceed \$1,000, if, upon an examination of the papers, they should advise and effect a ratification of the contract by appellees.

These facts tend to show that this agent was employed to buy as well as to sell. Appellees had bargained for the skill and labor of White, their agent, and had a right to expect and demand his undivided services in their behalf and for their interest. This they have not secured, and a court of chancery will not lend its aid to enforce a contract which, in equity, is regarded as constructively fraudulent.

Other questions have been discussed by the counsel on each side of this case, but, in the view we have taken of the case, it becomes unnecessary to decide them.

The decree of the superior court will be affirmed.

Decree affirmed.

STONE v. PRATT.

(25 Ill. 16.)

Supreme Court of Illinois. April Term, 1860.

Appeal from the superior court of Chicago.

This was a bill of chancery, filed by Horatio O. Stone against Jeremiah H. Pratt and Amos Pratt.

The bill charges, in substance, that, in 1849, one Calvin D'Wolf was the owner in fee of the north fifteen acres of the W. $\frac{1}{2}$, S. W. qr., sec. 34, T. 39 N., R. 14 E., in Cook county, Ill., and that, in May, 1852, by subsequent sales and conveyances, Amos Pratt acquired the title to said land; that on September 28, 1852, Amos Pratt, by an agreement in writing, sold the same, with other lands, to Clement H. D'Wolf for the sum of \$4,050, of which sum \$100 was paid in hand, and said D'Wolf agreed to pay the balance, as follows: \$600 in one year, \$670 in two years, \$670 in three years, \$670 in four years, \$670 in five years, and \$670 in six years from the date of the agreement, and to pay all assessments and taxes on the land. The agreement provided that, upon the performance on the part of the purchaser, Pratt should make and deliver to D'Wolf a quitclaim deed for the premises, with covenant of warranty as to the acts of Pratt only, and also provided for a forfeiture of the agreement, at the election of Pratt, in case of default of any of the payments, in which event D'Wolf was to be treated as tenant of Pratt.

The bill then charges that on September 23, 1853, Amos Pratt purchased certain other lands of one Warren Parker, for the sum of \$8,000, payable as follows: \$2,666.66 on October 10, 1853, the like sum on September 23, 1854, and the same sum on September 23, 1855; that, to secure the payment of the first installment, he assigned to Parker his agreement with D'Wolf, before stated, and the same, with his written agreement with Parker, was deposited with Brown & Hurd, to be held by them till Pratt's first installment became due; and if Pratt paid the same when due, the papers were to be returned to him, otherwise to be delivered to Parker, who was to have the right to sell at public sale the agreement between Pratt and D'Wolf, and retain out of the proceeds \$1,000 as liquidated damages for Pratt's default; that Pratt failed to pay Parker the first installment, and that he, on January 24, 1854, sold said agreement at public auction, having first given due notice of the sale, and that complainant became the purchaser of the same for the sum of \$1,000.

The complainant insisted that by said purchase he became the owner of all Pratt's right, title, and interest in the land, and the said agreement with D'Wolf, with power to enforce the same, and that if Pratt had any interest in the land, he held only a naked legal title as trustee for the complainant.

The bill then charged that on January 15,

1853, the complainant bought of Clement H. D'Wolf the said fifteen acres of land for \$4,225 to be paid in the manner following: \$275 cash; \$600 on September 28, 1853, and \$670 on September 28th in each of the years 1854, 1855, 1856, 1857, and 1858; that the contract gave complainant the right to make all the payments, except the first, to Amos Pratt, upon his agreement with D'Wolf, and that, upon payment in either way D'Wolf was to convey the fifteen acres to complainant; that after the purchase, by complainant, of the agreement between Amos Pratt and D'Wolf, the latter made a deed of the land to complainant, and the agreement between the complainant and D'Wolf was canceled; that complainant had requested Pratt to execute to him a deed for said fifteen acres of land, which he refused to do, and that the complainant had been informed that he had conveyed the premises to Jeremiah H. Pratt, his brother, and that the deed to him was without consideration, and made to defraud the complainant, and that Jeremiah H. Pratt had full notice of the rights and equities of complainant; that complainant had demanded a conveyance also from said Jeremiah H. Pratt, but that he refused to make it, and claimed to own the land.

The bill prayed for a decree compelling the Pratts to release and quitclaim the fifteen acre tract to the complainant, and for general relief.

Jeremiah H. Pratt answered the bill, and also filed a cross-bill, making Clement H. D'Wolf a party, praying for the cancellation of the agreement between Amos Pratt and D'Wolf as rescinded for nonpayment of the purchase money.

The complainant answered the cross-bill, and replications were filed to the several answers. The original bill was taken as confessed as to Amos Pratt. The cause was heard by the court upon the pleadings and proofs, and a decree entered, dismissing the original bill.

Scates, McAllister & Jewett, for appellant. S. W. Randall and Snapp & Cone, for appellees.

CATON, C. J. On the 23d of September, 1852, A. Pratt by indenture, agreed to sell, and convey to D'Wolf, or his assigns, several parcels of land for the gross sum of four thousand and fifty dollars, all on time except one hundred dollars; and D'Wolf, by the same instrument, agreed to pay the purchase money as therein stipulated.

On the 23d of September, 1853, Pratt agreed that certain covenants with one Parker should be performed on the 10th of October, 1853, and, upon his failure to do so, was to forfeit and pay the sum of one thousand dollars as stipulated damages, to secure which he deposited with Brown & Hurd the obligation of D'Wolf to pay him the purchase money, and they were authorized to deliver it to Parker, in case Pratt failed to perform or to

pay the thousand dollars. And Parker was authorized to sell this contract of D'Wolf, in open market, and thus raise the money with which to pay himself the thousand dollars.

Before the 11th of October, 1853, Pratt, alleging that he had been defrauded by Parker, forbade Brown & Hurd delivering the contract, which had been deposited with them, to Parker. On the 15th of January, 1853, Stone purchased of D'Wolf fifteen acres, part of the premises which Pratt had sold and agreed to convey to D'Wolf. Brown & Hurd delivered the contract which Pratt had left with them, as above stated, to Parker, who, on the 28th of January, 1854, sold it in pursuance of his original contract with Pratt, and Stone became the purchaser for one thousand dollars, which was just sufficient to pay the forfeiture provided for in the contract between Pratt and Parker.

Stone, insisting that by the purchase of the contract, he was entitled to recover the money due thereon in place of Pratt, and that Pratt was thereby in effect fully paid the purchase money for which he had agreed to convey the premises sold to D'Wolf, filed this bill to compel Pratt to convey to him the fifteen acres, which he had purchased of D'Wolf, parcel of that which D'Wolf had bought of Pratt.

With the view we take of the case, it is unnecessary to advert to the sale of the premises by A. Pratt to J. H. Pratt.

It is a well settled rule of law, that an entire contract cannot be divided so as to compel a party to perform it in parcels, either to different persons or at different times. When D'Wolf sold a part of the premises to Stone, he could not thereby impose the legal obligation upon Pratt to convey that portion to Stone, and the balance to himself. That would be making it in fact two contracts instead of one. It was asking him to make satisfaction of two instead of one. In case of disagreement it exposed him to two prosecutions instead of one, and required him to make two deeds instead of one. This is a hardship which the common law will never allow to be imposed upon a promisor or an obligor. Nor is this principle of the common law ignored by courts of equity, although in exceptional cases they will overlook it, where it is necessary to protect the rights of an innocent, fair, and bona fide purchaser against a contemplated fraud.

This is a bill for the specific performance of an agreement by one who at law has no claims whatever upon the defendant, at least in his own name. Such a bill is always addressed to the sound discretion of the court, which must be governed by the circumstances of each case as it is presented. In the case of *Lear v. Chouteau*, 23 Ill. 39, this court

said: "In order to induce a court of equity to enforce specifically a contract, it must be founded on a good consideration, it must be reasonable, fair and just. If its terms are such as our sense of justice revolts at, this court will not enforce it, though admitted to be binding at law." It may be added that the complainant must show no oppression or unconscionable advantage, when he comes into a court of conscience asking for a remedy beyond the letter of his strict rights. He must not ask for a favor beyond his technical legal rights when he bases his claim to that favor upon a hard, oppressive, technical advantage. He must stand before the court prepared to meet its scrutiny without a blush, relying upon the advocacy of a well regulated conscience in his favor. Such must not only be his own position, but he must show that it is not unjust or oppressive to the defendant, to compel him to perform specifically.

Let us then examine for a moment the position of these parties respectively. Waiving the question of the division of the contract, the complainant, before he could call on the defendant to convey to him this land, was obliged to satisfy an obligation which secured to the defendant about four thousand dollars. He attempts to do this, not by paying him or any one else having a right to receive the money, the actual amount due, or to become due, on the contract, but he purchases the contract at a forced sale for one thousand dollars. This is the extent of his merit. The defendant, by his contract with D'Wolf, was entitled to receive about the sum of four thousand dollars, before he could be asked, even by D'Wolf himself, to convey any portion of the premises. Now, what has he realized for this four thousand dollars' worth of land? Absolutely nothing. His claim, or right to receive the money, was sold (and upon the validity or effect of that sale we pass no opinion) to pay a forfeit. Nothing more,—nothing for which he had received value. Now all of this may have been a strictly legal transaction. The defendant, by his own folly, may have frittered away his legal right to this money or to the land, but it is not such a transaction as should induce a court of equity to throw down the legal barriers which surround the defendant, and compel him to do more for the ease and benefit of the complainant than the strict rules of law will give him. Equity will never give the pound of flesh, although it is in the bond, but will leave the law to give its value only. We shall not compel the defendant to recognize a dividing up of his obligations under this contract, but shall allow him, without regret, to insist upon his legal rights.

The decree of the court below is affirmed.

Decree affirmed.

THOMPSON v. WINTER.

(43 N. W. 796, 42 Minn. 121.)

Supreme Court of Minnesota. Nov. 30, 1889.

Appeal from district court, Redwood county; WEBBER, Judge.

John H. Bowers, for appellant *J. M. Thompson*, for respondent.

GILFILLAN, C. J. This is an action to compel specific performance of a contract in the nature of one to convey real estate. The defendant had purchased the land from the state, paying 15 per cent. of the purchase price, and receiving certificates of purchase. February 1, 1886, these parties entered into a contract in writing, whereby defendant agreed that, upon full performance on the part of the plaintiff, he would transfer by deed of assignment the said land certificates. Plaintiff was to pay therefor \$590, according to two promissory notes,—one for \$190, due October 1, 1886, with interest at 10 per cent., and one for \$400, due two years from February 1, 1886, with interest at 8 per cent.,—and pay all taxes and assessments, and the unpaid purchase money to the state. The plaintiff fully performed this contract on his part. In March, 1886, the parties made an oral agreement, by which defendant agreed to make certain improvements for the plaintiff on the land, by breaking, erecting buildings, and digging a well, for which plaintiff agreed to pay him the cost thereof, with interest; such payment not to be made before the expiration of five years from the time of making the improvements. Afterwards, pursuant to such agreement, defendant made such improvements to the amount of \$500, no part of which has been paid. The plaintiff was insolvent. On these facts the court below denied specific performance.

From the memorandum filed by the court below it appears that the specific performance was refused, in the exercise of what the court deemed its discretionary power, the reasons for so exercising that power being stated; that plaintiff has become insolvent; that the value of the improvements is equal to the purchase price; and that plaintiff can be compensated in damages. The mere fact that a person has a contract for the conveyance to him of real estate does not entitle him, as of right, to the interposition of a

court of equity to enforce it. The matter of compelling specific performance is one of sound and reasonable discretion,—of judicial, not arbitrary and capricious, discretion. There must be some reason, founded in equity and good conscience, for refusing the relief. Such reason has been generally found, by the court refusing it, in some mistake or fraud or unconscionableness in the contract, or in some laches on the part of the plaintiff changing the circumstances so as to make it inequitable to compel a conveyance, or where the claim is stale, or there is reason to believe it was abandoned. But, whatever the reason may be, it must have some reference to, some connection with, the contract itself, or the duties of the parties in relation to it. We have never found a case where the court refused the relief as a means of enforcing some independent claim of the defendant against the plaintiff, nor because the defendant had some independent claim which he might not be able to enforce against the plaintiff. If such could be regarded as an equitable reason for denying relief, every action of the kind might involve the investigation of all unclosed transactions between the parties, whether relating to the contract or subject-matter of the action, or entirely distinct from it. In this case there is no reason to suppose the contract other than a fair one. The plaintiff has been prompt in performing on his part, and in seeking his remedy. The defendant has a claim against plaintiff, entirely independent of the contract to convey, which claim, by the terms of the agreement under which it arose, was not to become due for more than three years after the time when he was to convey. The possibility that when it becomes due he may not be able to enforce it, by reason that plaintiff's insolvency may continue, does not make it inequitable to enforce this contract already matured. That a purchaser may have an adequate remedy by action for damages, although a reason for not holding what he has done to be part performance to take the case out of the operation of the statute of frauds, is of itself no reason for withholding the proper remedy, where the contract is valid under the statute. The order is reversed, and the court below will enter judgment on the findings of fact in favor of plaintiff for the relief demanded in the complaint.

FALCKE v. GRAY.

(4 Drew. 651.)

High Court of Chancery. 1859.

In this case the bill was filed for a specific performance of a contract entered into between the plaintiff, Mr. Falcke, and Mrs. Gray, one of the defendants, by which Mrs. Gray had agreed that, at the expiration of a six-months lease to the plaintiff of her furnished house, he should have the option of purchasing two china jars at the price of £40.

In January, 1859, the plaintiff, being desirous of finding a furnished house, applied to Mrs. Gray, who was willing to let hers, and, on looking over it, he observed the two jars, the subject of the suit. He had for twenty-five years carried on the business of a dealer in curiosities, china, etc., and was eminent in his trade, and was well acquainted with the prices which articles of this kind would fetch.

Shortly afterwards he had an interview with Mrs. Gray at her house; and Mr. Brend, from the office of Boyle & Bryden, estate and house agents, who were Mrs. Gray's agents in the matter, attended to advise Mrs. Gray. A discussion arose as to the terms of letting, and ultimately a rent of seven guineas per week was agreed upon, with an option to the plaintiff that he should, at the end of the term, be at liberty to purchase certain articles of furniture at a valuation, to be inserted in the agreement, including the two china jars, which were valued at £40.

With regard to the valuation of these jars at £40, it appeared from the evidence that Mr. Brend told Mrs. Gray that he did not know the value of the jars, but he should think they were worth £20 apiece; and the agreement was drawn up, putting the value of £40 on the jars, and was signed by Mrs. Gray and the plaintiff. On the 26th of January the plaintiff went to the house while his agent was taking the inventory, and then the jars had been removed; and on the same day Mrs. Gray came to Mr. Falcke's house, and informed him of the removal of the jars. During the interval between the 19th and the 26th of January Mrs. Gray, having begun to doubt whether the price placed on the jars was fair, was advised that it would be as well to take the opinion of Mr. Watson, also a dealer in curiosities; and, on the 26th, she accordingly went to Mr. Watson, and desired him to come in the evening to value the jars. This he did; and on seeing the jars he was so much struck with their beauty, etc., that he offered Mrs. Gray his check for £200 for them at once. Mrs. Gray then asked Mr. Watson if he thought she would be doing anything wrong in so selling them, and he told her it was all right; and she then took his check and Mr. Watson took away the jars. Mr. Watson was made a defendant to the bill.

The plaintiff now insisted that he was entitled to a decree for specific performance

against Mrs. Gray, and to delivery of the jars as against Mr. Watson; and on that part of the case the question was whether the transaction was a bona fide one on the part of Watson, or whether he knew of the contract between Mrs. Gray and the plaintiff. The defendant insisted that it was a contract for chattels, and could not be enforced.

The evidence as to the actual value of the vases was conflicting, but, putting it at the lowest, it greatly exceeded £40.

Mr. Baily and Mr. Waller, for plaintiff. Mr. Glasse and Jones Bateman, for Mrs. Gray. Mr. Greene and Mr. Speed, for Mr. Watson.

THE VICE CHANCELLOR (after stating the facts above stated). The first ground of defense is that, this being a bill for the specific performance of a contract for the purchase of chattels, this court will not interfere; but I am of opinion that the court will not refuse to interfere simply because the contract relates to chattels, and that if there were no other objection the contract in this case is such a contract as the court would specifically perform.

What is the difference in the view of the court between realty and personalty in respect to the question whether the court will interfere or not? Upon what principle does the court decree specific performance of any contract whatever? Lord Redesdale in *Harnett v. Yeilding*, 2 Schoales & L. 549, says: "Whether courts of equity in their determinations on this subject have always considered what was the original foundation for decrees of this nature, I very much doubt. I believe that, from something of habit, decrees of this kind have been carried to an extent which has tended to injustice. Unquestionably the original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed." So that the principle on which a court of equity proceeds is this: "A court of law gives damages for the nonperformance, but a court of equity says, 'that is not sufficient,—justice is not satisfied by that remedy'; and therefore a court of equity will decree specific performance, because a mere compensation in damages is not a sufficient remedy and satisfaction for the loss of the performance of the contract.

Now why should that principle apply less to chattels? If in a contract for chattels damages will be a sufficient compensation, the party is left to that remedy. Thus if a contract is for the purchase of a certain quantity of coals, stock, etc., this court will not decree specific performance, because a person can go into the market and buy similar articles, and get damages for any difference in the price of the articles in a court of law;

but, if damages would not be a sufficient compensation, the principle on which a court of equity decrees specific performance is just as applicable to a contract for the sale and purchase of chattels as to a contract for the sale and purchase of land.

In the present case the contract is for the purchase of articles of unusual beauty, rarity, and distinction, so that damages would not be an adequate compensation for non-performance; and I am of opinion that a contract for articles of such a description is such a contract as this court will enforce; and, in the absence of all other objection, I should have no hesitation in decreeing specific performance.

The next ground of defense is that the contract in the present case is a hard bargain between the plaintiff and Mrs. Gray; and it is insisted that the inadequacy in price is so great that on that ground the court will not decree specific performance. Now the price put on these jars was £40. What was their actual value? Certainly to talk of their value is to talk of something which is very artificial and fluctuating, depending upon the taste and caprice of the community; but still the jars derive their value from their beauty, distinction, and rarity, and those qualities give them a selling value. They have a value in the market. According to the plaintiff's own statement their value would be £100, or, if between persons not brokers, £125; and it is the interest of the plaintiff to represent their value as low as possible. A better test of their value is what Mr. Watson has given for them; and I think I may assume that £200 at least would be a fair price, though I cannot help thinking that their real value rather exceeded than fell short of that sum; but, taking £200 as the fair value, the price placed on the jars by Mr. Brend was only one-fifth of their selling value. That this was a hard bargain in the sense of its being for a very inadequate price there can be no doubt; and the defendant insists that, on this ground, the court will not enforce specific performance.

On the other hand, the plaintiff insists that, although it is true that in hard bargains, using the terms in one sense, the court will not decree specific performance, still that that does not apply to cases of mere inadequacy of price; and this is the question I have now to consider.

The general rule with regard to hard bargains is that the court will not decree specific performance, because specific performance is in the discretion of the court for the advancement of justice; such discretion, indeed, to be exercised, not according to caprice, but on strict principles of justice and equity. In the case of *White v. Damon*, 7 Ves. 30, Lord Eldon says: "I agree with Lord Rosslyn that giving a specific performance is matter of discretion, but it is not an arbitrary, capricious discretion. It must be

regulated upon grounds that will make it judicial." The principle upon which the court acts with respect to hard bargains appears to me to have been truly expressed by Lord Langdale in the case of *Wedgwood v. Adams*, 6 Beav. 600; and the passage in which he enunciates the principle has been quoted with approbation by Lord Justice Turner in *Watson v. Marston*, 4 De Gex, M. & G. 239. Lord Langdale in *Wedgwood v. Adams* says that the court exercises its discretion and decrees specific performance unless it would be highly unreasonable to do so, and that what is more or less unreasonable cannot well be defined. It must depend on the circumstances of each particular case.

As it is admitted by the plaintiff that in cases of hard bargains generally the court will not interfere, it is not necessary to go into any of the cases on the subject other than those which turn more or less on inadequacy of price; and here I may observe that in some cases the court has refused specific performance on the ground of the hardness of the bargain, where there has been not the least impropriety of conduct on the part of the person seeking specific performance. In most of the cases there has been some other ingredient besides mere inadequacy of price, but I will refer to those in which I find the opinion of the judges express on that particular point.

In *Young v. Clerk*, Prec. in Chan. 538, the defendant agreed to grant a lease of certain lands to the plaintiff for fourteen years at a rent of £40. The plaintiff had already been lessee of the same lands for many years, and knew that the value of the lands was not £40, but £167, and in that case specific performance was refused; but there was in that case the circumstance that the defendant, having recently come into possession of the land, came to look at it, and stayed at the plaintiff's house, and desired to see the plaintiff's underleases, in order to ascertain what the plaintiff had realized from the property. The plaintiff evaded showing him the underleases, and the defendant remained in ignorance of the true value of the land. If the bill had been to set aside the contract, it would not have succeeded. Lord Thurlow said: "I must take it to be the law that if a man contracts to purchase an estate for a certain price, and the intending purchaser knows at the time that there are mines under the estate of which the vendor is ignorant, still, as this court is not a court of honor, the court will not set aside the contract on a bill by the vendor; but nobody can doubt that the court would not decree specific performance of such a contract, and there is a wide distinction between a case in which the court would, on the one hand, decree specific performance of an incomplete contract, and, on the other, set aside a complete contract." And in giving judgment the lord chancellor said that this court was not bound to decree a specific exe-

cution of articles where they appeared to be unreasonable or founded on a fraud, or where it would be unconscionable to assist them.

The next case is *Kien v. Stukeley*, 1 Brown, Parl. Cas. 191; Gilb. 155, which was a bill in the equity side of the court of exchequer by the vendor for the specific performance of an agreement for the purchase of land, for which the purchaser had agreed to pay forty years' value. It was proved in the case that the plaintiff had left his deed with the defendant, and that there were no objections to the title; but a decree was made for specific performance. On appeal, the house of lords entertained great doubt whether such a bargain should be carried out by a court of equity, but they came to no decision on that point.

The next case is *Southwell v. Nicholas*, reported in a note to *Howell v. George*, 1 Mad. 9. In this case the plaintiff's father and the defendant Nicholas' brother, having some houses in Spring Gardens, agreed to purchase two old houses and pull them down to make an entrance into Spring Gardens. The houses were pulled down, and the plaintiff's father paid his share of the purchase money. The defendant's brother died, and his estates were sold for the payment of his debts. On a bill by the plaintiff for the specific performance of the agreement as to the two houses, it was contended by the defendant that there should be no specific performance, as his brother's estates had been sold, and there would be no consideration accruing to him for the expense he would be at. The master of the rolls was inclined to decree that the parties should pay for the two houses in proportion to the value of their houses to be benefited, but the matter was compromised by parties agreeing that the plaintiff should pay two-thirds and the defendant one-third for the two houses.

The next case is *Vaughan v. Thomas*, 1 Brown, C. C. 556. In this case the defendant agreed with the plaintiff for the sale to him of an annuity of £300 a year for the defendant's life, at five years' purchase. The defendant then represented himself as being only fifty-five of age, and the plaintiff insured the defendant's life on that footing; but two years afterwards he discovered that the defendant was sixty-one years of age at the time of granting the annuity, and the plaintiff was obliged in consequence to increase the insurance. Upon his representing this to the defendant, it was agreed that the plaintiff should grant to the defendant an additional annuity, which was expressed to be granted for £250, but in fact no money was paid on that occasion. In December, 1779, the defendant applied to the plaintiff to repurchase the annuity, and an agreement was entered into by them by which the plaintiff agreed to give up the annuity on payment of £1,500, the original purchase money, and all arrears then due, deducting the sum of

£200, the amount for four years of the additional annuity of £50. The arrears then due were £475, so that the sum settled for the repurchase was £1,775. After the agreement had been signed the plaintiff struck out his name, and two days after another agreement was prepared, whereby the plaintiff relinquished the annuity and all arrears for £2,000. The plaintiff filed a bill for the specific performance of this agreement. It was referred to the master to find the value of the original and additional annuity and the defendant's age. The master found that the annuity was worth nine years' purchase when it was granted. The plaintiff contended that the bargain was fair, and that he was entitled to the assistance of the court to carry it into execution; but the master of the rolls was of opinion that if they assisted the plaintiff they would be sanctioning a very unconscientious bargain, and that the plaintiff was not entitled to the aid of the court. The bill was therefore dismissed.

In the case of *Heathcote v. Paignon*, 2 Brown, 167, there was nothing but inadequacy of price, and the master of the rolls referred it to the master to report on the actual value. The master found a value of £500, for which only £200 had been given, and the court refused specific performance. On appeal, this decision was affirmed by Lord Thurlow, and the contract was set aside as being unjust.

The next case I shall mention is *Day v. Newman*, 2 Cox, 77. In that case the court refused to decree specific performance, but left the parties to their remedies at law on the ground of inadequacy in price. That case appears to me to be a distinct decision on the question.

White v. Damon, 7 Ves. 30, was a case of a purchase at an auction; yet Lord Rosslyn, on the simple ground of inadequacy in price, refused specific performance. This case therefore shows that inadequacy in price is a sufficient ground for refusing specific performance. Lord Eldon took a different view, but it was on the ground that the sale was by auction.

Now these two last-mentioned cases appear to me to be decisive on the point; and I am of opinion that in the present case I ought to refuse specific performance on the mere ground of inadequacy of price, even if there were none other.

But there is another circumstance in this case besides mere inadequacy. What was the nature of the transaction? It was not the case of a bargain between seller and buyer, the one trying to get the highest, and the other to give the lowest, price. The intention of the parties was that a fair and reasonable price should be placed on the articles, and that the plaintiff should have the option of purchasing at such fair and reasonable price. Mrs. Gray, though she was told by Mr. Brend that he was not a judge of the value, thought that the £40 mentioned by him was

such a fair price as a competent person would place on the jars; and it was upon that footing that she made the agreement. She was not herself a competent judge, though she knew they were of considerable value. Mr. Falcke knew that she was contracting on that footing, and he knew that the price put upon the jars by Brend was not a fair price. (The vice chancellor, after going through the plaintiff's evidence, from which it appeared that he, knowing that £40 was greatly insufficient, it being only two-fifths of the value, as he said, allowed the contract to be signed on that footing, proceeded:) The question is whether he can come to the court to compel Mrs. Gray to sell the jars to him for £40. I admit that this court is not a court of honor, but it appears to me that, although Mr. Falcke has done nothing he was legally bound not to do, yet, consistently with the authorities and justice of the case, I must refuse specific performance.

It has, however, been contended that Mrs.

Gray, having sold the jars to the defendants the Watsons, should not have been made a defendant; but Mrs. Gray has placed herself in such a position that the suit could not go on without her being made a party. The bill, therefore, must be dismissed without costs as against her.

With regard to the defendants the Watsons, the question is whether they had notice, when they purchased from Mrs. Gray, that she had entered into an agreement by virtue of which she could not sell them to another person. Now I cannot help entertaining some suspicion that the Watsons knew something more than that a mere question had arisen as to value; but the onus of proving that they had notice lies on the plaintiff, and I think that, although there is some doubt on the evidence, notice to them has not been sufficiently proved. Under all the circumstances, I think the bill, as against the defendants the Watsons, must be dismissed, with costs.

PAINE v. MELLER.

(6 Ves. 349.)

Chancery. July 22, 1801.

Upon the 1st of September, 1796, the plaintiffs sold to the defendant, by auction, some houses in Ratcliffe Highway, upon the usual terms, a deposit of 25l. per cent, and a proper conveyance to be executed upon payment of the remainder of the purchase money at Michaelmas next. The premises were with others subject to certain annuities: but a trust of stock was declared for the payment of these annuities. The first abstract delivered was clearly defective: so that the purchase could not be completed at that time. A further abstract was delivered to the solicitor for the defendant, at the end of September, or the beginning of October. He insisted upon having a release from the annuitants. The treaty continued through October; and about the end of that month the defendant's solicitor agreed to waive all objections, if the plaintiff would allow him eleven guineas, and if the trustees of the stock would join in the conveyance; and refused a proposal to give up the purchase. The plaintiff agreed to make the allowance desired. On the 4th or 5th of November the defendant's solicitor sent a draft of a conveyance. The trustees of the stock were prevailed upon to join in the conveyance by a new declaration of trust. The draft was returned to the defendant's solicitor; the deeds were engrossed; and upon the 16th or 17th of December he declared himself satisfied with the title; and said, the deeds would be ready in two or three days; and that he should complete the purchase under the promise of the eleven guineas. Upon the 18th of December the houses were burnt: the insurance having been suffered to expire at Michaelmas 1796. On the 20th of December the defendant's solicitor wrote a letter; observing, that he had taken an objection to the freehold title; and should not have thought anything more of the purchase, but for the covenant of indemnity from the trustees, inserted in the draft by him, and approved by one of the trustees of the stock: but as that had been struck out by another trustee, he could not advise his client to accept the title; and he should call for the deposit.

The bill was then filed, praying a specific performance of the contract; and a decree was made by the late lord chancellor, simply referring it to the master to see whether a good title could be made. This decree was dissatisfactory to both parties, as not deciding the question; and a petition of rehearing was presented by the plaintiff.

Mr. Mansfield and Mr. Cox, for plaintiff, insisted, that the objection to the title from the charge of the annuities was frivolous: there being a fund of stock with a trust declared upon it.

Mr. Sutton and Mr. Lewis, for defendant.—The delay in performing this contract arose from the defect of the title; and the plaintiff ought to have acquainted the defendant with the circumstance of the insurance expiring. In *Stent v. Baylis*, 2 P. Wms. 217, referred to in *Mortimer v. Capper*, 3 Brown, Ch. 156, Sir Joseph Jekyll expresses a clear opinion upon this case. 2 P. Wms. 220. *Pope v. Roots*, 7 Brown, Ch. 184.

Mr. Mansfield, in reply.—All the cases referred to are got rid of by *Jackson v. Lever*, 3 Brown, Ch. 605. The former cases proceeded upon this fallacy, that the party could not have the thing bought; for chance had decided against him: but he had the chance; and he must take it each way. In the case of a life it might last fifty years, and might drop the next day. But this is not a purchase of property depending upon the contingency of life, like an annuity. A man purchasing a house is to consider with himself, whether he will insure or not. Not a word was said about insurance: therefore notice was not incumbent on the plaintiffs; and there was as much negligence in the defendant in not inquiring about that. Such an accident did not occur to either of them. If in the sale of a house nothing is said about insurance, it could not enter into the bargain.

LORD CHANCELLOR.—The abstract first delivered was undoubtedly imperfect in certain respects. It did not go back further than forty-three years; and there was no specific mention of the property in Ratcliffe Highway in the abstract. There was also the objection upon the annuities. Unquestionably that abstract was not satisfactory; and the express condition of the sale could not be complied with. *Harrington v. Wheeler*, 4 Ves. 686; *Seton v. Slade*, 7 Ves. 265. Of course the defendant could not be called on to pay his purchase money. Then it was with the vendee to choose to go on with the bargain, or to put an end to the contract. The agent however chose not to put an end to it; and though a circumstance took place at Michaelmas sufficient to put an end to any action of law, the contract was kept alive, at least to the 10th of December. It is clear, the objection was given up as to the freehold title; and the only difference was as to the indemnity against the annuities, affecting these with other premises. I do not consider whether this objection is of form or substance: but leave it to be determined, when it may be necessary, whether the purchaser under such circumstances has not a right to insist, that the annuitants shall release the premises; or whether this court will say, under all circumstances the purchasers shall take the premises burthened with the annuities, with a great number of others, and seek their indemnity against the trust property and the trustees, if they preferred a personal covenant by the trustees. If in equity these premises belonged to the

vendee, he would have a title to the rents and profits at Michaelmas by relation; and he must pay the purchase money with interest from that time. First, it is said, the title was never accepted in fact: 2dly, if not, under these circumstances a court of equity will not compel a specific performance. As to the second point, the objection is grounded upon two circumstances: 1st, the simple fact of the fire; 2dly, that the premises had been insured prior to the contract; that that fact, and the fact that the insurance expired at Michaelmas 1796, were not disclosed; and that the premises afterwards remained uncovered by any insurance. The authority of Sir Joseph Jekyll has been mentioned: but no case has been cited in support of that dictum; and it is in a degree suggested, not admitted, at the bar, that it may be considered over-ruled by subsequent cases. As to the mere effect of the accident itself no solid objection can be founded upon that simply; for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. See *Foster v. Foust*, 2 Serg. & R. 11. They are vendible as his, chargeable as his, capable of being incumbered as his; they may be devised as his; they may be assets; and they would descend to his heir. If a man had signed a contract for a house upon that land, which is now appropriated to the London Docks, and that house was burnt, it would be impossible to say to the purchaser, willing to take the land without the house, because much more valuable on account of this project, that he should not have it. As to the annuity cases and all the others, the true answer has been given; that the party has the thing he bought, though no payment may have been made; for he bought subject to contingency. If it is a real estate, he of course has it. Then as to the non-communication, I cannot say that, in my judgment, forms an objection; for I do not see how I can allow it, unless I say this court warrants to every buyer of a house that the house is insured, and not only insured, but to the full extent of the value. The house is bought, not the benefit of any existing policy. However general the practice of insuring from fire is, it is not universal; and it is yet less general that houses are insured to their full value, or near it. The question, whether insured or not, is

with the vendor solely, not with the vendee; unless he proposes something upon that; and makes it matter of contract with the vendor, that the vendee shall buy according to that fact, that the house is insured. I am therefore of opinion, that if the agent on behalf of this purchaser did accept this title previously to the destruction of the premises, the vendors are in the situation in which they would have been if the title and the conveyance were ready at Michaelmas 1796, but by the default of the vendee were not executed, but the title was accepted, and the premises were burnt down on the quarter day. As to the fact, where there has been a great deal of treaty, and a considerable hardship must fall upon one party, if the case is to be put entirely upon the fact, the court must guard against surprise; and I am not sure, even the plaintiff's witnesses accurately understand the nature of the facts they depose to. It is to be observed, they are all the plaintiff's agents, subject to the influence necessarily belonging to that situation. The case is therefore not sufficiently clear upon the fact, and there ought to be some reference to the master or an inquiry before a jury; but that must not be upon the validity of the title; for it is clear, the objection to the freehold title, that it was not old enough, and the other objection, that the purchaser had a right to insist upon a release of the annuities, were waived. The question between them is, whether the parties agreed that an indemnity should be given in any form; and if so, in what form. The inquiry must be, whether the title had been accepted by the agent on behalf of the defendant on or before the 18th of December 1796. That inquiry will miscarry, unless the master, or the jury, if satisfied that there was an acquiescence in the proposal, shall be of opinion, that is an acceptance of the proposal. I should think, a court of law would hold that: but if there is any doubt of it, I would rather refer it to the master to inquire, whether the agent on behalf of the defendant had accepted or acquiesced in the proposal; with a direction, that he should be examined; and they will appreciate the credit due to him; and will not forget, that he was bartering for himself for eleven guineas; if that appears.

The decree was reversed; and the reference to the master directed accordingly.

GOULD v. MURCH.

(70 Me. 288.)

Supreme Judicial Court of Maine. Oct. 29,
1879.

C. L. Jones, for plaintiff. Walton & Walton, for defendant.

LIBBEY, J. The notes in suit, with three others, were given in payment for a lot of land on which were a dwelling house and other buildings; and on payment of the notes at maturity, the plaintiff agreed to convey the premises to the defendant. The defendant was to have possession of the premises till he made default of payment as agreed, and he entered into possession under the agreement. Within a year from that time the buildings were burnt without the fault of either party.

The question presented to the court is whether the destruction of the buildings can be set up by the defendant as a defense to the notes. We think it can be.

When the owner of a lot of land with buildings upon it agrees to convey it at a future day on payment of the purchase money by the purchaser, and before payment and conveyance the buildings are destroyed by fire without the fault of either party, the loss must fall upon the vendor; and if the buildings formed a material part of the value of the premises, the vendee cannot be compelled to take a deed of the land alone, and pay the purchase money; and if he has paid it he may recover it back. *Thompson v. Gould*, 20 Pick. 134, and cases there cited. *Gould v. Thompson*, 4 Metc. (Mass.) 224; *Wells v. Calnan*, 107 Mass. 514.

In *Thompson v. Gould*, the authorities bearing upon the question were elaborately examined and considered, and Wilde, J., in the opinion of the court says: "In respect to the loss of personal property, under the like circumstances, the principle of law is perfectly

clear and well established by all the authorities. When there is an agreement for the sale and purchase of goods and chattels, and after the agreement and before the sale is completed the property is destroyed by casualty, the loss must be borne by the vendor; the property remaining vested in him at the time of the destruction. *Tarling v. Baxter*, 9 Dowl. & R. 276; *Hinde v. Whitehouse*, 7 East, 558; *Rugg v. Minett*, 11 East, 210. No reason has been given, nor can be given, why the same principle should not be applied to real estate. The principle in no respect depends upon the nature and quality of the property, and there can therefore be no distinction between personal and real estate."

In *Wells v. Calnan* the same rule was affirmed. Gray, J., in the opinion of the court, very clearly and tersely states it as follows: "When property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time; and if the owner of a house and land agrees to sell and convey it upon the payment of a certain price which the purchaser agrees to pay, and before full payment the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase money."

The reasons upon which the rule is based are clearly and fully stated in the cases cited, and it is unnecessary to repeat them here.

But the use and occupation of the premises by the defendant, from the time the agreement for the sale and purchase was made, formed a part of the consideration for the notes; and the plaintiff can recover in this action a sum equal to the value of the use of the premises while the defendant occupied them. *Wells v. Calnan*, *supra*.

In accordance with the stipulations in the report, the action must stand for trial.

APPLETON, C. J., WALTON, BARROWS and DANFORTH, JJ., concurred.
SYMONDS, J., did not sit.

See also Gould v. Thompson 4 Metc. 224

MARKS et al. v. TICHENOR.¹

(4 S. W. 225, 85 Ky. 536.)

Court of Appeals of Kentucky. May 5, 1887.

Appeal from circuit court, McLean county.

Owen & Ellis and W. B. Noe, for appellants. Jep. C. Jonson, for appellee.

LEWIS, J. Appellee having sold, and by deed executed October 24, 1884, conveyed, to appellants three tracts of land adjoining, and constituting one farm, instituted an action to recover judgment on the notes given for the purchase money, and to subject the land to satisfy it. In defense, appellants state that the deed as written does not contain the whole contract entered into between the parties, but a portion of it was by mistake omitted, and that they accepted the deed upon the condition of the execution by appellee of the following writing, which embraces the omitted part:

"I have this day sold to James A. and Samuel C. Marks my farm known as the 'Daniel McFarland Farm.' I agree to cover said house, and put two coats of paint on the outside, and deliver the same to said parties by or on the first day of January, 1885. Eleven thousand of the shingles is to be hand-shaved shingles, and the remainder to be cut shingles. I also agree to furnish as much as 200 feet of sheeting if needed on said house; and, if any more is needed, said Marks is to furnish it. T. C. Tichenor."

It is further stated that about November 29, 1884, the dwelling-house mentioned was destroyed by fire, in consequence of which appellee never did deliver it, and they therefore ask that the notes sued on be credited

by the value of the house, which they aver was \$1,000. It is stated in the reply, and not controverted, that, at the time of the sale of the land, it was in the possession of a tenant of appellee, whose term did not expire until January 1, 1885, of which fact appellants were aware, and that time was agreed on in view of such tenancy.

In the sale of land it becomes the real property of the vendee from the execution, delivery, and acceptance of the written contract. "It is vendible as his, chargeable as his, and capable of being devised or descending as his." Consequently it is a well-established and reasonable rule that the destruction of buildings thereon by fire, between the time of such contract of sale and the time fixed upon in the contract for the delivery of possession by the vendor to the vendee, must be the loss of the latter and not of the former. *Calhoon v. Belden*, 3 Bush, 674. There are only two exceptions to this rule. The first is when, as was the case in *Combs v. Fisher*, 3 Bibb, 51, there is an express contract to deliver the possession of the land, with the improvements or buildings thereon, in the same situation as was the case when the sale was made. The second is when, as was in *Cornish v. Strutton*, 8 B. Mon. 586, the building has been destroyed by the culpable negligence of the vendor.

There is no allegation or proof that the destruction of the dwelling-house in this case was caused by the negligence of the vendor, or any other person; nor do we think the contract, fairly construed, amounts to an express agreement by the vendor to assume the risk of the destruction of the buildings by fire. The purpose of the supplemental contract executed by appellee was to provide for the repair by him of the house as therein agreed, and which the evidence shows he did do, but not to insure it against destruction by fire, or to shift the risk from appellants to himself. He simply covenanted to deliver possession, without any express undertaking to sustain any loss that might arise from the burning of the house.

Judgment affirmed.

¹ The purchaser under an executory contract for the sale of land is the equitable owner. *Burkhart v. Howard* (Or.) 12 Pac. 79; *Gilbert v. Sleeper* (Cal.) Id. 172; *Alpers v. Knight* (Cal.) 8 Pac. 446; *Taylor v. Holmes*, 14 Fed. 498; *Martin v. Carver* (Ky.) 1 S. W. 199; *Bartle v. Curtis* (Iowa) 26 N. W. 73. Any accidental loss accruing between the time of his purchase and the conveyance of the legal title must be borne by him, and he is entitled to all the benefits. *Martin v. Carver* (Ky.) 1 S. W. 199.

BOSTWICK v. BEACH et al.

(12 N. E. 32, 105 N. Y. 661.)

Court of Appeals of New York. April 26, 1887.

Application to modify interlocutory judgment.

This was an action for specific performance, brought against defendants, as executors, upon a contract for the sale of land, in pursuance of a power in the testator's will. The plaintiff deposited the unpaid portions of the purchase money at the time when the conveyance should have been executed. Upon a former appeal (9 N. E. 41) the interlocutory judgment against the executors was, with some modifications, affirmed, by which the plaintiff's prayer for specific performance was granted, and he was not required to pay interest on the purchase money. The object of this application is to have such interest allowed the executors.

Milton A. Fowler, for appellants. O. D. M. Boker, for respondent.

RAPALLO, J. When this case was before us on the appeal from the interlocutory judgment, it appeared from the findings that the unpaid portion of the purchase money (\$10,500) had been tendered to the executors on the first of March, 1882, and that, on their refusal to accept the same, and deliver the deed, that sum had been deposited by the plaintiff in the First National Bank of Lowville to the credit of the executors, to be paid to them on the delivery of the deed. There was nothing to show that after that deposit the plaintiff had derived any benefit from the use of the fund, and presumptively it had lain idle and unproductive. Therefore the purchaser was not charged with interest on the purchase money.

It is now shown, by affidavits, that, shortly after this deposit, the fund was wholly or in part withdrawn from the bank by the plaintiff, and we are now asked to add to the modifications directed in the opinion a further provision charging the plaintiff with interest on the amount so withdrawn. If the fact had appeared in the case when before us on appeal, this modification would doubtless have been proper, and even now we might find means to make it, if no other facts were shown on the part of the plaintiff raising a counter equity. But, in opposition to the application of the defendants, the plaintiff presents affidavits showing that during the pendency of this action, in consequence of neglect and mismanagement on the part of the defendants, the ditches on the premises have been allowed to be filled up, the buildings to become dilapidated, the water-works to go to decay, the fences to be destroyed, and the value of the property to be thus depreciated to an amount exceeding the interest on the unpaid purchase money. If these facts had appeared, they undoubtedly would have influenced our judg-

ment in respect to allowing interest upon the purchase money, or making some other provision for compensating the plaintiff for the damages alleged to have been sustained. Where specific performance is decreed, the court will, so far as possible, place the parties in the same situation they would have been in if the contract had been performed at the time agreed upon, and by the application of the rule of courts of equity, by which things which ought to have been done are considered as having been done at the proper time, the vendor is regarded as trustee of the land for the benefit of the purchaser, and liable to account to him for the rents and profits, or for the value of the use and occupation, and the purchaser is treated as trustee of the purchase money unpaid, and charged with interest thereon, unless the purchase money has been appropriated, and no benefit has accrued from it to the purchaser.

But this is not the only manner which the court has adopted to adjust the equities of the parties. For instance, where the subject of the purchase was a leasehold estate in a mill, and the delay of performance of the contract was attributable to the vendor for his failure to show good right to assign his lease, and dilapidations had occurred, he was charged with the expenses of repairs required to put the mill in tenantable condition, and of those which had been incurred for keeping up the machinery until the purchaser could prudently take possession. And in *Ferguson v. Tadman*, 1 Sim. 530, where the estate had deteriorated in value by reason of mismanagement and neglect, during five years which elapsed between the filing of the bill for specific performance and the decree, the amount of the deterioration, with interest, was ascertained, and allowed to the plaintiff out of the purchase money which had been paid into court. In *Worrall v. Munn*, 38 N. Y. 137, these principles were recognized; and the vendee, having obtained a decree for specific performance, was allowed the damages sustained, during the pendency of the suit, by deterioration from waste committed by the defendant during the pendency of the suit.

If the matter should now be opened for the purpose of letting the defendants in to claim interest on the purchase money, it would be no more than just that the same indulgence should be extended to the plaintiff, to let him in to prove the damages he claims by reason of deteriorations caused by mismanagement and neglect. These points appear to be the only ones as to which the parties have been unable to agree, in settling the form of the judgment. From the affidavits presented, it would seem that the damages claimed by the plaintiff would about equal the interest claimed by the defendants; but, if the judgment below is modified so as to admit the allowance of interest, it should also be modified so as to admit proof of the damages claimed. If the statements

in the affidavits are correct, justice would apparently be done by leaving the matter as it is, and confining the modifications of the interlocutory judgment to those directed in the original opinion of this court, which appear to be substantially contained in the modified judgment as proposed on the part of the plaintiff. The details, however, are subject to settlement in the supreme court. But if the defendants desire to insist upon their claim to be allowed interest, and to contest the amount of damages resulting from deterioration and mismanagement, the modified judgment should contain provisions referring it to the referee to ascertain what amount of the sum deposited in the bank was withdrawn by the plaintiff, or subject to his control, and for what length of time, and charging him with interest thereon during that time. The amount of deterioration of the property, by reason of mismanagement and neglect, between the first of March, 1882, and the time of plaintiff's obtaining possession, should also be ascertained and charged, either to the defendants, as executors, or to the defendant Emily P. Beach, as the equities may appear. She certainly has no reason to complain of any loss

she may sustain through this litigation, as it appears to have been caused by her persistent refusal to carry out the contract, which, according to the findings of fact, was intelligently entered into by her, and was a fair contract for the full value of the farm, and was beneficial to all concerned in the estate. By this unjustifiable refusal on her part, all parties have been subjected to damage, and there is no reason why the loss should fall upon the plaintiff, who seems to have been always ready to perform his part of the contract.

It is to be hoped that, upon the principles here indicated, the counsel for the respective parties may be able to agree upon the form of judgment to be entered. Otherwise it may be settled by the supreme court, and the interlocutory judgment may be modified so as to provide for the ascertainment and allowance of the interest claimed by the defendants, and also of the damages claimed by the plaintiff, at the election of the defendants. If the defendant shall not consent to have the damages ascertained and allowed, the application for the allowance of interest is denied.

(All concur.)

LEWIS v. HAWKINS et al.

(23 Wall. 119, 23 L. Ed. 113.)

Supreme Court of the United States. Oct. 1874.

Appeal from the Circuit Court for the Western District of Arkansas.

A. H. Garland, for appellant. Pike & Johnson, for the widow.

SWAYNE, Justice. Upon the execution of the notes and the title-bond between Lewis and Hawkins, Lewis held the legal title as trustee for Hawkins; and Hawkins was a trustee for Lewis as to the purchase-money. Hawkins was cestui que trust as to the former and Lewis as to the latter. 1 Story, Eq. Jur. § 789; 2 Story, Eq. Jur. § 1212; 1 Sugd. Vend. 175; Swartwout v. Burr, 1 Barb. 499; Champion v. Brown, 6 Johns. Ch. 402. The seller under such circumstances has a vendor's lien, which is certainly not impaired by withholding the conveyance. The equitable estate of the vendee is alienable, descendible, and devisable in like manner as real estate held by a legal title. The securities for the purchase-money are personalty, and in the event of the death of the vendor, go to his personal representative. 2 Story, Eq. Jur. § 1212. It does not appear that the title-bond authorized Hawkins to take possession, or that he did so. If there were no such authority, and he entered into possession, he held as a licensee or tenant at will. Suffern v. Townsend, 9 Johns. 35; Dolittle v. Eddy, 7 Barb. 75. The vendee cannot in such cases dispute the title of his vendor any more than the lessee can dispute that of his lessor. Whiteside v. Jackson, 1 Wend. 422; Hamilton v. Taylor, 1 Litt. Sel. Cas. 444. Any other person coming into possession under the vendee, either with his consent or as an intruder, is bound by a like estoppel. Jackson v. Walker, 7 Cow. 637. Hamiter, having bought and assumed the payment of the purchase-money stipulated to be paid by Hawkins, took the property subject to the same liabilities, legal and equitable, to which it was subject in the hands of Hawkins. 1 Story, Eq. Jur. § 789; 1 Sugd. Vend. (Perkins' Ed.) 175; Champion v. Brown, 6 Johns. Ch. 402; Muldrow's Ex'rs v. Muldrow's Heirs, 2 Dana, 387; 2 Har. & J. 64; Shipman v. Cook, 16 N. J. Eq. 254.

The discharge in bankruptcy released Hawkins from personal liability for his debt, but the statute of limitations cannot avail to protect the land from the vendor's lien upon it, for the purchase-money which Hawkins agreed to pay, and which Hamiter, when he bought the land, assumed and agreed to pay for him.

We have already shown that as between Lewis and Hawkins there was a trust which embraced the purchase-money and fastened itself upon the land. The debt did not affect his assignee personally, but as we have shown also it continued to bind the land in all re-

spects as if the transfer had not been made. The trust was an express one. Its terms and purposes were evinced by the title-bond, and the promissory notes to which that instrument referred. "As between trustee and cestui que trust, in the case of an express trust, the statute of limitation has no application, and no length of time is a bar. Accounts have been decreed against trustees extending over periods of thirty, forty, and even fifty years. The relations and privity between trustee and cestui que trust are such that the possession of one is the possession of the other, and there can be no adverse possession during the continuance of the relation. * * * A cestui que trust cannot set up the statute against his co-cestui que trust, nor against his trustee. These rules apply in all cases of express trusts." Perry, Trusts, § 863.

"As between trustees and cestui que trust, an express trust, constituted by the act of the parties themselves, will not be barred by any length of time, for in such cases there is no adverse possession, the possession of the trustee being the possession of the cestui que trust." Hill, Trustees, 264*.

The same principle applies where the cestui que trust is in possession. He is regarded as a tenant at will to the trustee. "Therefore, until this tenancy is determined there can be no adverse possession between the parties." Id. 266*. The relation once established is presumed to continue, unless a distinct denial, or acts, or a possession inconsistent with it are clearly shown. Whiting v. Whiting, 4 Gray, 236; Creigh's Heirs v. Henson, 10 Grat. 231; Spickernell v. Hotham, Kay, 669; Gardard v. Tuck, 65 E. C. L. 249, 8 Man. G. & S. 231; Decouche v. Savetier, 3 Johns. Ch. 190; Anstice v. Brown, 6 Paige, 448; Kane v. Bloodgood, 7 Johns. Ch. 90.

In many of the cases it is held that the lien of the vendor under the circumstances of this case is substantially a mortgage. Lingan v. Henderson, 1 Bland, Ch. 236; Moreton v. Harrison, Id. 491; Relfe v. Relfe, 34 Ala. 504. It is well settled that the possession of the mortgagor is not adverse to that of the mortgagee. In the case last cited it is said that to apply the statute of limitations "would be like making the lapse of time the origin of title in the tenant against his landlord." That the remedy upon the bond, note, or simple contract for the purchase-money is barred in cases like this, in no wise affects the right to proceed in equity against the land. As in respect to mortgages, the lien will be presumed to have been satisfied after the lapse of twenty years from the maturity of the debt, but in both cases laches may be explained and the presumption repelled. Moreton v. Harrison, supra. The principles upon which this opinion proceeds are distinctly recognized in Harris v. King, 16 Ark. 122. That case alone would be decisive of the case before us. The considerations which apply

where the vendor in such cases resorts to an action of ejectment were examined by this court in *Burnett v. Caldwell*, 9 Wall. 290.

The bill avers the tender of a deed by the complainant to Hawkins before the bill was filed. The answer of Hawkins denies the allegation. The testimony of Lewis sustains the bill; that of Hawkins the answer. The averment is not established. Except as to the costs the point is of no significance. If the tender of a deed had been properly made, and there had been no unjustifiable resistance to the taking of the decree by the complainant, to which he is entitled, he would have been required to pay all the costs. There be-

ing a contest, and it appearing that a tender would have been without effect, the costs must abide the result of the litigation. *Keiselbrack v. Livingston*, 4 Johns. Ch. 144; *Hanson v. Lake*, 2 Younge & C. 328.

There is manifest error in the decree, but the bill is defective in not making the heirs-at-law of Hamiter parties, unless there is some statutory provision of the State of Arkansas which obviates this objection.

If necessary the bill can be amended in the court below.

Decree reversed, and the cause remanded with directions to proceed in conformity with this opinion.

BISSELL v. HEYWARD.

(96 U. S. 580, 24 L. Ed. 678.)

Supreme Court of the United States. Oct. 1877.

Appeal from the circuit court of the United States for the district of South Carolina.

William C. Heyward, who was seised in fee of certain lands in the state of South Carolina, made his last will and testament, bearing date Jan. 20, 1852. So much thereof as relates to them is as follows: "I give to my brother, Henry Heyward, of New York" (here is a description of the lands), "for and during the term of his natural life, and, after the determination of that estate, I give the same to my friend, William C. Bee, and his heirs, to prevent the contingent remainders hereinafter limited from being barred; in trust, nevertheless, during the lifetime of my said brother, to apply the income thereof to his use and benefit; and, from and after his decease, I give the use of the same estate, real and personal, to his eldest son, Henry Heyward, Jr., if then living, until he attains the age of twenty-one years; and if he should survive his father, and attain the age of twenty-one years, to him and his heirs for ever: but in case the said Henry Heyward, Jr., should not survive his father, and attain the age of twenty-one years, then I give the whole of the said estate, real and personal, after the decease of my brother, Henry Heyward, for the use of the person who may thereafter, from time to time, sustain the character of heir male of the body of my said brother, Henry Heyward, as such term was used in the common law before the abolition of the rights of primogeniture, until such person shall attain the age of twenty-one years, or the expiration of twenty-one years from the death of my said brother, whichever may first happen; and, after the happening of either of those events, to the then heir male of the body of my brother, absolutely and for ever."

On the eighteenth day of June, 1863, William C. Heyward contracted to sell, for \$120,000, said lands, to John B. Bissell; who took immediate possession of them, which he has ever since retained. On July 31, following, he paid \$20,000 of the purchase-money. During that year, and before the completion of the purchase, Heyward died, and said Bee, appointed the executor of his will, duly qualified as such. Owing to the civil war and other causes, matters remained unaltered in their main features until March, 1870, when said Henry Heyward, a citizen of New York, filed his bill against said Bissell and said Bee, citizens of South Carolina, to compel the specific performance, by Bissell, of his agreement to purchase. The answer of Bissell admits the agreement and his possession of the property, and his payment of \$20,000; and alleges that he was provided with the means of paying the balance of the purchase-money; that neither said William

C. Heyward, nor, since his death, said Bee, tendered him a conveyance; and that he was willing to pay when he should receive a valid conveyance; that he sold sixty-three bales of cotton, for cash in Confederate notes, and on Feb. 11, 1864, tendered the said balance, in said notes, to the executor, who declined to receive them, on the ground that he could not make a good title. Bee, in his answer, admitted the tender to him by Bissell, and his refusal to accept it, on the ground that he was advised that he could neither make a title nor safely accept payment in Confederate currency. It was admitted, on the hearing below, that said money was tendered at that date, in such currency; that the parties through whom a good title could be made lived in New York; and that, after Bee's refusal to accept the notes tendered, Bissell used them for other purposes.

It does not appear by the pleadings, the evidence, or the agreed statement of facts on file, whether Henry Heyward, Jr., who was living when the bill was filed, and had then attained the age of twenty-one years, is now living. There is neither allegation nor proof of his death.

The court decreed that Bissell should perform his contract of purchase, and pay, in United States currency, a sum equal to the value of \$100,000 in Confederate currency on June 18, 1863, the day of sale, with interest thereon until Feb. 11, 1864; from and after which day he should pay interest only on such a sum as was the value of \$100,000 on said 18th of June, less its value on said 11th of February; said values and interest to be ascertained by the clerk of the court to whom the cause was referred, as master, to state and report the same; that upon Bissell's making the payment as stated and reported, that the clerk, "as master to said William C. Bee, executor of William C. Heyward," convey the premises in fee-simple; but that, upon his failure so to pay, the master should sell the property, at public auction, for cash.

Said Henry Heyward died before the execution of the decree. On Nov. 23, 1874, Zefa Heyward, his wife, Zefita Heyward, his daughter, and Frank Heyward, his son, filed their bill of revivor, reciting the original bill, the proceedings thereunder, the reference to the master, the death of said Henry,—leaving a last will and testament, which was duly proved before the surrogate of the county of New York,—their appointment to execute the same, and that said Zefa alone took upon herself the execution thereof, and qualified accordingly, and praying that the bill might be revived. This bill was duly served; no answer was made, and an order of revivor was entered accordingly.

The master subsequently reported that the balance found by him to be due upon the contract was \$28,353.50; and that, in reaching that result, he compared the value of the Confederate currency, in which the contract

was payable, with United States paper currency at the date of the contract and of the tender. He found that, on the 18th of June, 1863, \$1 in United States currency was worth \$5.20 in Confederate currency; and that on the 14th of February, 1864, the value was \$1 to \$13.01. The court confirmed the report, Dec. 15, 1874; and decreed that the interlocutory decree previously rendered be carried into execution. Bissell thereupon appealed to this court, Bee declining to join in the appeal.

William A. Maury, for appellant. Edward McCrady, for appellee.

MR. JUSTICE HUNT, after stating the case, delivered the opinion of the court.

It is objected that there is a fatal defect of parties complainant. The point of this objection is that Henry Heyward and William C. Bee were not able together to make a title that ought to be satisfactory to Bissell, and hence that the decree should be reversed.

The will of William C. Heyward took effect only upon his death. Until the occurrence of that event, the devisees therein named had no more title to or interest in the property in question than if their names had not been mentioned in the will. If he had consummated his contract with Bissell by executing a deed of the property, this would have worked an absolute revocation of the devise as to this property. The execution of the contract (with the partial payment thereon) was a transfer in equity of the title of the land to Bissell; leaving in the representatives of William C. Heyward simply a naked title as trustee for Bissell, to be conveyed upon performance on his part. By the terms of the will, this legal title was vested in William C. Bee, the trustee to preserve remainders.

Henry Heyward was tenant for life, and as such offered to convey to Bissell, "by feoffment, and livery of seisin, and to procure the release of right of entry and action by William C. Bee, the remainder-man for preserving contingent remainders;" and he avers in his bill that this would have made a good and effectual conveyance of the legal estate.

Bee held the legal title under the will, and his title to the legal estate continued in force as long as the remainders were contingent; and there is nothing in any part of the record showing that such was not the condition of the title when Heyward offered to convey, and that it is not so at the present time.

Chancellor Kent says (4 Kent, Comm. p. 256), "The trustees are entitled to a right of entry in case of a wrongful alienation by the tenant for life, or whenever his estate for life determines in his lifetime by any other means. The trustees are under the cognizance of a court of equity, and it will con-

trol their acts, and punish them for a breach of trust; and if the feoffment be made by the purchaser with notice of the trust, as was the fact in Chudleigh's Case, a court of chancery will hold the lands still subject to the former trust. But this interference of equity is regulated by the circumstances and justice of the particular case. The court may, in its discretion, forbear to interfere; or it may and will allow, or even compel, the trustees to join in a sale to destroy the contingent remainder, if it should appear that such a measure would answer the uses originally intended by the settlement." To this he cites many authorities.

We think this objection is not well taken.

Was there error in the amount decreed to be paid?

One of the statements of fact in the case sets forth that Bissell tendered the money; and fails to state that he deposited it, or in any manner set it apart or appropriated it for the purpose of the tender. The other states that he used the money he had thus provided. The legal effect is the same. To have the effect of stopping interest or costs, a tender must be kept good; and it ceases to have that effect when the money is used by the debtor for other purposes. *Roosevelt v. Bank*, 45 Barb. 579; *Giles v. Hart*, 3 Salk. 343; *Sweatland v. Squire*, 2 Salk. 623.

The defendant insists that the value of the Confederate notes should be reduced to gold or sterling exchange, which would still farther depreciate their value.

This objection cannot be sustained. By the laws of the United States, all contracts between individuals could then be lawfully discharged in the legal-tender notes of the United States. These notes, and not gold or sterling exchange, were the standard of value to which other currencies are to be reduced to ascertain their value. *Knox v. Lee*, 12 Wall. 457; *Thorington v. Smith*, 8 Wall. 1; *Dooley v. Smith*, 13 Wall. 604; *Rev. St. S. C.* p. 285.

Confederate notes, although without the authority of the United States, and, indeed, in hostility to it, formed the only currency of South Carolina at the date of the transactions in question. United States currency was unknown, except when found upon the person of the soldiers of the United States taken and held as prisoners.

Confederate notes can in no proper sense be treated as commodities merely. The contract in question was made payable in terms in dollars; but both parties agree in writing that Confederate-note dollars were intended. The \$20,000 was paid in Confederate notes; and, when the defendant tendered his \$100,000, he tendered it in Confederate notes as dollars, and he obtained them by selling sixty-three bales of cotton for Confederate dollars. *Stewart v. Salamon*, 94 U. S. 434.

Decree affirmed.

WETZLER v. DUFFY.

(47 N. W. 184, 78 Wis. 170.)

Supreme Court of Wisconsin. Nov. 25, 1890.

Appeal from circuit court, Ashland county; J. K. Parish, Judge.

Cole & O'Keefe, for appellant. Sleight & Foster, for respondent.

TAYLOR, J. The facts in this case are substantially as follows: On the 14th of May, 1887, the plaintiff agreed to convey to the said defendant a certain lot of land situate in Ashland county, described as follows: "Commencing at the north-west corner of lot No. one, (1,) in block No. six, (6,) of the village of Hurley, according to the recorded plat thereof; thence east twenty-five (25) feet; thence south ninety (90) feet; thence west twenty-five (25) feet; and thence north ninety (90) feet to the place of beginning,"—for the consideration of \$2,500 agreed to be paid by the defendant. That on the same day the plaintiff executed a deed of conveyance to the said defendant, which both parties supposed contained a correct description of the property sold to the defendant; but, in fact, the description was imperfect, and does not describe the land sold and intended to be conveyed. The description in the deed is as follows: "The following described real estate situated in the county of Ashland, and state of Wisconsin,—to-wit: commencing at the north-west corner of lot number one, (1,) in block number six, (6,) in the village of Hurley, according to the recorded plat thereof; running thence west twenty-five (25) feet; thence south ninety (90) feet; thence east twenty-five (25) feet; thence north ninety (90) feet to the original point of beginning." Said deed was recorded in the proper recorder's office, and on the same day the defendant executed and delivered to the plaintiff a mortgage upon the property sold by the plaintiff to the defendant, in which mortgage the property is correctly described, to secure the payment of \$1,000, part of the purchase money. The complaint alleges the non-payment of a part of the money due upon the mortgage, and asks judgment, first to correct the description in the deed from the plaintiff to the defendant, and for a judgment to foreclose the said mortgage. The answer admits all the material allegations of the complaint, and further admits that, supposing the plaintiff's deed had conveyed to her the land she purchased, she went into the possession of the same, and paid \$300 of the sum secured by said mortgage; that on the 27th day of June, A. D. 1887, a fire broke out in the frame store building situate on said lot, and it was wholly destroyed by fire, the defendant having no insurance thereon, thereby destroying the greater part of the value of said lot to the defendant. It is admitted that this frame building was on the lot when the plaintiff agreed to convey

the same to the defendant, and at the time the deed was in fact made, and the mortgage back to the plaintiff given to secure the \$1,000, part of the purchase price. The defendant also alleges in her answer that, at the time she purchased the lot of the plaintiff, the building on said lot was insured by the plaintiff for the sum of \$800, in a reliable insurance company; and that he agreed to transfer said insurance policy to the defendant, for the sum of \$40, to be paid by the defendant; and that the plaintiff neglected and refused to transfer said insurance policy to the defendant, to her damage. The defendant also alleges a refusal on the part of the plaintiff to make a good deed of conveyance of the property actually purchased by her, and sets up, as a counter-claim, a demand for the money actually paid by her upon such purchase. The action was tried by the court, and, after hearing the testimony offered by the respective parties, the court decided in favor of the plaintiff and gave judgment reforming the deed and for a foreclosure of the mortgage. The defendant excepted to the findings of fact and conclusions of law. After a careful reading of the testimony, we think it very clear that the findings of fact are fully sustained by the evidence, and the conclusions of law, and the judgment thereon in favor of the plaintiff, are clearly right.

The learned counsel for the defendant contends that the judgment is erroneous, because it clearly appears from the findings and the evidence that, before the commencement of this action, and before a perfect deed had been given by the plaintiff to the defendant, for the real estate in dispute, the building situate thereon had been burned; and so the plaintiff could not make a perfect title to the premises sold to the defendant, the house burned being a very material part of the lot sold. He argues that when a party agrees to convey real estate to another for a fixed price, and when a considerable portion of such price is paid for the buildings situate thereon, and such buildings are destroyed by fire, without the fault of the purchaser, before the title is conveyed to him, he may refuse to take a conveyance, and recover the purchase money already paid, and to this proposition he cites *Thompson v. Gould*, 20 Pick. 134, and *Wells v. Calnan*, 107 Mass. 514. We think this case is clearly distinguishable from the cases cited. In those cases the buildings on the premises were destroyed before the time for making the deed had arrived, and it does not appear in the case last cited that the purchaser had taken possession under his contract. In the case at bar, the contract was a sale to be paid for on delivery of a deed, and the deed was to be delivered immediately. A deed was delivered which was supposed to convey the land to the defendant, and she took actual possession, as owner thereof, gave back a mortgage to secure part of the purchase

• money, the other part having been paid in cash. We think it very clear that, when this imperfect deed was given, the purchase price paid, and possession taken of the property intended to be conveyed by the defendant, the whole equitable title, at least to the land, vested in the defendant; and while such equitable title was vested in the defendant, the house was destroyed by fire. Upon its destruction the defendant did not seek to avoid her contract, but rebuilt on the lot, and continued in the actual possession of the same up to the time of the commencement of this action. Under such a state of facts, we think the defendant must be considered the owner of the premises at the time of the fire, and the loss must fall on her. Whether we would feel bound to follow the decisions of the court of Massachusetts, had the defendant been in possession of the lot under a contract for a deed to be executed at some future time, and before that time had arrived the house had been destroyed by fire, without the fault of either party, need not be determined in this case. For all practical purposes, the defendant was the owner of the house and lot when the fire occurred, and the Massachusetts cases place their decision upon the ground that the actual owner must stand the loss. In addition to this, when the court by its judgment corrected the deed, the legal estate became vested in the defendant from the time of the execution and delivery of the deed.

The learned counsel for the appellant urges another point as error, viz.: That the court did not make any findings upon his counter-claim for damages for a breach of contract on the part of plaintiff to transfer to her the policy of insurance he held upon the building at the time the same was burned. We have looked into the testimony which bears upon that question, and think it is entirely insufficient to sustain a finding thereon in favor of the defendant. But the counsel for the de-

fendant insists that, if it be admitted that the evidence is insufficient to sustain a finding in favor of the plaintiff, still, it was error for the court not to make a finding on the question. The exceptions of the defendant are not sufficient to raise that question in this court. The record does not show that he called the attention of the court to the matter, or that he asked the court to make a finding on that point. All he did was to except to the findings because there was no finding on that question. These exceptions are not made in court, and probably never came to the knowledge of the court until he was asked to sign the bill of exceptions in the case. The rule was established in this court in *Wilkinson v. Wilkinson*, 59 Wis. 557, 560, 18 N. W. 527; *Barry v. Schmidt*, 57 Wis. 172, 15 N. W. 24; *Wrigglesworth v. Wrigglesworth*, 45 Wis. 255-257; *Mead v. Supervisors*, 41 Wis. 205; *Williams v. Lumber Co.*, 72 Wis. 487, 40 N. W. 154,—that, if a party to an action desires any particular finding of fact, he must call the attention of the court to the matter of fact upon which he desires a separate finding; otherwise, he cannot avail himself of the neglect of the court to make such finding. This rule is only applicable to a case where the testimony sustains the findings made by the court, and there is not sufficient evidence in the case to require, as a matter of law, a finding different from those found by the court upon some other material matter. In this case, the court having omitted to find for either party on the counter-claim made by the defendant in her answer, and the evidence being of such a character as would have clearly justified the court in finding against such counter-claim, we must infer, from his omission to make a special finding on that point, that he found against the defendant's claim. We think the case was fairly tried, and that the judgment is right.

The judgment of the circuit is affirmed.

PHINIZY v. GUERNSEY et al.

(36 S. E. 796, 111 Ga. 346.)

Supreme Court of Georgia. July 12, 1900.

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action by Leonard Phinizy against C. H. Guernsey and others. From a judgment sustaining a demurrer to the complaint, plaintiff brings error. Reversed.

J. R. Lamar, for plaintiff in error. Jos. B. & Bryan Cumming, for defendants in error.

COBB, J. This was an action brought for the purpose of compelling the specific performance of a contract for the sale of land. According to the allegations of the petition, the defendants, who were the owners of a city lot upon which was situated a building, entered into a written agreement to sell the same to the plaintiff for the sum of \$16,000, of which \$5 was paid when the writing was signed, and the balance was to be paid when the vendee should satisfy himself that the vendors' title to the property was good. The plaintiff had agreed to take the property, but, though it is not affirmatively stated in the petition, it is clearly inferable therefrom that he never entered into possession. The written agreement to sell the property was signed on January 28, 1899. A conveyance of the property was delayed while the plaintiff was investigating the title, and after this investigation a further delay was occasioned by the fact that the defendants could not have canceled a security deed which they had given to the property, for the reason that the holder thereof refused to cancel the same until his bond for titles was surrendered, and that paper had been lost by the defendants. Pending this delay, on June 8, 1899, the building on the bargained premises was destroyed by fire through no fault of the defendants. There were at the date of the fire in full force policies of fire insurance for amounts aggregating the sum of \$10,000. The plaintiff avers his desire to comply with the contract of sale, so far as it is possible, in the changed condition of affairs, to carry the same into effect. He alleges that he is willing to take the land, and that the amount to be paid by him should be ascertained by the application of equitable principles. There was no agreement between the parties with reference to the ownership of the policies of insurance prior to the actual conveyance of the property, though it was agreed that when the property was conveyed in accordance with the terms of the contract the policies of insurance should be assigned to the plaintiff. The prayers of the petition were that the defendants be decreed to make to plaintiff a conveyance of the land under the terms set forth in the contract of sale, the court to make an abatement in the purchase price to the extent of the value of the improvements destroyed by fire, and for general relief. By amendment, prayers were added

that, in the event the court should be of opinion that the plaintiff is not entitled to an abatement of the purchase money by reason of the destruction of the improvements, a decree should be entered that upon payment of the purchase money the defendants should be required to make to plaintiff a deed to the land, and turn over to him the insurance money collected. There was a demurrer to the petition on the ground that the facts set forth did not entitle the plaintiff to the relief prayed, and that on account of the changed condition in affairs a specific performance of the contract was impracticable. The court sustained the demurrer and dismissed the petition, and to this ruling the plaintiff excepted.

1. "When a binding agreement is entered into to sell land, equity regards the vendor as a trustee of the legal title for the benefit of the vendee, while the latter is looked upon as a trustee of the purchase money for the benefit of the former." Bisp. Eq. (5th Ed.) § 364. This rule, however, is not applicable unless there is an ability as well as a willingness on the part of the vendor to convey; the purchaser not being considered as the owner from the date of the contract unless the vendor is prepared to convey a clear title and is not in default. 1 Warv. Vend. p. 195. In the case of Mackey v. Bowles, 98 Ga. 730, 25 S. E. 834, it was held that if, after the parties had entered into a binding executory contract to sell, the property was damaged before the vendor was in a condition to convey, the loss fell upon the vendor, and not on the purchaser. The loss in that case arose out of the destruction by fire of a building situated upon the land which was the subject-matter of the sale. See, also, in this connection, Kinney v. Hickox, 24 Neb. 167, 38 N. W. 816; Thompson v. Gould, 20 Pick. 134. Applying the principles above alluded to to the present case, as the vendee had not gone into possession before the fire, and the vendors were not, prior to that occurrence, in a position where they could make to the vendee an unincumbered title to the property, they were the owners of the property at the date the fire occurred, and the loss resulting therefrom must fall upon them. If the contract has been so far completed that the vendee is to be treated as the owner of the premises, then the loss falls upon him, as was the case in Paine v. Meller, 6 Ves. 349, where it was held that when there was a contract for the sale of houses, which, on account of defects in the title, could not be completed,—the treaty, however, proceeding upon a proposal to waive the objection upon certain terms,—and the houses were burned before the conveyance, the purchaser was bound if he accepted the title; and the fact that the vendor allowed insurance on the houses to expire on the day on which the contract was originally to have been completed, without notice to the vendee, makes no difference.

2. The next question to be determined is,

who was entitled to collect the insurance? As has been seen, the loss occasioned by the fire fell upon the vendors, and it would seem that the indemnity against loss should belong to them. This is, we believe, the rule in such cases. If the contract of sale had been so far completed that the vendors would have held the legal title as trustees for the vendee, then they would likewise have held title to the policies in the same capacity. But, as they were the owners of the property to the extent that the loss occasioned by the fire fell upon them, they will also be treated as owners of the property so far as the right to the insurance on the building is concerned. In *Poole v. Adams*, 33 L. J. (N. S.) 639, it was held that a purchaser of property insured, which was destroyed by fire, does not by the mere fact of purchase acquire a right to the insurance money. It has been held in some cases that, where a contract of sale is so far completed that the vendor is to be treated as the trustee of the vendee, the vendor would also hold in trust for the vendee a policy of insurance which was on the property at the time the contract was made, and that, if a loss by fire occurred between the date of the contract and the time fixed for the delivery of the deed, the vendor would be compelled to account to the vendee for the insurance money collected on the policy, as he was in equity the owner of the property at the time of the fire, and the loss fell upon him. *Reed v. Lukens*, 44 Pa. St. 200. See, also, *Insurance Co. v. Updegraff*, 21 Pa. St. 513; *Williams v. Lilley*, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150; *Grange Mill Co. v. Western Assur. Co.* (Ill. Sup.) 9 N. E. 274. The rule is thus stated by the supreme court of Ohio in *Gilbert v. Port*, 28 Ohio St. 276 (Syl., point 8): "As between vendor and vendee under a valid and subsisting contract of sale of real estate, covered by a policy of insurance, where a loss insured against occurs after the date of the contract and before conveyance, the true test for determining for whom the money recovered on the policy belongs, in the absence of stipulations governing, is to determine who was the owner, and which party actually sustained the loss." As in the present case the loss fell upon the vendors, they were entitled to collect and hold the money due by the insurance companies on the policies issued on the property.

3. When there has been a binding agreement to sell improved real estate, and before the property is conveyed the improvements upon the property are destroyed by fire without the fault of the vendor, will a court of equity compel, at the instance of the vendee, a specific performance of the contract? Section 4041 of the Civil Code declares: "The vendor seeking specific performance must show an ability to comply substantially with his contract in every part, and as to all the property; but a want of title, or other inability as to part, will not be a good answer to the vendee seeking performance,

who is willing to accept title to the part, receiving compensation for the other. If the defects in the vendor's title be trifling or comparatively small, equity will decree at his instance granting compensation for such defects." The section quoted is but a modification of the general rules recognized by courts of equity in reference to application for the specific performance of contracts. "It is settled that immaterial deficiencies will not deprive the vendor of his right to have the contract performed as against the vendee, provided that the deficiencies are such as may be compensated in money. Under such circumstances, the vendee may be compelled to take the property, and a suitable deduction will be made in the price. But, if the deficiencies are material and important, the vendee will not be compelled to take the property. He is entitled to have what he bargained for, and it would obviously be extremely unjust to force anything upon him which he had not designed or contracted to buy. If there is a failure in that which is an inducement to the purchase, he will not be compelled to take." *Bisp. Eq.* (5th Ed.) § 389. In *Gould v. Murch*, 70 Me. 288, it was held: When the owner of land with a building thereon agrees to convey it at a future day on payment of the purchase money, and before payment and conveyance the building is destroyed by fire without the fault of either party, the loss must fall upon the vendor; and, if the building formed a material part of the value of the premises; the vendee cannot be compelled to take a deed to the land alone, and pay the purchase money. See, also, *Smith v. Cansler*, 83 Ky. 367; *Wells v. Calnan*, 107 Mass. 514; *Powell v. Railroad Co.*, 12 Or. 488, 8 Pac. 544; *Kinney v. Hickox*, 24 Neb. 167, 38 N. W. 816; *Huguénin v. Courtenay*, 21 S. C. 403. It may be stated as a general rule that, where property which is the subject of a contract of sale has been substantially damaged or materially changed between the date of the contract of sale and the time when the vendor offers to convey, the courts will not decree a specific performance of the contract at the instance of the vendor. The reason for this is apparent. The vendor has no right to force upon the vendee something which he has not agreed to buy. The rule is different, however, when the application for specific performance comes from the vendee. There is a manifest reason for this difference. The vendee has a right, if he sees proper to do so, to accept less than he bargained for, and compensation for the loss of that which he does not obtain. If, for any reason, the vendor cannot convey to the vendee substantially what the contract calls for, of course a specific performance of the contract according to its terms is impossible. Such obstacles to a specific performance may arise from a defect in the title to some portion of the premises bargained for, or from the fact that the interest of the vendor is different from

that described in the contract, or the property may be subject to liens or incumbrances, or, if the subject of the contract is land, it may be deficient in quantity or quality or value. "In such a case there are only three possible alternatives for a court of equity to pursue: Either to refuse its remedy entirely; or to enforce the contract without any regard to the partial failure, compelling the purchaser to take what there is to give, and to pay the full price, as agreed; or to decree a conveyance of the vendor's actual interest, and allow to the vendee a pecuniary compensation or abatement from the price proportioned to the amount and value of the defect in title or deficiency in the subject-matter." Pom. Cont. § 434. In the same connection the author just quoted says: That the first alternative might often contravene the wishes and interests of both parties, and cannot, therefore, be taken as the universal rule. That the second one would be extremely unjust and inequitable, though it is occasionally resorted to when the vendee is not in a situation which entitles him to favorable consideration. That the third is based upon equitable principles. It endeavors to preserve the rights of both parties, and is therefore constantly resorted to and applied by courts of equity in aid of a vendee, and sometimes, although under more and greater restrictions, in aid of the vendor. But that there are circumstances under which even a vendee is not allowed to avail himself of the doctrine. In section 435 the same author says: "If the purchaser is willing and desirous to take the partial interest which the vendor can convey, and especially if he is the party calling upon the court for relief, there can be but little difficulty in granting him the remedy of performance, with a reasonable compensation for the defects." Mr. Bispham, in his work on the Principles of Equity, thus states the rule: "It may sometimes happen that defects exist which render the property less valuable than the contract price, but which nevertheless may not be of so vital a character as to induce the purchaser entirely to throw up his bargain. In such a case the equity of specific performance with compensation comes into play for the benefit of the vendee. He is entitled to have the agreement carried out, and yet at the same time to have an abatement or allowance made by reason of the defects." Bisp. Eq. (5th Ed.) § 390. See, also, Fry, Spec. Perf. (3d Ed.) §§ 1222, 1223; 2 Story, Eq. Jur. (13th Ed.) § 779; 2 Suth. Dam. (2d Ed.) § 589, p. 1311; 2 Beach, Mod. Eq. Jur. §§ 624, 627; 22 Am. & Eng. Enc. Law (1st Ed.) pp. 942, 943; *Harbers v. Gadsden*, 6 Rich. Eq. 284, 62 Am. Dec. 390. The text-books and cases cited show that the doctrine of specific performance, with compensation for defects when the vendor cannot convey exactly what his contract calls for, is thoroughly established, and it is in rare cases where the court will refuse such relief at the instance of the

vendee. It is true that in nearly if not quite all of the cases the inability on the part of the vendor to convey what the contract called for arose from some fact which was in existence at the time the contract of sale was made, such as defects in the title to a part of the premises, deficiency in quantity or quality or value of the property which was the subject-matter of the contract, and the like. There does not seem, however, to be any good reason why the principle should not be applicable where the inability of the vendor to convey a part of that which his contract stipulated for arose subsequent to the making of the contract, out of some transaction in which the vendee was not involved; and the fact that the vendor was himself without fault would not seem to be an obstacle which would prevent the application of the rule. Requiring a vendor to pay damages to his vendee for a failure to convey property which subsequent to the execution or the contract of sale was destroyed by fire is no greater hardship than requiring a vendor to pay damages on account of his having ignorantly, though honestly, and after the exercise of all possible diligence, bargained away something which he did not own, but which he believed was his own. That he would be required to pay damages in the latter case, no one will doubt. That he should be in the former case, ought not, it would seem, to be questioned, upon principle. In *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477, which was a case of an executory contract for the sale of real estate, where the vendor was to furnish an abstract of title, and, if not satisfactory, he was to have the option of perfecting the title, or annulling the contract and returning the money paid, and the abstract failed to show title, and the vendor failed to exercise his option, after notice to do so, until after buildings thereon were destroyed by fire, the vendor still remaining in possession, it was held, on a bill by the vendee for the specific performance of the contract as to the land, and compensation for the buildings and property destroyed, that the contract was not so complete as to make the land the property of the vendee, so as to throw upon him the loss of the buildings, and that upon specific performance being ordered the vendee was entitled to compensation for the loss, to be deducted from the purchase money, and that the vendor was entitled to interest on the unpaid purchase money only from the time a good title to the property was shown, the vendor being entitled to the rents and profits up to such time. The case just referred to is the only one which has been called to our attention which is at all similar to the present case. Upon principle, however, we have no hesitancy in holding that the vendee in a case like the present is entitled to have a conveyance made to him of the land, and compensation for the loss of the building, provided the loss thus sustained is capable of

computation. If the plaintiff sustains his allegations, a decree should be entered that the defendants convey to him the land which was the subject-matter of the contract, and that the purchase price be abated in such an amount as is just and reasonable in view of the changed condition of the property.

4. If the difference in value between the interest contracted for and the interest that can be conveyed is incapable of computation, of course the court will not undertake to enter a decree for specific performance, with compensation for defects. But, as has been said, in the light of many adjudicated cases, "It is conceived that the court will seldom now consider a difficulty of this kind insuperable." Fry, *Spec. Perf.* (3d Ed.) § 1240. We do not think the present case falls within the rule above referred to, as it seems to us that the amount which should be allowed to the plaintiff as compensation for the loss sustained by him in not obtaining a conveyance of the land with the building on it can be made the subject of exact computation. Let it be kept in mind that the plaintiff is entitled to be placed, so far as property and money will place him, in exactly the same position that he was in on the day that the contract of sale was entered into. If on that day the property was worth more than he agreed to pay for it, he is entitled to the profit on his bargain. If, on the other hand, the property was worth less than he agreed to pay for it, he must suffer the loss. Let it be ascertained what was the market value of the property with the building on it on the day that the contract was entered into. Let it also be ascertained what was the market

value of the lot without regard to the building on that day. If the market value of the improved lot was more than the contract price, the difference between these two sums would be the profit that the plaintiff would have realized on his bargain. Deduct the amount of profit from the market value of the lot alone, and the sum remaining will be the amount which the plaintiff should be required to pay. If the market value of the property and the contract price are the same, then the plaintiff should be required to pay a sum which would equal the market value of the lot without the building. If the market value of the whole property was less than the contract price, then the plaintiff should be required to pay the market value of the lot without the building, and in addition to this the difference between the market value of the lot and building and the contract price, provided that in no event should the plaintiff be required to pay more than \$16,000. While we find no rule for computing the amount of compensation in such cases, we think the above rules are in accordance with equitable principles, and are deducible from the general rules which seem to have been recognized by the courts and text writers. See, in this connection, *Smith v. Kirkpatrick*, 79 Ga. 410, 7 S. E. 258; 2 *Suth. Dam.* (2d Ed.) pp. 1311, 1312; 2 *Beach, Mod. Eq. Jur.* § 629; *Wilcoxon v. Calloway*, 67 N. C. 463; Fry, *Spec. Perf.* (3d Ed.) § 1239. The prayers of the petition were broad enough to authorize relief along the lines above indicated. The court erred in sustaining the demurrer, and the case should be tried in the light of what is here laid down. Judgment reversed. All the justices concurring.

LEONARD v. CRANE et al.

(35 N. E. 474, 147 Ill. 52.)

Supreme Court of Illinois. Oct. 27, 1893.

Appeal from circuit court, Jefferson county; E. D. Youngblood, Judge.

Bill by Elizabeth A. Leonard against J. McKendree Crane and others. A cross bill was filed by Isaac Crane. A decree was entered dismissing the bill and granting the prayer of the cross bill. Complainant appeals. Affirmed.

The other facts fully appear in the following statement by PHILLIPS, J.:

A bill was filed by appellant for specific performance, and substantially alleges that complainant, in consideration of certain personal property and a certain amount to be paid in cash, purchased a house and lot occupied by J. McKendree Crane and wife. It is alleged by the complainant that the contract was consummated by a deed having been signed by the parties, which was delivered to the husband of complainant, who was present with a notary public, by whom the acknowledgment was to be taken; and it is further claimed that the deed was acknowledged. It is further averred by the complainant that the wife of J. McKendree Crane, on the morning after the trade was consummated, got possession of the deed for the purpose of examining it, and refused to surrender the same, and subsequently destroyed it. A supplemental bill was filed, in which it is alleged that J. McKendree Crane and wife made a conveyance of same lot to Isaac Crane, who at the time held a mortgage on the premises. It is further averred that after the conveyance to Isaac Crane the premises were occupied by his tenant, and appellant commenced a proceeding in forcible detainer, and recovered a judgment against the tenant, which was not appealed from; and that said Isaac Crane had notice of the claim of appellant at the time he received a deed conveying the premises to him. The answer denies the execution and delivery of a deed conveying the premises to complainant, as alleged in her bill, and avers the premises were occupied as a homestead; and that the signing of the deed by the wife of J. McKendree Crane was procured by threatening to institute a lawsuit against her; and that at the time of the signing of the said deed by said McKendree Crane he was so intoxicated as to be wholly incapable and incompetent to do business, and the complainant had notice thereof. A cross bill was filed by Isaac Crane, which averred the conveyance of the premises to him by J. McKendree Crane and wife, and that he entered into possession of the same by placing on said premises his tenant, against whom proceedings were instituted in forcible detainer; and that said tenant conspired and colluded with the appellant to deprive the said Isaac Crane of possession, and neglected to sign an appeal bond; and prays in said cross bill

for an accounting for rents, and that the possession of the premises may be restored to him. A decree was entered dismissing the original and supplemental bills and granting the relief prayed in the cross bill of Isaac Crane, and appellant excepted, and brings the record to this court by appeal.

Albert Watson and John W. Burton, for appellant. J. M. Durham and C. H. Patton, for appellees.

PHILLIPS, J., (after stating the facts.) The evidence of this record clearly shows the premises were occupied by J. McKendree Crane and wife as a homestead, and were in value less than \$1,000. The testimony shows that a deed signed by J. McKendree Crane and wife contained a clause relinquishing the homestead right, but there is no evidence to show that the acknowledgment as claimed to have been made by the notary public contained any clause with that relinquishment. By the conveyance act it is requisite that in the deed there shall be contained a clause waiving the right of homestead, and a similar clause must be contained in the acknowledgment of both the husband and wife; and the estate of homestead thus created can be relinquished only in the mode pointed out by the statute, or by abandonment. This rule is sustained by the uniform decision of this court. *Richards v. Greene*, 73 Ill. 54; *Eldridge v. Pierce*, 90 Ill. 474; *Trustees, etc., v. Hovey*, 94 Ill. 394; *Browning v. Harris*, 99 Ill. 459. Where a bill is filed to restore a deed, by which deed a conveyance of the homestead is sought to be consummated, the proof must be such that it must show a deed that would be sufficient to convey the homestead; not only by evidence of the relinquishment of the homestead in the body of the deed, but the acknowledgment must contain a relinquishment of the homestead, acknowledged by the husband and wife. The evidence also shows that the husband of the complainant, with a notary, accompanied J. McKendree Crane to his house, and that others subsequently came to the house, and for more than one hour efforts were made to induce the wife to sign the deed, which had been prepared before the visit of the husband with the notary to the house; and the proof clearly shows that at the time J. McKendree Crane was much intoxicated, and that both he and the complainant's husband sought to induce Mrs. Crane to sign the deed by persuasion; and that further, complainant's husband said that he had purchased the property, and that it would save her trouble if she would sign it, and that threats of abandonment were made by her husband, and other threats were made by him unless she signed the deed, and during this period of time of more than an hour in which these efforts were made to induce the wife to sign this deed she was seeking to have the execution of the deed put off until next morning, claiming that her husband was too much

intoxicated to do business, and claiming that it was the only home she had, and, in tears, begging for time to be allowed to consult with her father-in-law, but, overcome by the persistence with which the demand on her to execute the deed was made, she signed the deed, and just before signing her husband gave her \$20, which was to be her own, and that sum she tendered the husband of the complainant when on the next morning he offered to pay the balance of the purchase money, he having previously paid Crane \$20. There is no evidence in the record showing any acknowledgment of the deed by her other than the simple signing of the same, nor is there evidence showing any inquiry made of her by the notary.

On this state of facts a court of equity may well refuse specific performance. It was held in *Fitzpatrick v. Beatty*, 1 Gilman, 454: "Nor will a court of equity decree a specific performance where the contract is founded in fraud, imposition, or mistake, or where it would be unconscientious to enforce it." In *Frisby v. Ballance*, 4 Scam. 287, it was held: "An application for the specific performance of a contract is addressed to the sound legal discretion of the court, and it is not a matter of course that it will be decreed, because a legal contract is shown to exist. Indeed, the origin and ground of this jurisdiction is that a compensation for damages is inadequate to the full measure of the parties' equitable rights. It is not necessary to authorize this court to refuse a specific performance that the agreement should be so tainted with fraud as to authorize a decree that it should be given up and canceled on

that account. * * * A specific performance will not be decreed unless the agreement has been entered into with perfect fairness, and without misapprehension, misrepresentation, or oppression." To the same effect are *Race v. Weston*, 86 Ill. 91; *Proudfoot v. Wightman*, 78 Ill. 553. There is some conflict in the evidence as to whether the deed was taken from the table, after it was signed, by the notary public or by the husband and agent of the complainant, but from the view we take of this record that question is immaterial.

The evidence in this record shows the personal property which was sought to be transferred as a part consideration was valued at \$300 between Leonard and Crane, and the weight of proof shows that the value of the property was not to exceed \$150; and this fact, in connection with the condition in which J. McKendree Crane was, and the circumstances under which the signature of the wife was obtained, are such that it would be unconscionable for a court of equity to order a conveyance to be made. In the absence of proof that the acknowledgment contained a clause relinquishing the rights of homestead, a court of equity cannot decree the title as vested in the complainant by reason of execution of the deed shown by the evidence. Thus, it was not error to dismiss the original and supplemental bills of complainant; and, the complainant having wrongfully obtained possession of the premises as against Isaac Crane, and he being entitled to the same, it was not error to grant the relief prayed for in the cross bill. The decree is affirmed.

GRAYBILL et al. v. BRAUGH.

(17 S. E. 558, 89 Va. 895.)

Supreme Court of Appeals of Virginia. April 20, 1893.

Appeal from circuit court, Botetourt county.

Bill by E. J. Braugh against Mary W. T. Graybill and others for the specific performance of a contract for the sale of land. From a decree in complainant's favor, defendants appeal. Reversed.

E. & E. N. Pendleton, for appellants.
Benj. Haden, for appellee.

FAUNTLEROY, J. This is an appeal from decrees of the circuit court of Botetourt county, rendered on the 20th day of May, 1890, and the 27th day of January, 1891, in a chancery suit in said court depending, in which E. J. Braugh is complainant and Mary W. T. Graybill and Lewis H. Graybill, her husband, and A. Nash Johnston, are defendants. It appears from the record in this case that on the 12th day of March, 1888, Lewis H. Graybill bought of J. H. H. Figgatt, special commissioner of the circuit court of Botetourt county, in the cause therein pending of J. P. Thrasher vs. Brierly and others, a tract of land in Botetourt county, Va., containing about 50 acres; that on the 3d day of February, 1890, before the purchase money had been paid, and before any deed had been made to Graybill for the land, the said Graybill gave to E. J. Braugh an option in writing and under seal for the purchase of this land by Braugh for the nominal consideration of one dollar, but, in fact, nothing, it is admitted, was ever paid to Graybill by Braugh, not even the one dollar for the said option. On the 20th of March, 1890, J. H. H. Figgatt, the commissioner aforesaid, upon the payment of the purchase money for the land by the judicial purchaser, Lewis H. Graybill, conveyed the land to Mary W. T. Graybill, the wife of Lewis H. Graybill, by the direction of said Graybill, as he was ordered by the decree of sale to do. On the 22d of March, 1890, Lewis H. Graybill and wife conveyed this land to A. Nash Johnston for \$2,000. At the time of this purchase Johnston was informed that Lewis H. Graybill had given an option to E. J. Braugh on this land for the period of 10 months from February 3, 1890, but that nothing had been paid by Braugh on said option, and that it bound Braugh to pay or do nothing whatever, and it was therefore not binding on Lewis H. Graybill. At the April rules, 1890, of the circuit court of Botetourt county E. J. Braugh filed his bill in this suit, asserting the said option as a binding contract, which he prayed to have specifically performed, and that the deed from J. H. H. Figgatt, commissioner, to Mary W. T. Graybill, and the deed from Lewis H. Graybill and Mary W. T. Graybill, his wife, to A. Nash Johnston,

be set aside, vacated, and annulled, and charging Mrs. Graybill, Lewis H. Graybill, A. Nash Johnston, and J. H. H. Figgatt, commissioner, with notice of his option, and with fraud in the execution of the deeds aforesaid.

The said parties filed their demurrers and answers, and denied the allegations and equities of the bill, and the circuit court of Botetourt county, by the decrees complained of, decided that both Mrs. Graybill and A. Nash Johnston had notice of the said option at the time of receiving their respective deeds, and that said option is an enforceable contract, and binding on all the parties, including A. Nash Johnston, and directing A. Nash Johnston to convey the land to E. J. Braugh, without retaining a lien on the land, upon the payment by E. J. Braugh of the cash payment and first deferred payment, and executing bonds for the second and third deferred payments of the purchase money, "with security approved by the clerk of this court," etc., "thereby substituting for the vendor's lien to secure the deferred payments of the purchase money mere personal security, and that, too, not such as might be satisfactory to the parties interested, nor such as should be approved by the court, but with security approved by the clerk," etc. Johnston did not buy the land from Lewis H. Graybill, but from Mrs. Mary W. T. Graybill. Lewis H. Graybill never had any title to the land, and the interest of Braugh, if any, by virtue of a mere naked option to buy, which did not bind him to buy in any event whatever, was not such an interest in the subject of which a purchaser for value is bound to notice, or which equity will regard. 2 Pom. Eq. Jur. § 692. Unilateral or option contracts are not favored in equity, and the want of mutuality of obligation and risk may generally be urged as bar to their specific enforcement. 2 Warr. Vend. p. 769. "Equity requires an actual consideration, and permits the want of it to be shown, notwithstanding the seal, and applies the doctrine to covenants, settlements, and executory agreements of every description." 1 Pom. Eq. Jur. § 383. In respect to voluntary contracts, or such as are not founded on a valuable consideration, courts of equity do not interfere to enforce them as against the party himself, or as against volunteers claiming under him. 2 Story, Eq. Jur. § 706a. In *Duval v. Bibb*, 4 Hen. & M. 116, it was held that in equity either party to a deed may aver and prove against the other the true and actual consideration on which the deed was founded, though a different consideration be expressed therein. Equity disregards the form and looks to the substance. The nominal consideration of one dollar in the option, it is admitted, was never paid, and the option says: "It is agreed by the parties hereto that there shall be no obligation upon the said E. J. Braugh by virtue of this agreement, unless within the

period of the said ten months he pays one third of the purchase money." He did not sign the option, and it did not bind him to do anything. He attempted to make a large profit on an investment of nothing, and without the obligation to do anything, and he simply failed. The complainant's bill should have been dismissed in the circuit court for want of mutuality of obligation in the option sued upon. It professes to bind one of the parties absolutely, and stipulates only for the indefinite pleasure of the other; and it cannot, therefore, be specifically enforced. *Ford v. Euker*, 86 Va. 79, 9 S. E. 500. It, moreover, appears that neither party contemplated a sale subject to the wife's (Mrs. Graybill's) contingent right of dower, and in this respect this case is ruled by the case of *Dunsmore v. Lyle*, 87 Va. 391, 12 S. E. 610, where specific performance was refused, even though the bill offered to take a deed from Lyle subject to the wife's dower. In this case the complainant Braugh seeks to enforce a conveyance of the land free from the dower interest of Mrs. Graybill, who never signed the option, and who, on hearing of it, interposed her remonstrance immediately, and communicated her refusal to be bound by it to Braugh. "Specific execu-

tion of an agreement to sell and convey will not ordinarily be decreed against the vendor, a married man, whose wife refuses to join in the deed, when there is no proof of fraud on his part in her refusal, unless the purchaser is willing to pay the full purchase money, and accept the deed without her joining." 2 Warv. Vend. p. 769. See *Clarke v. Reins*, 12 Grat. 98. Mrs. Graybill held the legal title to the land, and she is in no manner bound by the option of her husband, to which she was not a party, and against which she protested, from the first moment that it came to her knowledge. *Dunsmore v. Lyle* (Va.) 12 S. E. 611; *McCann v. Janes*, 1 Rob. (Va.) 256; *Clarke v. Reins*, 12 Grat. 98; *Booten v. Scheffer*, 21 Grat. 474; *Iron Co. v. Gardiner*, 79 Va. 305; *Litterall v. Jackson*, 80 Va. 604; *Cheatham v. Cheatham's Ex'r*, 81 Va. 395; *Railroad Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239. The circuit court erred in overruling the demurrer of Graybill and wife to the complainant's bill, and we are of opinion that the decrees appealed from are wholly erroneous, and our judgment is to reverse and annul them, and to enter a decree here dismissing the complainant's bill.

Reversed.

HALL et al. v. HALL et al.

(16 N. E. 896, 125 Ill. 95.)

Supreme Court of Illinois. May 9, 1888.

Appeal from circuit court, Kane county; Charles Killum, Judge.

This is a bill for the specific performance of an agreement, entered into between the heirs of Alexis Hall, to set aside a will made by him, brought against the widow and minor heirs of Eugene Hall, one of the parties to the agreement.

Sherwood & Jones, for appellants. A. J. Hopkins, N. J. Aldrich, F. H. Thatcher, and Charles Wheaton, for appellees.

SHELDON, C. J. The defense set up in this case is that the contract of January 19, 1883, was not a complete contract, and that, not being complete, it is as no contract, and so that alleged agreement cannot be specifically enforced; that the only complete contract there could have been in the case would have been that of February 10, 1883, had the papers of that date all been executed and delivered, but as they were not, the attempted contract of February 10th was not completed, and hence there is no contract whatever to be specifically performed. It would seem from the evidence that the will of Alexis Hall, made on December 7, 1881, had come to the knowledge of his children, and had created a family dissatisfaction from its giving to Eugene the larger part of the estate, and its being executed under the circumstances it was; and that threats had been made by the other children that they would contest the will. To reconcile this family difference, the writing of November, 1882, appears to have been made, and signed by all the children, whereby they agreed that there should be an equal distribution of their father's estate between his four surviving children when the time for such distribution should come. It seems that another cause of difficulty had sprung up between Eugene and his sister Matilda, and her husband, from a long-standing note for \$2,300 which had been given by the two latter to Eugene, and was unpaid, and for which the latter had taken collateral securities, which had failed to be collected from the negligence of Eugene, as was contended. This additional difficulty was amicably composed by these brothers and sisters by their all generously sharing equally among them and the widow the burden of this Plummer indebtedness; and soon after the death of Alexis Hall they came together, and executed this second agreement, of January 19, 1883. By this agreement all the four children and the widow agreed to settle the demands of Eugene on Matilda Plummer and her husband, by each bearing one-fifth part of the Plummer indebtedness; and they renew their former agreement of November previous to set aside the will of Alexis Hall, and that there should be a distribution of his

estate as intestate estate. This agreement is signed by the widow, who did not sign the November agreement.

This is an agreement of a most praiseworthy kind,—an amicable arrangement among brothers and sisters of difficulties between them, which would have been carried out to the entire satisfaction of them all but for the sudden death of Eugene. It is an agreement which a court of equity will look upon favorably, and readily interpose its specific performance, unless there be some insuperable bar to prevent. The written agreement of January 19th is plain, clear, and full; it bears upon its face evidence of ample consideration, and is of itself a complete contract. That this would be an obligatory contract, although it was understood at the time that there should thereafter be a more formal instrument drawn up and executed to express the parties' agreement, is abundantly established by the authorities. *Fowle v. Freeman*, 9 Ves. 351; *Chinnock v. Marchioness of Ely*, 4 De Gex, J. & S. 638; *Pratt v. Railroad Co.*, 21 N. Y. 305; *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266. All there is that can be urged against the completeness of this written contract of January 9th is that it omits to state one alleged term of the contract which was then made, viz., that Eugene was to have the home farm at an appraisal to be fixed by appraisers. This is an independent matter, separate and distinct from the two subjects of agreement named in the writing,—the Plummer indebtedness, and the setting aside of the will. The bill does not ask to have performed a contract resting partly in a writing and partly in parol. It does not depend upon, or seek anything whatever respecting, the alleged parol part of the contract; but it is the defendants who are placing reliance upon this parol part of the contract, setting it up in defense, and in defeat of the performance of the contract in writing. If the defendants would not have the enjoyment of the parol part of the contract, and so not have the benefit of what they contracted for, there would be some equity in such a defense. The heirs of Eugene allege, against the performance of this written contract, that he was to have the home farm, and that this is not expressed in the writing. But if he does not get the home farm, and the other children convey their interest in it to him or his heirs, there would seem to be no equity in such a defense of the mere omission of the writing to say that Eugene was to have the home farm at a price to be fixed by appraisers. And just such is the case presented here. Two of the children, Stephen A. and Matilda Plummer, have executed agreements for conveying to Eugene their interest in the home farm. The other of the three children, Mrs. Summers, is ready and willing, and offers by the bill, to make a like agreement for conveyance of her interest in the home farm; so that the defendants do or will, under the offer of the bill, get the entire benefit

of the parol part of the contract. There is no equity, then, in the defense which is set up, that this parol part of the contract was not expressed in the writing of January 9th; and we think the authorities establish that such a defense is not sustainable where the defendant gets secured to him all the benefit of the parol portion of the contract. In *Railway Co. v. Winter*, 1 Craig & P. 57, a bill by the company for the specific performance of a written contract for the purchase of real estate, where there had been a subsequent parol agreement that the company should also pay for timber on the land, and for certain expenses, performance was decreed, subject to the parol variation; and Lord Chancellor Cottonham said: "This is not a case within the meaning of those decisions in which the court has said that it will not specifically perform the contract with a variation." If the court finds a written contract has been entered into, and the plaintiff says, 'That was agreed upon,' but then there were certain other terms added, or certain variations made, the court holds that in such a case the contract is not in the writing, but in the terms which are verbally stated to have been the agreement between the parties, and therefore refuses specifically to perform such an agreement. On the other hand, it is quite competent for the defendant to set up a variation from the written contract; and it will depend upon the particular circumstances of each case whether that is to defeat the plaintiff's title to have a specific performance, or whether the court will perform the contract; taking care that the subject-matter of this parol agreement or understanding is also carried into effect, so that all parties may have the benefit of what they contracted for." See *Robinson v. Page*, 3 Russ. 114; *Price v. Dyer*, 17 Ves. 357. In 3 Pars. Cont. (5th Ed.) 389, the author says: "It is a principle of equity jurisprudence that parol evidence is admissible to rebut, but not to raise, an equity; and this principle or rule gives rise here to an important distinction. Although, to resist a specific performance, a defendant may show by parol that the written document does not fully represent the contract between the parties, and thus defeat the bill, or compel the plaintiff to accept a performance with a variation, yet a plaintiff cannot have a decree for a specific performance of a written contract with a variation upon parol evidence." In *Park v. Johnson*, 4 Allen, 259, after a review of the English cases upon the subject, the court says: "The weight of authority seems clearly with the plaintiff on this point, [of having specific performance, where ready to take the written agreement, and fully to perform the omitted stipulation:] and, while the court would refuse to give them aid in compelling the lit-

eral execution of a written contract which does not contain the whole agreement, they allow the objection to operate no further than to require the party seeking the aid of the court to modify the written contract so as to embrace all the stipulations that are alleged to have been omitted or subsequently varied."

When Mr. Aldrich met the parties on February 10th he brought with him five papers, namely: (1) The agreement between the four children to set aside the will; (2) an agreement between the widow and children to settle the Plummer indebtedness; (3) a renunciation of the will by the widow; (4) an agreement between Stephen A. Hall and Eugene A. Hall for a conveyance by the former of an undivided one-fourth of the Alexis Hall farm; (5) a like agreement between Mrs. Plummer and Eugene A. for conveyance of a like undivided one-fourth. The first three were on that day executed by all the parties there present, and delivered to Mr. Aldrich; Mrs. Summers being the only party absent. The first three papers contained, essentially, nothing more than the agreement of January 19th, amplified by legal verbiage; and the signing of them by Mrs. Summers was of no moment, as she had signed the 19th January agreement. The other two agreements for conveyances by Stephen A. and Mrs. Plummer were also signed by them, respectively, on February 10th. A like agreement for a conveyance by Mrs. Summers, who was absent, was thereafter to be executed by her, which she has ever been ready and willing, and offers by the bill, to execute. Whatever of incompleteness there may be in these papers of February 10th, or any one of them, has no bearing, as we conceive, upon the present bill. It does not call in aid that transaction, and in no way depends upon it. The bill is rested wholly upon the agreement of January 19, 1883, and asks the specific performance of that agreement. As the specific performance is only asked subject to the defendants having all the benefit of the alleged parol part of the agreement which is claimed to have been made, we are of opinion the complainants are entitled to have the agreement of January 19, 1883, specifically performed.

It is claimed that the defendant Marion O. Hall has a dower interest in the land. Whether that be so or not is no objection to a decree of specific performance against the heirs of Eugene A. Hall. Any decree of conveyance might be made subject to whatever right of dower, if any, Marion O. Hall may have in the land.

The decree will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

KELSEY et al. v. CROWTHER et al.

(27 Pac. 695, 7 Utah, 519.)

Supreme Court of Utah. Sept. 12, 1891.

Appeal from district court, Salt Lake county; Elliot Sanford and T. J. Anderson, Judges.

Suit in equity by Lewis P. Kelsey and J. K. Gillespie against W. J. Crowther, J. T. Lynch, and William Glassman, to enforce a specific performance of a contract to sell land. Complaint was dismissed, and plaintiffs appeal. Affirmed.

P. L. Williams, Waldemar Van Cott, and O. W. Powers, for appellants. Arthur Brown, for respondents.

BLACKBURN, J. This is a suit in equity to enforce the specific performance of the following contract: "Salt Lake, Utah, September 13, 1887. Received of Lewis P. Kelsey and J. K. Gillespie the sum of fifty dollars, being part consideration of the purchase price, to wit, \$2,750.00, at which the undersigned agrees and contracts to sell, and by good and sufficient warranty deed convey, free of all liens, to said Kelsey & Gillespie, the following described lot of ground, to wit: The east thirty (30) acres of the south half of the southwest quarter of section three, (3) township one (1) south, of range one (1) west, of Salt Lake meridian. Said purchaser to have after this date thirty (30) days for the examination of the title of said premises, and, in case said title is adversely reported on by the attorneys of the said purchasers, then the said part consideration hereby receipted shall be at once returned to said purchasers; but if said title is approved I hereby contract and agree to and with said Kelsey & Gillespie that I will at once, on the payment of said balance of agreed purchase money, to-wit, \$2,700.00, duly execute, sign, and acknowledge a full and perfect warranty deed conveying to said purchasers the entire title to said premises, and I agree to at once furnish an abstract of title to said premises and other needful papers." The complaint alleges a tender of the money, although an abstract was not furnished, a demand for a deed, and the failure to make same. The answer is a specific denial of the allegations of the complaint. A trial was had by the court, findings of fact, and a judgment that the complaint be dismissed, from which judgment the plaintiffs appeal. The testimony is all in the record, and we do not deem it important to review the findings of fact made by the trial court. The claim of the appellants is that the evidence does not justify the judgment. It shows that the contract was signed and delivered on the 13th day of

September, 1887; that the defendants failed altogether to furnish an abstract; that at no time within the 30 days did the plaintiffs offer to pay the purchase money and demand a deed, but on the 31st day, October 14, 1887, defendant Crowther went to the office of plaintiffs, and told Kelsey, one of the plaintiffs, that he did not come round yesterday, and that his time was up, and Kelsey said that he had forgotten it, and Crowther further told him that he had forfeited his \$50; but he further said—but this Kelsey denies—he offered him back the \$50. This occurred on the street in front of the office of plaintiffs, Crowther being in his buggy with his wife; and Kelsey went immediately into his office, and brought a bag with money in it, and said, "Here is your money," but Crowther drove off, and refused to wait. Kelsey says the amount of money required was in the bag. Kelsey further says that the offer of the money was on the condition that Crowther's wife would also sign the deed. We think this judgment must be affirmed.

1. The contract is an option. The plaintiffs had 30 days in which to tender the money and demand a deed. By the terms of the contract they did not have 31 days, and, having failed in that time to tender the money, they lost their right to enforce the contract. Nor do we think the failure of the defendant to furnish an abstract extended the time. It might make him liable for damages, but not enlarge or change the terms of the contract.

2. It does not appear from the evidence in this case that the plaintiffs have not a full and complete remedy at law for all the damages they may have suffered by reason of any and all breaches of this contract, if any were committed by the defendant Crowther; and as a rule specific performance of contracts is not enforced in equity, where the parties injured by breach of contract can be completely compensated in a suit at law.

3. The plaintiff Kelsey says that he offered the money on the condition that the wife of the defendant Crowther would sign the deed. A husband cannot contract away his wife's right of dower. A court of equity has no power on the husband's contract to compel a wife to relinquish her dower rights. Therefore the offer of the money was upon a condition that could not be complied with, and that was not obligatory upon the defendant, and that a court of equity could not enforce, and was no offer at all. 3 Pom. Eq. Jur. § 1400 et seq. We see no reason for the reversal of this judgment. It is therefore affirmed.

ZANE, C. J., and MINER, J., concur.

COMBS v. SCOTT et al.

(45 N. W. 532, 76 Wis. 662.)

Supreme Court of Wisconsin. April 29, 1890.

Appeal from circuit court, Lincoln county; CHARLES M. WEBB, Judge.

Curtis & Curtis, for appellants.

Courts of equity will not decree specific performance in the case of stale or suspicious claims. *Walker v. Jeffreys*, 1 Hare, 348; *Heaphy v. Hill*, 2 Sim. & S. 29; *Williams v. Williams*, 50 Wis. 311, 318, 6 N. W. Rep. 814; *Anthony v. Leftwich*, 3 Rand. (Va.) 238; *Pigg v. Corder*, 12 Leigh, 69; *Madox v. McQueen*, 3 A. K. Marsh. 400; *Ruff's Appeal*, 117 Pa. St. 319, 11 Atl. Rep. 553; *Railroad Co. v. Bartlett*, 10 Gray, 384; *Haughwout v. Murphy*, 21 N. J. Eq. 118; *Merritt v. Brown*, Id. 401; *Johns v. Norris*, 22 N. J. Eq. 102; *White v. Bennett*, 7 Rich. Eq. 260; *McDermid v. McGregor*, 21 Minn. 111.

Bump & Hetzel, for respondent.

ORTON, J. This is an action for specific performance, brought by the plaintiff, Harrison Combs, against Walter A. Scott, trustee of the estate of Thomas B. Scott, deceased, and his heirs as defendants, of the following contract, viz.: "May 1, 1882. In consideration of one dollar and other valuable considerations, to-wit, settlement of all suits, actions, differences, and matters of difference, I agree to give to Harrison Combs, of Applington, Iowa, on or before July 1, 1882, a good and sufficient deed in fee-simple of all my right, title, and interest of, in, and to the stump lands which I now own, lying within one and one-half or two miles of Hay Meadow creek, in Lincoln county, Wisconsin, not being adjacent to and along Prairie river, all in town thirty-two, in ranges six and seven, and town thirty-three, in ranges six and seven; the intention being to convey to said Combs all the lands lying on and along Hay Meadow creek from below, adjacent, and above the dam on said creek, not including cedar lands on lower end of Hay Meadow, or lands below the meadow; the intention being to include all stump lands opposite, above, and in the vicinity of the dam of Combs, on Hay Meadow creek,—lands that the outlet of hauling off timber that would go to Prairie river not to be included. [Signed] THOMAS B. SCOTT, [Seal.] In presence of D. W. McLEOD." The plaintiff alleged in his complaint that he demanded a conveyance of said lands of Thomas B. Scott in his life-time, and that he refused so to convey the same; and that he demanded a conveyance of the same of the defendant Walter A. Scott, the trustee of said estate, and that he also refused so to do; and that he has no adequate remedy at law for the breach of said contract, and that said lands have greatly increased in value since the breach thereof; and that he owns a mill in the vicinity of said lands, built for the purpose of manufacturing the timber thereon, which will be greatly depreciated in value in case said lands are not conveyed to him. The plaintiff also alleged the location and description of said lands, according to the terms of the contract, to

consist of certain 40 acre tracts lying in townships 32 and 33, ranges 6, 7, and 9, in Lincoln county, Wis., appended to the complaint. The defendant Walter A. Scott, as such trustee, answered said complaint, and alleged that said contract was incomplete, and that it was intended thereby that the plaintiff and Thomas B. Scott should thereafter select and locate said lands, and agree to such selection, and that the plaintiff neglected to cause such selection to be made for more than four years, and until the death of said Scott, and that now it is impossible to ascertain what lands were intended by said contract. He denied that said list of lands, so appended, contained the lands contemplated by the agreement, excepting, perhaps, about seven 40-acre tracts in township 32, in range 6; and alleged, further, that he is ignorant of many of the facts alleged in the complaint, and that it is now impossible, by reason of the death of his father, Thomas B. Scott, to execute said memorandum, and that the plaintiff ought not to have specific performance of the same, on account of his laches and unreasonable delay in attempting to enforce the same. On the trial both parties introduced testimony to show what lands were intended as "stump lands," and what lands come within the boundaries mentioned in the contract, and the testimony relating thereto was quite contradictory, but the circuit court found, upon what appears to have been, perhaps, a preponderance of the testimony, and as correctly and accurately as practicable and possible, that certain 29 of said 40-acre tracts were the lands within the intent and meaning of said contract; and rendered judgment that the defendant Walter A. Scott, as such trustee, convey the same to the plaintiff. From that judgment this appeal is taken.

The objection to this judgment that has peculiar force, and makes the strongest appeal to a court of equity, is that specific performance ought not to have been adjudged in this case on account of the laches and unreasonable delay of the plaintiff in bringing his suit. The contract is dated May 1, and was to be performed July 1, 1882. Thomas B. Scott died October 7, 1886, and this action was commenced in April, 1888. These lands, July 1, 1882, when the contract was to have been performed, according to the testimony of the plaintiff himself, were of the value of only \$10 for each 40-acre tract, and at the time of the trial they were worth from 20 to 50 times as much, or from \$200 to \$500 for each 40-acre tract. The timber on these lands has become much more valuable by the long delay, and a railroad has been built, and is in operation, through these lands, and the country generally has been greatly improved since July 1, 1882. The plaintiff has never taken any care of the lands, and has neglected to pay any taxes on them, and has allowed many of them to be sold for taxes; and Thomas B. Scott, in his life-time, paid all the taxes on them, and redeemed them from previous sales for taxes; and the defendant, as trustee, has paid all the taxes since the death of Thomas B. Scott, at an expense of many hundred dollars,—many times as much as the value

of the lands when the contract was made.

The enforcement of the contract at maturity would have been of merely nominal expense and damage to Thomas B. Scott, but will now impose an enormous claim upon his estate of many thousands of dollars. There was a delay of over four years while Thomas B. Scott was living, and nearly two years since, before bringing the suit, and without extenuation or excuse. It would be difficult to find a case in the books of greater change in the situation and value of the lands, and the circumstances material to the relief occasioned by the delay, or in which specific performance has ever granted under such circumstances. Although it may not be impossible to select, locate, and identify the lands within the intention of the contract, it has certainly been rendered much more difficult and uncertain by the death of one of the parties whose personal knowledge would seem to be requisite, if not necessary, to determine what lands were meant by "stump lands," and the meaning of the other unusual conditions of the contract. The material testimony of Thomas B. Scott has been utterly lost by the delay. He refused to convey the lands, and could do no more than to await the suit of the plaintiff for the specific performance or for the breach of the contract. The plaintiff waited until the statute of limitations had nearly run on the contract before bringing his suit. "It is a settled principle that a specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court, upon a view of all the circumstances." Chancellor KENT, in *Seymour v. Delancey*, 6 Johns. Ch. 222. "A matter not of absolute right in the party, but of sound discretion in the court." 1 Story, Eq. Jur. § 769. "Specific performance will not be decreed when for any reason it would be inequitable. 'It is an application to sound discretion.'" Chief Justice RYAN, in *Williams v. Williams*, 50 Wis. 311, 6 N. W. Rep. 814. "The unquestionable jurisdiction * * * is not compulsory upon the court, but the subject of discretion." Lord ERSKINE, in *Radcliffe v. Warrington*, 12 Ves. 331. The learned counsel of the appellant has cited in his brief numerous authorities to the same effect, but the principle is elementary, and the above authorities are sufficient. In consideration of the peculiar circumstances of this case, we cannot but think that it would be an abuse of sound discretion to grant such relief. "Unreasonable delay in bringing suit for the specific performance of a contract to convey will be a defense to the relief, especially where the other party has made improvements in the mean time, or the property has greatly increased in value." *Johns v. Norris*, 22 N. J. Eq. 102. The delay of only about two years was held sufficient to defeat the action in *Haughwout v. Murphy*, 21 N. J. Eq. 118, and *Merritt v. Brown*, Id. 401. Where one party to the contract has notified the other party that he will not perform it by refusing to convey as in this case, acquiescence in this by the other party, by a comparatively brief delay in enforcing his right, will be a bar to this remedy. *McDermid v. McGregor*, 21 Minn. 111. Change in the circumstances

of the parties, and in the situation of the subject-matter of the contract, the destruction of evidence, and the death of one of the parties to the contract, who if living could make clear what his successor might not be able to explain, are mentioned in *Anthony v. Leftwich*, 3 Rand. (Va.) 238, as reasons for denying the relief. In *Ruff's Appeal*, 117 Pa. St. 319, 11 Atl. Rep. 553, a railroad had been built, which brought the lands within reach of market, and greatly enhanced their value, and some of the lands had been sold, and the plaintiff laid by for years while these changes were going on. It was held inequitable to decree specific performance. That was very much like this case. The lands have been sold for taxes, and yet the plaintiff waited until they became vastly enhanced in value by railroad and other improvements. Specific performance will not be enforced if for any reason it is inequitable to do so. *Williams v. Williams*, supra. The following authorities enforce the principle that laches and unreasonable delay in bringing suit will defeat an action for specific performance of a contract to convey. *Pom. Spec. Perf.* §§ 407, 408, and cases cited; *Fry Spec. Perf.* §§ 1072, 1078, 1079; *Eads v. Williams*, 4 De Gex, M. & G. 691; *Watson v. Reid*, 1 Russ. & M. 236; *Southcomb v. Bishop of Exeter*, 6 Hare, 226; *Harrington v. Wheeler*, 4 Ves. 686; *Alley v. Deschamps*, 13 Ves. 225; *McWilliams v. Long*, 32 Barb. 194; *Delavan v. Duncan*, 49 N. Y. 485; *Davison v. Associates*, 71 N. Y. 333; *Henderson v. Hicks*, 55 Cal. 364; *Taylor v. Merrill*, 55 Ill. 52; *Smith v. Lawrence*, 15 Mich. 499; *Holt v. Rogers*, 8 Pet. 420; *Preston v. Preston*, 95 U. S. 200; *State v. West*, 68 Mo. 229. See other cases cited in appellants' brief. The reasons are abundant why equitable relief should be denied in this case. The disparity in the value of the lands, of from 20 to 50 fold over their value when the contract was made, as of when it was to have been performed, is ample reason to leave the plaintiff to his legal remedy for the breach of the contract.

In analogy to all other like cases, as in the sale of personal property, or for breach of the covenant of seisin in deeds, the plaintiff would be entitled only to recover the consideration paid and interest, or the difference between that and the value of lands when they ought to have been conveyed, or at most, and by the most liberal rule, the value of the lands at the time of the breach of the contract. The equitable remedy in this case would be so extravagantly greater than at law that it would scarcely seem to be in the same case. Being compelled to remit the plaintiff to his remedy at law, the rule of damages in such a case may as well be considered. The rule seems not to be uniform in the different courts. In *Loomis v. Wadhams*, 8 Gray, 557, a case much like this, where the lands had to be selected, the rule was that the plaintiff might recover the value of the lands that might have been selected at the time the conveyance ought to have been made. Where the vendor acted in bad faith in refusing to convey on account of the enhanced value of the land, the damages were the difference between the contract price and the enhanced value when the

conveyance should have been made. 1 Sedg. Dam. top p. 368; *Baldwin v. Munn*, 2 Wend. 399; *McNair v. Compton*, 35 Pa. St. 23. In *Key v. Key*, 3 Head. 448, the rule was the consideration paid and interest, whether the vendor acted in bad faith or not. The rule in the supreme court of the United States is the price of the land as settled by the contract at the time of its breach. *Hopkins v. Lee*, 6 Wheat. 109. This is in analogy to the sale of personal property. In *Gale v. Dean*, 20 Ill. 320, the rule was the value of the land at the time of the breach of the contract. It would seem that in the majority of cases the rule is the consideration money and interest, or the difference between the consideration and the value of the land when it should have been conveyed. It would be fruitless to examine the cases to any greater extent. In cases of property consideration, or cases where the consideration is other than money, or barter contracts, the value of the land at the time of the breach is the rule from necessity, and as approximating nearer to what the plaintiff has lost. *Brigham v. Evans*, 113 Mass. 538. The rule in such a case as this has not been settled in this state. For non-delivery of chattels, the damages are their value at the time when they shall have been delivered, and interest to the time of trial. *Ingram v. Rankin*, 47 Wis. 406, 2 N. W. Rep. 755. In *Hall v. Delaplaine*, 5 Wis. 206, it was a contract to convey, but with some peculiar features, and the rule was the consideration and interest. In *Yenner v. Hammond*, 36 Wis. 277, the penalty was fixed in the contract, but Chief Justice RYAN discusses the rule in such cases, and leaves the question open whether, in some cases, the vendee may recover damages in excess of the consideration and interest. The rule, so far as it has been considered by this court is, unquestionably, that nothing in excess of the consideration and interest can be recovered, or perhaps I ought to say that such is the general rule. This rule is in harmony with cases of breach of the covenant of seisin. *Rich v. Johnson*, 2 Pin. 88; *Messer v. Oestreich*, 52 Wis. 684, 10 N. W. Rep. 6. In this case the consideration is very small and indefinite. The contract is based on a final settlement of suits and other matters between the parties. The learned counsel of the appellant has well said in his brief that "of course the amount claimed in these suits would afford no criterion as to the amount the plaintiff was to receive," or, I may add, that it was understood by the parties he did receive, by the contract. The best, if not the only, criterion of that amount, would seem to be the value of the lands at the time the contract was made, or when the deed was to be made, which would be the same thing; for there is no evidence that their value had changed in the mean time. That would be the most favorable rule to the plaintiff that could be adopted in this case. Such a rule, we have seen, has been sanctioned in many cases, and, if applied to this case, must stand as an exception to what I understand is the general rule already established by this court, in consequence of the impossibility of ascertaining with any certainty the consid-

eration of the contract in money or values. The real consideration must have been very small in amount, and scarcely more than nominal, for it appears that Thomas B. Scott paid the plaintiff, on such settlement, the sum of \$5,000 in money. The value of the lands, at the time the deed was to be made, was only \$10 for each 40 acres, or \$290 in gross, according to the testimony of the plaintiff himself. That sum, and interest thereon to the time of the trial, is all the compensation in money the plaintiff is entitled to recover, and of this he, at least, has no reason to complain.

The question remains, what can be done with this suit? The usual practice would be to dismiss this complaint, and leave the plaintiff to proceed in an action at law to recover his compensation in money for the breach of the contract by the defendant. But it seems that the statute or limitations has already run on the contract, and the plaintiff has no remedy at law. We have concluded, therefore, that the circuit court ought to retain this suit in equity, to do complete justice between the parties. The usual rule in equity is, if the court cannot grant the relief prayed, to grant such relief as the party is entitled to upon the facts, and in cases of specific performance, if for any reason the title cannot be conveyed, to hold the case for compensation to the plaintiff. *Story, Eq. Jur. § 19*, and cases there referred to. *Hall v. Delaplaine*, supra. But in this case the court deems it inequitable to adjudge the conveyance of the land, notwithstanding the defendant is able to convey. This is an unusual case for retaining jurisdiction in equity to grant compensation, but there does not appear to be any reason why it may not be done as well as in cases of inability of the defendant to convey, on the well-known principle that a court of equity, having obtained jurisdiction for one purpose, may retain it for another, to give full relief, or to do justice between the parties, pertinent to the facts of the case. "When the impossibility of a specific performance is disclosed at the hearing, and the suit was brought by the plaintiff in ignorance of such fact, the court will award the remedy of damages." *Pom. Eq. Jur. § 1410*, and note. In *Hopkins v. Gilman*, 22 Wis. 476, a bill was filed for specific performance of an agreement to arbitrate, and to execute a lease, and the court held that such relief could not be granted. The present chief justice says in his opinion: "Now, although the facts alleged are insufficient to justify a decree for specific performance, yet we think a court of equity may retain the suit for the purpose of awarding compensation for the value of the improvements. Undoubtedly an action for damages for non-performance of the contract would be the usual remedy. But must this suit be dismissed, and the plaintiff turned over to that remedy alone? It seems to us not, but that the court, having acquired jurisdiction of the cause, should provide and grant any relief consistent with the case made by the complaint and embraced within the issue;" citing *Tenney v. Bank*, 20 Wis. 152; *Leonard v. Rogan*, Id. 540; *Greason v. Ketel-*

tas. 17 N. Y. 491; and *Barlow v. Scott*, 24 N. Y. 40. We think this case comes within the principle and practice of that case, and may be retained for the purpose of awarding compensation as above determined. The circuit court applied the same principle in giving compensation to the plaintiff for one 40-acre tract, which had been sold and conveyed for non-payment of taxes, but in doing so adopted a rule of damages unsupported by any authority, by giving the plaintiff the present value thereof. The present attitude of this case was not anticipated sufficiently for the counsel to argue or cite authorities upon the above question, but to save time and expense, and make a full disposition of the case in this court, and determine the mandate to be sent to the circuit court, we have concluded to decide all questions necessary to a full disposition of the case. We think that the selection and location of the lands, and the identification thereof, made by the finding of the circuit court, should be taken as the lands within the meaning of the contract, and \$10 for each 40-acre tract thereof should be taken as the value of said lands at the time when a conveyance thereof was to be made according to the contract, and interest thereon from that time to the time of the trial, as full compensation and damages for the breach of said contract by the said Thomas B. Scott, deceased, and by the defendant as trustee of his estate, and judgment should be rendered accordingly. But this, we think, should be left optional with

said defendant, or to have a new trial to determine what lands are within the intent and meaning of said contract, and the value thereof on the 1st day of July, 1882, the time fixed in said contract for the conveyance thereof. We do not think that the contract is so uncertain that it cannot be executed or enforced, and we think that the finding of the circuit court as to the lands embraced in the contract, and the value thereof at \$10 for each 40-acre tract at the time aforesaid, are supported by the evidence, and are as near correct as practicable. It is doubtful if the result of another trial to determine the same facts would be of any advantage to either party. But inasmuch as the defendant contends that the finding of what lands are embraced within the contract is not supported by the evidence, and as the retaining of the suit for damages to avoid the operation of the statute of limitations, and the rule of damages established, are favorable to the plaintiff, we have concluded to make a new trial in the case optional with the defendant. The judgment of the circuit court is reversed, and the cause remanded, with directions to render judgment for the plaintiff in accordance with this opinion, or to grant a new trial at the option of the defendant, to determine the above facts, viz.: (1) What lands are embraced in the contract; and (2) their value on the 1st day of July, 1882; and to render judgment accordingly.

LYON, J., took no part.

FRAME v. FRAME et al.

(9 S. E. 901, 32 W. Va. 463.)

Supreme Court of Appeals of West Virginia.
June 26, 1889.

Appeal from circuit court, Braxton county; HENRY BRANNON, Judge.

This was a chancery suit, brought September 12, 1887, in the circuit court of Braxton county. The bill was filed at October rules, 1887, and it alleged that the plaintiff, L. M. Frame, was the son of William B. Frame, deceased, who was a former resident in said county. That the plaintiff lived with his father, and worked, aided, and assisted him on his farm till the plaintiff married, on May 1, 1855. That the said father owned seven or eight different tracts of lands in said county, and, being desirous of compensating the plaintiff for his services and of starting him in life, proposed to him, if he would go upon a certain tract of land, situated on the south side of Elk river, about one mile from Frame's mill, in said county,—containing 100 acres,—and cultivate and improve the same, that he would give him said land, and make him a deed therefor. This tract was granted to said William B. Frame by the commonwealth of Virginia, by patent dated September 30, 1846, a copy of which is filed with the bill, and shows the metes and bounds of this tract. That the plaintiff accepted the proposition, and, on or about May 12, 1855, moved upon said tract of land, and has ever since lived upon said land, claiming, as the bill says, and holding, the same adversely to all the world,—and further alleged that the plaintiff's possession has been open, notorious, and exclusive from that day to this,—a period over 32 years,—and he still owns, possesses, and claims the same. Some years after the plaintiff moved upon said tract of land, his father became the surety of one A. W. Wilson, on a constable's bond, in the month of May, 1868. Being apprehensive that he might be made liable, by reason of such suretyship, for the default of said Wilson, he determined to convey all of his lands to his two sons, John W. Frame and Thomas J. Frame; and accordingly, by deed bearing date the 26th of May, 1868,—a copy of which was filed with the bill,—he conveyed to his said two sons seven different tracts of land, one of the said tracts being the same tract which 13 years previously he had granted to the plaintiff, and placed him in possession of. Why his father, William B. Frame, included the plaintiff's tract of land in said conveyance, the plaintiff is not advised. "Certain it is that it was never intended by his father or by his brothers to deprive him of the ownership or possession of said tract of land, even if they could legally have done so. His said brothers well knew all the facts in relation to the agreement under which he went into possession of said land; well knew his long possession, improvement, and cultivation of the same, and well knew he was entitled to a deed therefor. In fact, they never disputed the plaintiff's

right to said land, never attempted to oust him from the possession thereof, never set up any claim thereto, nor did any act in the least tending to assert a claim thereto, except as hereinafter stated. The character of said conveyance was well understood by the said William B. Frame and his said two sons, the said William B. Frame remaining in possession of said lands, except the tract sold to the plaintiff, until his death, and paying taxes therein, except the tract owned by the plaintiff, the taxes upon which were paid by the said plaintiff. It was not until July, 1886, that either of said brothers did any act which in the slightest asserted any claim to the plaintiff's land. On the 1st day of July, 1886, John H. Frame, by deed of that date, conveyed an undivided half of five of said tracts of land, including the tract owned by the plaintiff, to George Goad, trustee, to secure to Jelenko & Bro. the sum of \$482.54, evidenced by a negotiable note of that date and payable six months after date, also to secure to Jelenko & Loeb the sum of \$536.54, evidenced by note of that date, payable six months after date, with provision that upon default of payment of said notes, or either of them, said trustee should, upon request of the holder of said notes or either of them, sell the said undivided half of said land according to law, for cash. A copy of said deed is here filed as part hereof, marked 'Exhibit No. 3.' The firm of Jelenko & Bro. is composed of the defendants Jacob Jelenko and Gustavus Jelenko, and the firm of Jelenko & Loeb is composed of the defendants William Jelenko and Charles Loeb. At the time of the conveyance by John H. Frame to said George Goad, trustee, the plaintiff was still in the open, notorious, and exclusive possession of said 100 acres of land, and by law the said George Goad and Jacob Jelenko and Gustavus Jelenko and William Jelenko and Charles Loeb had constructive notice of the rights of the plaintiff to said 100 acres of land, and his ownership thereof, and, in addition thereto, had actual notice of such right and ownership. That on the 22d day of August, 1877, the said John H. Frame having made default in the payment of said notes, the said George Goad, as trustee, sold the said undivided one-half of said five tracts of land, including the plaintiff's tract of 100 acres, at public auction, to the highest bidder, at which sale the said defendant Charles Loeb became the purchaser of said undivided one-half of said five tracts of land, including the land of plaintiff, at the price of \$700. That the said George Goad is about to convey the same to the said Loeb by a deed as such trustee. The plaintiff says that the said deed from William B. Frame to his sons Thomas J. and John H. Frame, and the trust-deed from the said John H. Frame to the said Goad, constitute a cloud upon the title of the plaintiff to said 100 acres of land; and the deed from Goad to Loeb, when made, will still further cloud his title. He is advised that he has a right to have said clouds removed, and to have specific execution of

his said contract, made with his said father, and the legal title to said land conveyed to him. He therefore asks that said contract be specifically executed; that the said George Goad be restrained and enjoined from conveying the undivided one-half of said 100 acres to the said Charles Loeb; that the said John H. Frame, Thomas J. Frame, George Goad, and the parties secured by said deed of trust, be held to have no interest in said 100 acres of land; that the clouds arising from the conveyance hereinbefore set out be removed by this honorable court; that the said John H. Frame, Thomas J. Frame, and George Goad be required to unite in a deed conveying said 100 acres of land to the plaintiff, and that he have such other, further, and general relief as the court may see fit to grant."

The parties defendant to this bill were the plaintiff's said two brothers, and the trustee George Goad, and said two firms secured by said deed of trust, and Charles Loeb, the purchaser of this tract of land at the public sale under the deed of trust. The exhibits referred to in the bill were all filed with it. The following is the answer of Thomas J. Frame, filed December 5, 1887: "To the Hon. Henry Brannon, etc.—Defendant, for answer to said bill, says that he does not desire to controvert the right of the said L. M. Frame to have specific execution of his contract, as set out in said bill, and he here tenders a deed for all his right, title, and interest in the said 100-acre tract of land, and, having answered, asks to be hence dismissed, with his costs. THOMAS J. FRAME." The deed referred to in this answer was filed with this answer, and thereupon this order was made: "Thomas J. Frame this day filed his answer to plaintiff's bill, to which the plaintiff replies generally, and the said Thomas J. Frame, having by his answer tendered a deed for all his right, title, and interest in the tract of 100 acres of land in the bill mentioned, which deed is accepted by the plaintiff, it is ordered that this cause be dismissed as to the said Thomas J. Frame, but be retained for further proceedings against the other defendants; and said L. M. Frame hath leave to withdraw said deed from the papers of this cause."

At the October rules, 1887, all the other defendants other than John W. Frame filed their joint and several answers, which were as follows: "These defendants, for answer to said bill, say that it is true, as alleged in the plaintiff's said bill, that defendants Jelenko & Bro. and Jelenko & Loeb were creditors of John H. Frame in the sums and at the times set out in the plaintiff's bill, respectively, and for which the said John H. Frame, in order to secure them in their respective sums on the — day of —, 188—, conveyed to the defendant George Goad, trustee, his undivided half interest in the five tracts of land in the plaintiff's bill mentioned, situated on Elk river, near Frame's Mill, in Braxton county, among

which was a tract containing 100 acres, claimed by plaintiff in his bill filed in this cause. It is also true that the said undivided half interests in the said five tracts of land conveyed to the said George Goad, trustee, as aforesaid, were on the 22d day of August, 1887, by order of the defendants Jelenko & Bro. and Jelenko & Loeb, sold by the said George Goad, trustee, after giving notice as required by law, at public auction, at the front door of the court-house of Braxton county, for cash, to Charles Loeb, at the price of \$700.00, he being the highest bidder therefor, which amount was paid on day of said sale by said Loeb. A deed was obtained by said Loeb from said trustee, on 1st day of October, 1887, which is here filed, marked 'Exhibit No. 1,' and made part of this answer. These respondents deny that the plaintiff ever had any title, or semblance of title, to the said 100 acres of land claimed by him in his said bill, or that his possession thereof was adverse and exclusive for the period of time alleged in his bill, or it ever was so held by him for any period of time from the time his said father obtained his grant from the commonwealth of Virginia therefor to the present time. These respondents here expressly deny ever having had any notice, either actual or constructive, of any claim of title by plaintiff to said tract of land, or of any right thereto by him whatever. These defendants, for further answer, say that they are advised and believe and charge that plaintiff never had any contract of purchase with his said father for said 100 acres of land, but that, if he had any such contract, it was without consideration, and cannot affect the title of either George Goad, trustee, or defendant Charles Loeb, to said land; that if the plaintiff ever occupied, resided on, or controlled in any manner said tract of land in the life-time of his said father, it was a mere tenancy at will, and not under a contract of purchase. These defendants also deny that William B. Frame, in his life-time, ever made plaintiff any proposition to the effect that if he (plaintiff) would move upon said 100 acres of land, and improve it, that he would give said land to him. These defendants, having answered fully all material allegations in the plaintiff's bill charged, pray hence to be dismissed, with their costs in this behalf expended, and they will ever pray," etc.

The exhibits referred to in this answer were filed as exhibits with it. Depositions were taken both by the plaintiff and by the defendants. The plaintiff proved by one witness, a nephew of William B. Frame, that the plaintiff, L. M. Frame, had had possession of and lived upon the 100-acre farm named and described in the bill for 31 years,—ever since 1856. That he, the witness, went to the residence of plaintiff's father one morning in 1856, and William B. Frame told him he had given the plaintiff, "Lemuel, a farm yesterday morning," and he pointed out this 100-acre tract, which was in sight,

"across the river," as the farm he had given him; and he said he had given his other lands to John and Thomas, his sons. He said that "Lemuel could go to work, or starve." He said they would have to give a woman who was in the house on this farm two bushels of corn in order to get her to leave and give up the house to Lemuel, so he could move in. Lemuel Frame, the plaintiff, moved on the place a week or 10 days afterwards, and has been in the occupation of it ever since. The witness proved, also, that he had since then gotten timber trees off this tract of land. He got the timber trees of the plaintiff, L. M. Frame, who always claimed this as his farm. These trees were sawed for the witness at the mill of the plaintiff's father, William B. Frame, who knew where these trees came from, but set up no claim to them. He never disputed about them, and never claimed that the plaintiff, L. M. Frame, did not own this tract of land, as he claimed. The members of William B. Frame's family,—his wife, sons, and daughter, and a son of the plaintiff's family,—who were all examined, all testified they had never heard of William B. Frame's giving his sons John H. Frame and Thomas J. Frame any lands in 1856, as had been testified to by their cousin. But the daughter testified that she had lived with her father in 1856, up to 1864, and at that time she heard him say frequently he had given L. M. Frame the farm he claimed in this suit; that he moved on the land within a month after it was given to him, and has lived on it ever since. Her father always called it "Lemuel's place." The widow of William B. Frame, whom he married in 1864, proves the same statement that she heard made by William B. Frame frequently. She never heard him say he had given any other lands to his other children in 1856. The plaintiff himself testified that he had lived on the 100-acre farm in controversy since the 18th or 20th of May, 1856; that his father gave it to him, and he moved on it and occupied it as his own, and he did not occupy it as a tenant of his father. His occupancy of it has been open, notorious, and visible. He has cultivated the land, cleared it, fenced it, and cut saw-logs from it. He cleared and fenced on it some 72 acres. The whole of this was fenced prior to 1871. He has planted on it 800 apple-trees, and some 50 peach-trees, and, while the house he lived in was on the land when he went there, he had put up another house on the land; also, a log stable. John H. Frame and Thomas J. Frame, his brothers, to whom he had conveyed this and other tracts of land in 1868, frequently got timber trees off of the land, buying them from him and not disputing his ownership of the land. John H. Frame had in this way bought timber from him off of this land in 1868 and 1869. The plaintiff's son proved that about 18 months ago his father, Lemuel M. Frame, had offered to sell this farm of 100 acres to one T. A. Reip at \$50 for the house and garden, and \$1 apiece

for the bearing apple-trees and walnut-trees. Witness told John H. Frame of this offer, which he had declined. John H. Frame said witness' father had better have reduced the price of the trees to 50 cents, rather than miss the sale. He knew of John H. Frame on several occasions buying a stick of timber off of this tract of land and paying witness' father for it. He proved his father had lived on this land from his earliest remembrance, and he was now 30 years old. He always claimed the farm as his own, and every one spoke of it as his father's farm. He had cleared and inclosed about three-fourths of it. On the other fourth was a maple-sugar orchard of 15 or 16 acres, from which his father made sugar every year. He knew of his father more than once selling a stick of timber off of this land to his grandfather, William B. Frame. He bought one of these sticks of wood about 1866. William B. Frame died in 1876.

It was also proved by other witnesses that the plaintiff, L. M. Frame, had lived on this tract of land some 30 years; that during all that time he claimed it as his own farm; that, although it was taxed to his father, William B. Frame, till 1868, and after that to John H. Frame, and Thomas J. Frame, yet the taxes were always paid by plaintiff, L. M. Frame. He testified that about 1882 he refused to pay the taxes on this tract of land, unless the sheriff made out a separate receipt for this tract, and did not have it as it had been on the receipt for the taxes of all the lands owned by John H. Frame and Thomas J. Frame, and after that a separate receipt was made out by the sheriff for this tract of land. The defendants Jelenko & Bro. and Jelenko & Loeb were wholesale merchants, doing business in Charleston, Kanawha county, W. Va. John H. Frame was a retail merchant at Frametown, Braxton county, W. Va. He purchased goods of these two wholesale firms in 1882, and continued thereafter to do so. When he commenced doing business with these firms they made inquiry of the clerk of the county court of Braxton with reference to his financial condition, and what real estate he owned, and with what personal property he was taxed, and whether there were any liens on his property. They were informed that he owned a moiety of the seven tracts of land conveyed to him and his brother Thomas J. Frame. They included the 100-acre tract now claimed by the plaintiff, L. M. Frame. At the foot of a copy of this deed for these seven tracts of land from William B. Frame to Thomas J. Frame and John H. Frame was this memorandum, sent to a member of the firm by said county clerk: "The only lien on record against the above, so far as I have been able to find, is a judgment lien against John H. Frame, in favor of Philip Frankenberger, for \$143.90, with interest from the 13th day of June, 1885, and \$1.90 costs. I find that John H. Frame is assessed on the personal property book of this county with the aggre-

gate sum of \$96, consisting of 3 head of cattle, at \$40; 2 hogs, \$4; 1 watch or clock, at \$2; farming implements, \$5; household, etc., \$15; I have given the boundary to each tract as it is in the deed above mentioned."

A member of one of the firms, Charles Loeb, went up to Braxton county, to try and collect the amount due them for boots and shoes they had sold to John H. Frame, which amounted to \$536.54. He said he could not pay it, but was willing to secure them on his real estate, if they would give him six months' longer credit. To this Charles Loeb, one of the members of said firm, agreed; whereupon John H. Frame gave his note for the balance due the firm, payable in six months, and a deed of trust dated July 1, 1886, on an undivided moiety of five tracts of land, including the 100-acre tract claimed by the plaintiff. "When I made this arrangement for my firm, Jelenko & Loeb, I also, as the agent of the firm of Jelenko & Bro., wholesale dry-goods merchants in Charleston, settled the balance due them from him to Jelenko & Bro., bought of them by John H. Frame. This balance was \$482.54, for which he executed his note to Jelenko & Bro., dated July 1, 1886, payable in six months, which was secured by said deed of trust on said five tracts of land, including the 100-acre tract claimed by the plaintiff." This deed was executed, and duly acknowledged and recorded in the county court clerk's office of Braxton county, on July 2, 1886, both by John H. Frame and his wife, Amanda Frame. The trustee in this deed of trust, George Goad, pursuant to the provisions in this deed of trust, sold the said one undivided moiety of these five several tracts of land, and Charles Loeb became the purchaser thereof for \$700, which being paid in cash, said trustee executed and delivered to him a deed for one undivided moiety of these five tracts of land, including this 100-acre tract claimed by the plaintiff. This deed is filed with the answer of the defendants, it having been recorded. A lawyer, on behalf of Lemuel M. Frame, when these lands were being offered for sale and before they were sold, publicly announced that the party purchasing this 100-acre tract claimed by Lemuel M. Frame could not get any title thereto, as he had claimed the land for 30 years, and lived upon it, and the trustee, Goad, said: "Certainly, you can only get such title as is in me."

J. F. Brown, for appellants. W. E. R. Byrne, for appellee.

GREEN, J., (*after stating the facts as above.*) The first question presented by this record is, will a court of equity specifically enforce in any case, or against any one, a verbal gift of land from a father to a child, as in some cases it is difficult, if not impossible, in principle, to distinguish gifts and sales? I will, before considering directly this question, state briefly the law in refer-

ence to the specific enforcement of verbal sales of land, and the principles on which it is based. By the statute of frauds, passed in 1677, and a similar statute to be found wherever the common law prevails, "No action shall be brought upon any contract or sale of land, tenements or hereditaments, or interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." See Code W. Va. 1887, c. 98. The English courts, very soon after the passage of their statute of frauds, took the view that, while the chancery courts were as much bound by this statute as the common-law courts, yet, as it was the peculiar province of a chancery court to relieve against fraud, a court of chancery, despite this statute, would specifically enforce a verbal contract for the sale of land when the refusal to execute the contract would itself amount to the practicing of fraud by the defendant on the plaintiff. In so doing, they said, they were engrafting no exception on this statute, but simply proceeding to prevent fraud upon general principles which prevailed universally in courts of equity, and it would never do to so construe the statute of frauds, as to promote instead of suppressing fraud, as it was intended to do. See Browne, St. Frauds, § 457. If the defendant has partly performed his part of such contract, and his act of part performance is incapable of compensation in damages, it would obviously be fraud on the plaintiff to permit the defendant to refuse to execute such contract because it was verbal; and in such case a court of equity will compel the specific performance of such verbal contract. If, for example, the vendor of real estate, by a verbal contract, has delivered possession of the land to the vendee, this will entitle the vendee who is in possession of the land to compel a specific performance of the contract by making a deed therefor on the payment of the purchase money; for otherwise the vendor might sue the vendee as a trespasser, and to permit him to do so after he has put the vendee in possession under the verbal contract would be to permit him to take advantage of his own wrong, in repudiating his obligation, and it would be punishing the vendee, who has complied with his own obligation. If the vendee has taken possession of the land, the courts regard that the wrong done by compelling him to surrender the possession of it as a trespasser is such an injury as could not be compensated in damages, and hence there is no other way of punishing the recalcitrant vendor for committing a fraud on the vendee, who has complied with his contract, by treating him as a trespasser. The authorities supporting these views are numerous, both in England and America. See 2 Lomax, Dig. p. (40,) 55; 1 Story, Eq. Jur. § 761; Wat. Spec. Perf. § 270. It is also settled, both in England and America, that, if the vendee under a verbal agreement for the purchase of real estate expends labor or

money in improving the same, the contract is thereby partly performed, and the statute of frauds has no application to it. In such a case the improvements by the vendee in possession constitute valuable and equitable consideration, and entitle him to specific execution of the contract which he complies with fully on his part. There is, then, *First*, the verbal agreement; *second*, the delivery and taking possession of the estate in accordance with the agreement; and, *third*, the expenditure of money in consequence and in faith of the agreement; and, *fourth*, a complete compliance with the agreement by the vendee, by the payment of the entire purchase money. If the first of these circumstances alone exists, the statute of frauds denies all remedy. When the second ensues, the vendee has partly performed his contract, and has taken a step which would render it a fraud on the part of the vendor to divest him of his possession and refuse him a deed. When the third circumstance follows, in expenditures to improve the land, all the powers of equity are summoned into action to protect the vendee on several grounds, each sufficient and each distinct in its nature. It will then, when the vendee fully complies with his contract, compel specific execution by the vendor—*First*, because it would be a fraud in him to refuse it; *secondly*, he would profit by his own fraud, in acquiring the improvements with the land he sold; and, *thirdly*, because the vendee has introduced a valuable consideration, which, if he lost it, could not be restored to him, and is not ordinarily of a nature to be compensatory in damages. These views are well sustained by both English and American authorities. See 1 Sugd. Vend. (8th Amer. Ed.) p. (151,) 226; 1 Story, Eq. Jur. § 761; Browne, St. Frauds, § 487a; Wat. Spec. Perf. § 280; Rhea v. Jordan, 28 Grat. 683; Tracy v. Tracy, 14 W. Va. 243. If a donee, being a child, under a parol gift of real estate by a father, take possession and expend money or labor to improve it as against the donor, he stands upon the same footing as a purchaser for a valuable consideration. The statute of frauds has no application to the transaction, and equity will compel its specific performance by requiring him to execute his deed to consummate his gift. We will now consider parol gift specially. If A. points to a house and lot, and says to his child, B., "I give you this house and lot," and B. says, "I accept the gift," and nothing more passes in reference to the matter, a court of equity will take no cognizance of it. B., if he had paid A. for the house and lot, without taking possession, could not compel him to execute a deed, because he could have his remedy in recovering the money he had paid, with interest, in a court of law. *A fortiori*, a court of equity will not entertain B. when he has paid nothing; and, if B. should sue at law, he can recover nothing, because A.'s promise or gift was without consideration,—a *nudum pactum*,—and B. has suffered no damages. The

donee has not changed his situation, and there is no basis for an appeal to a court of equity to interpose. But suppose B. enters the house and makes it his home, and goes on to act as owner, and improves the premises by the expenditure of money or labor. He digs ditches and enriches the land. He builds fences for its permanent protection. He plants out trees, clears the land and lives in the house. These acts change the situation and fix the gift. Why? Because valuable consideration has now entered into the transaction. The agreement of gift has been partly performed, by acts which cannot be undone. A valuable consideration may be a detriment to the promisee or a benefit to the promisor. What was in its inception? A promise sustained only by a good consideration—the love and affection of a father to a child—has by such acts become in effect a promise sustained by a valuable consideration.

It may be regarded as settled law in this state and in Virginia that a verbal donee of land—a child, who, under the verbal gift, has taken possession of the land and improved it—has a right to demand in a court of equity a specific performance of the contract by the execution of a deed by the father, thereby consummating his verbal gift. This was so held in *Shobe's Ex'rs v. Carr*, 3 Munf. 10, decided as long ago as 1811, and this case has been repeatedly followed or recognized as law by numerous Virginia decisions ever since. See *Darlington v. McCoole*, 1 Leigh, 36; *Reed's Heirs v. Vannorsdale*, 2 Leigh, 569; *Pigg v. Corder*, 12 Leigh, 69; *Cox v. Cox*, 26 Grat. 305. There are also numerous authorities in other states to the like effect. *Freeman v. Freeman*, 43 N. Y. 34; *Lobdell v. Lobdell*, 33 How. Pr. 347; *Shepherd v. Bevin*, 9 Gill, 32; *Young v. Glendenning*, 6 Watts, 510; *Galbraith v. Galbraith*, 5 Kan. 409; *Kurtz v. Hibner*, 55 Ill. 521; *McLain v. School-Directors*, 51 Pa. St. 196; *Neale v. Neales*, 9 Wall. 1; *Hardesty v. Richardson*, 44 Md. 617. If, however, a father give his child verbally a farm, and put him in possession thereof, but he neither spends money nor labor in improving the land, it is very questionable in Virginia and in West Virginia whether the child, in a court of equity, could compel the father to make him a deed. It was so decided in the cases of *Stokes v. Oliver*, 76 Va. 72, and *Kefter v. Grayson*, Id. 517. In these cases it was held that the love and affection of a father to a child is not enough, of itself, to warrant a decree for a specific performance, even when the agreement to make the gift is in writing, and the child in possession of the farm. But the contrary was held by this court in *Marling v. Marling*, 9 W. Va. 79. But, in delivering the opinion of the court, in that case, on page 95, I express my own opinion, that, while such agreement need not be under seal, it must be a formal agreement, in writing, duly delivered as such, and while in such case, the consideration being good, though not valuable, a court of equity could properly dis-

pense with the seal to it, yet it could not dispense with its being a formal agreement in writing, and a verbal agreement to give a farm to a child could not be enforced specifically, even when the child had been put in possession of the farm, but such agreements of gift, when performed in part by putting the donee in possession, have been enforced in some states. See *TILGHMAN*, C. J., in *Lessee of Syler v. Eckhart*, 1 Bin. 380; *Big. Fraud*, 386; *Smith*, Eq. 254, 255; *Mahon v. Baker*, 26 Pa. St. 519. And it must be admitted that the reasoning which supports the enforcement of a verbal contract of sale partly performed by the simple delivery of possession appears equally applicable when there is a verbal gift of land by a father to a child, accompanied by the delivering of the possession of the land. See 1 *Story*, Eq. Jur. § 761, and articles of John W. Daniel in the April, 1883, number of *Virginia Law Journal*, where the question we are considering is elaborately discussed in an able article. Many of the views taken in said article I have adopted in this opinion.

I have thus far been discussing the right of a donee or vendee of real estate by a verbal agreement to enforce specifically such verbal agreement when the donor has put the donee in possession of the land. We will now consider whether the law is modified when the vendee or donee in possession of the land seeks to have his contract specifically enforced against a subsequent purchaser for valuable consideration of the donor, or against a judgment creditor of the vendor or donor. In the first place, it must be observed that when the vendee or donee is in possession of the land, openly and notoriously living upon it, for instance, there cannot be a purchaser of the land for valuable consideration without notice from the vendor or donor, because such possession by the vendee or donee of itself conveys notice to the whole world of the equitable title of the vendee or donee, and of his right to the legal title; the possession of realty being the fact of most comprehensive and far-reaching consequences that bears upon its title. The perfect legal title was originally conferred by this delivery of possession or livery of seisin. A fee was not perfect without this delivery of possession, but, if accompanied by such delivery of possession, it was perfect, even though it was a mere verbal transfer. The earth has been described as that universal manuscript, open to the eyes of all. When, therefore, a man proposes to buy or deal with realty, his first duty is to read this public manuscript; that is, to look and see who is there upon it and what are his rights there. And, if the person in possession has an equitable title to it, he is as much bound to respect it as if it was a perfect legal title, evidenced by a deed duly recorded. See 2 *Sugd. Vend.* 866; *Sedg. & W. Tr. Title Land*, § 717; 1 *Story*, Eq. Jur. § 400; *Big. Fraud*, 293, 294; *Floyd v. Harding*, 28 *Grat.* 410; *Merithew v. Andrews*, 44 *Barb.* 207; *Grimstone v. Carter*, 3 *Paige*, 421; *Had-*

duck v. Wilmarth, 5 N. H. 181; *Knox v. Thompson*, 1 *Litt. (Ky.)* 350; *Tuttle v. Jackson*, 6 *Wend.* 213; *Parks v. Jackson*, 11 *Wend.* 442; *Morgan v. Morgan*, 3 *Stew. (Ala.)* 383. When the sale or gift of the land is by a verbal agreement, the terms of such agreement must be definite and made out with reasonable certainty. See *Wright v. Pucket*, 22 *Grat.* 370. By reasonable certainty is not meant a mathematical certainty; but what is meant is that the evidence adduced must leave the court satisfied and convinced as to the terms of the agreement, and it must be so definite as to guide the court safely into carrying it into execution. The plaintiff who seeks a specific performance of a verbal contract or gift of land, or, indeed, who seeks the aid of a court of equity to enforce any equitable right, must show that he has used reasonable diligence, and that his claim is not a stale claim. See 1 *Bart. Ch. Pr.* § 23. As there stated, it is a familiar doctrine of the courts of equity that nothing can call them into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing.

We will assume, first, that a verbal gift of this 100 acres of land, patented to William B. Frame September 30, 1846, was by him, about May 12, 1856, made to his son Lemuel M. Frame, and the donee then took possession of this 100 acres, exercising an undisputed ownership over it from that time, selling timber off it to his father and others, and had lived upon it and cleared it up and cultivated it ever since, and that considerable time and money had been spent by him in improving this tract of land. These facts the counsel of the plaintiff, L. M. Frame, regard as clearly proven. If they are really proven, with the requisite degree of distinctness and certainty, then, on the authorities we have cited, it would seem clear that the son of L. M. Frame had a right to specifically enforce this agreement against his father, William B. Frame, provided he used reasonable diligence in instituting his suit, and did not permit his claim to become too stale before he brought his suit. It is claimed by the plaintiff, L. M. Frame, that he was in the exclusive and uninterrupted possession of this farm, claiming against all the world, and especially against his father, the donor,—actually selling him timber off this land. It was unnecessary for him to institute this suit while this state of things existed. The donee, L. M. Frame, was not called upon to act, no one disputing his right to the same, and he having held possession and use of it. There is much strength in this view; and, so long as this state of things existed, the court might be disposed to excuse the plaintiff, L. M. Frame, for not instituting this suit for a specific performance. How long did this state of things exist? The record shows until May 26, 1868. But not thereafter, for William B. Frame, the father, exercised the most decisive act of ownership over this 100-acre tract; for on that day, for a consideration stated on

the face of the deed to have been \$500, he and his wife conveyed to their sons Thomas J. and John W. Frame seven different tracts of land, including the tract of 100 acres claimed to have been given verbally to said L. M. Frame 13 years before. This put it entirely out of his power to make a deed of this land to L. M. Frame, knowing that he could not acquire a valid title for this tract of land, on which he was living, except by instituting in a court of equity a suit for the specific performance of the verbal agreement to give it to him, made by his father some 13 years before. He never could have acquired a good title to this tract of land by living upon it, claiming it as his own, and exercising rights of ownership over it, no matter how notorious, undisputed, and exclusive such possession was. For, as he entered upon the land by permission of his father, who had the legal title, his possession was admitted in subordination to his father's title, and was not, therefore, and could not become, adversary to his father's title, or the title of those claiming by deed under his father. See *Hudson v. Putney*, 14 W. Va. 561. He knew, therefore, as early as June, 1868, that if he wanted a title to this 100-acre tract, on which he lived, he would have to get it by asking a court of equity to compel the legal owners to convey the land to him, as the true equitable owner. It was his duty, therefore, if he did not mean to abandon his equitable title, to have instituted this suit in a reasonable time after January 1, 1868. It may be said that he did not know that his father then conveyed this tract of land to his two brothers. But though, perhaps, we cannot assume that he knew this deed was made to his brothers by his father simply because it was promptly put on record, yet there is his own statement in his deposition of facts, which shows that he did know of the making of this deed to his brothers, for he says he always paid the taxes on this land, though it was taxed in his father's name until 1868, and then in the name of his brothers; that the tax-bill was thus made out, and he paid the taxes on this tract, though the tax-bills were made out against his brothers, and that he refused to pay them after a while, if not differently made out. He was thus reminded each year by these tax-bills, that the legal title of this land was in his father till 1868; after that, in his brothers. It was clearly his duty, when it was thus made known to him that he could not acquire legal title to this land except by suit, for him to have brought such suit with reasonable promptness, especially as 13 years had already expired since he claimed the equitable right to this land. But he did not institute such suit for more than 19 years, and some 32 years after the alleged verbal promise of his father to give him this land. In the mean time his father had died, and one of his brothers, to whom, in 1868, his father had conveyed this land, and the records of the clerk of the county court showed that, upon the fact that he owns this land, this brother

er had acquired a credit, and been trusted, and, on his giving security to pay debts so owed, in the shape of a deed of trust on his interest in this and other lands, the trustee had sold said interest in said land at public auction for cash. There is a strong contrast between the care and diligence of the plaintiff in protecting his rights and that of the defendants. Before they extended credit to the plaintiff's brother, and took this deed of trust of him, they had the clerk's records in the county court of Braxton, where his brother lived, examined, to ascertain what lands he owned, and whose liens were upon them, and all they now ask is that, as they have used every precaution in conducting their business, the court will not deprive them of the security they took by setting up an equitable title of the plaintiff, of which they had no actual notice and of which the plaintiff must have, in the nature of things, known that they could take no notice. They were wholesale merchants, living remote from Braxton county, in Charleston. The defendant John H. Frame was engaged in the mercantile business in the county of Braxton, and his brother, (the plaintiff,) who lived near him, must have known that in conducting such business he would buy his goods of wholesale merchants, at a distance, and thus incur debts, and such creditors would have no means of knowing his pecuniary condition, except as it was shown by the records in the clerk's office of the county court. So, by his neglect in bringing the suit the plaintiff must have known he was furnishing his brother John H. Frame the means of imposing on the wholesale merchants, of whom he was buying his goods on credit, as to his pecuniary condition. Just what might have been expected did occur, and loss must now be sustained. Should this loss be sustained by the plaintiff, who was so grossly careless, or by the defendants, who acted with caution and diligence? *Vigilantibus non dormientibus jura subveniunt.*

But the staleness of the plaintiff's claim is not the only difficulty in making out this case, as presented by this record. I have heretofore assumed that he proved the verbal gift of this 100 acres of land from his father in 1856. But has he proven the agreement to make this gift with the requisite degree of certainty and distinctness, such as a court of equity should require, especially when it is borne in mind that the plaintiff, who alleges this verbal agreement, asks to have it specifically enforced, to the obvious loss of purchasers from his brother for valuable consideration, without any actual notice of such verbal gift? The bill alleges that the plaintiff lived with his father, and worked and assisted him on his farm, until his marriage, which occurred on May 1, 1855; that his father at that time was the owner of seven or eight different tracts of land in Braxton county, W. Va., and being desirous of compensating the plaintiff for his services, and starting him in life, proposed to him that if

he would go upon a certain tract of land, situated on the south side of Elk river, about one mile above Frame's mill, in said county, containing 100 acres, and cultivate and improve the same, he would give said land to him, and make him a deed therefor. The plaintiff accepted this proposition of his father and on or about May 12, 1855, moved upon said land, and has since held and claimed the same adversely to all the world. This possession has been open, notorious, and exclusive from that day to this,—a period of over 32 years. "Some years after the plaintiff moved on this land,—in the month of May, 1868,—being apprehensive that he might be made liable by reason of his suretyship of a constable named Wilson, because of his default, he determined to convey all of his said land to his two sons, the defendants Thomas J. and John H. Frame. He made them a deed, duly recorded, a copy of which is filed with the bill. On the face of the deed the consideration purports to be \$500 cash." This verbal agreement by the plaintiff's father to give him this tract of land was not an absolute promise to give him the land, and make him a deed therefor, but was only a conditional promise that he would do so if the plaintiff (his son) would cultivate and improve the same. In what way he was required to improve the same is not stated in the bill, if it were specified by the father at the time. But, as the bill states that "the plaintiff [the son] accepted the proposition, moved upon the land, erected a house thereon, and commenced to cultivate and improve the same," it is very probable that the building of a dwelling-house on this farm, as a residence for his son and his family, (he having married,) was an improvement required of the son by the father. This is the more probable as we may infer from the proof in the case that the house then on the land was a very indifferent one,—in fact, one not fit to be occupied by his son's family as their dwelling. But even this very indifferent house was then occupied by a woman, who might not surrender the possession of it. There is no direct proof as to the character of this house that was on the land, but the plaintiff's son proves that about a year before this suit was brought his father (the plaintiff) offered to sell to T. A. Reip the house and garden at \$50, and his brother John said his father should have taken less than he asked for it. We may, I think, fairly infer from this that the house was hardly fit for a man and his family to occupy. The plaintiff testified he built a house on this land. But I assume it was a very poor house, as he continued to live in a house worth less than \$50. When he built this house does not appear. It only appears that the son (the plaintiff) moved into the house on the place when the gift was made by the father. This, the proof shows, was not at the time he was married, on May 1, 1855. There is nothing said about his marriage in the evidence. If the agreement was that the father would

make the deed to the plaintiff, (the son,) if he would build a residence on the farm and improve it, as the bill says, such an agreement was a conditional agreement.

The building of the residence and improving the farm being a condition precedent to the son's acquiring a right to demand a deed of the father, and if a time was named when the house was to be built, if the son failed to build the house in the specified time, or of the character named, he lost forever a right to demand a deed of the father. *Keffer v. Grayson*, 76 Va. 517. Some 12 years after this parol agreement to make a gift on certain conditions to his son, (the plaintiff,) the father actually conveyed this land to two other sons. "Why he did so," the bill says, "the plaintiff is not advised. Certain it is that it was never intended by his father or his brothers to deprive him of the ownership or possession of this tract of land." It seems to me, a probable explanation of the conduct of the father and brothers to the plaintiff is that, he having failed to comply with the condition on which only the father was to convey him the land,—that is, as I surmise, to build in a certain specified time a house of a particular character,—he had no right to demand a deed of his father, and his father was at liberty to convey it to his other sons; and this he did because of the failure of the plaintiff to comply with the condition imposed on him by his father, the plaintiff, and his family, after 12 years, still living in a house worth less than \$50. The answer of the defendants to the appellee's bill denied this verbal gift by the father to his son (the plaintiff) of this land. This put on him the burden of proving this parol agreement of his father to give him this land; and the law, we have seen, required him to prove the agreement with definiteness and accuracy. Has this been done? It seems to me, it has not. No one who was present when the alleged verbal agreement was entered into by the father and son for the gift of this tract of land testifies in the case to what then transpired, or as to the terms of, or conditions attached to, the gift. That it was a conditional agreement we only learn from the allegations in the bill. There is not one particle of evidence showing what the terms or conditions of this gift were. The whole proof consists of subsequent admission by the father that he had given this land to his son (the plaintiff) or admission by conduct or by acts that he regarded this farm as belonging to his son (the plaintiff.) But such statements and conduct are what would naturally have occurred had the verbal gift of this farm to his son (the plaintiff) been a conditional one, such as is set out in the bill, or such as I have above suggested. Naturally, the father would have expected the condition precedent attached to the gift would in good time have been complied with by the son, and the gift thus perfected; and, anticipating that this would be the case, the father would naturally speak and act as if this farm belonged to his son,

and though he had no right to demand a deed for this farm unless he complied strictly with the conditions precedent to the gift, whatever they were. The most direct and satisfactory evidence of this verbal agreement was deposition of a nephew of the father, giving what was said casually by the father to the witness the day after this verbal gift of this farm to his son, (the plaintiff.) This we will analyze. He says in his deposition taken October 17, 1887: "L. M. Frame, the plaintiff, has resided on this farm of 100 acres about 31 years. I went to his father's, William B. Frame's, one morning, and he said to me: 'I have made way with my land.' I said, 'Have you?' and he said, 'Yes. I gave Lemuel a farm yesterday,'—and he pointed to the 100-acre farm across the river as the one he had given him. He said he let John and Tom have the balance. He had owned six or seven tracts of land. He said: 'Now Lemuel can go to work, or starve.' He said too, they would have to give Nancy Jones, to get her out of the house, two bushels of corn, before Lem could move in." Though this witness is so definite as to what was said then, still it is obvious that his testimony is far from being satisfactory. It gives the details of a casual conversation in which the witness had had no interest and which occurred some 31 years before. We know there must have been very substantial errors in it. For instance, the bill does not pretend that William B. Frame gave all his land to his three sons at that time, in 1856; but it says he gave this one farm of 100 acres to his son (the plaintiff) then, and the balance of his land to his two other sons, John and Tom, some 12 years afterwards, and not one member of the family, or a single other witness, ever heard of any gift at that time of any of his lands by William B. Frame to any of his children except this 100 acres to his son, (the plaintiff.) This, I suppose, was a mistake made by the nephew as to what his uncle, William B. Frame, then said to him. He heard this many years afterwards. This witness said the father said, "Now Lemuel," (the plaintiff,) "must go to work." This does not look as if the gift was made, as stated in the bill, "to compensate the plaintiff for his past services, and to start him in life." He had lived with his father, but we may infer from what his father said that he did not think his past services deserved compensation, but rather considered that he had

heretofore supported him in idleness, and he proposed to do so no longer, but he must "go to work or starve." There is in this conversation corroborative evidence of the small value of the house on this 100 acres of land, for it was supposed Nancy Jones would let the son move into this house, and she would give it up, for the trifling compensation of two bushels of corn. She could not have regarded the house at all desirable to live in, if she could surrender it so easily. This conversation took place before the son (the plaintiff) had taken possession of this farm, and when, of course, the conditional gift named in the bill was imperfect, and when, of course, the son had no right to demand a deed of the father; and, though the statements and acts of the father subsequently show simply that he had given his son (the plaintiff) this farm, and were made after he had taken possession, yet none of them are inconsistent with the gift being conditional and the condition not complied with, and this, one suspects, was the case, from his father having some 12 years afterwards made to two other sons a deed for this farm. It seems to me, therefore, that the plaintiff has failed to show with the requisite degree of distinctness and accuracy the terms of the verbal agreement made by his father, giving him this land, because of the great lapse of time (31 years) before the institution of this suit.

The court below ought to have dismissed his bill at his costs. The court below, obviously, by its order made December 5, 1887, properly dismissed the bill as to the defendant Thomas J. Frame, he tendering with his answer a deed to the plaintiff for his moiety of the land, which the plaintiff was willing to accept, but the court below erred in its decree of May 2, 1888, specifically enforcing said alleged verbal contract against the other defendants. This decree must be set aside, annulled, and reversed, and the appellants must recover of the appellee, L. M. Frame, their costs in this court expended, and this court, entering such order as the court below should have done, must dismiss the bill of the plaintiff, and the defendants below, other than Thomas J. Frame, must recover of the plaintiff below their costs expended in the court below.

SNYDER, P., and ENGLISH, J., concurred.
BRANNON, J., absent.

CHENEY v. LIBBY.

(10 Sup. Ct. 498, 134 U. S. 68, 33 L. Ed. 818.)

Supreme Court of the United States. March 3, 1890.

Appeal from the circuit court of the United States for the district of Nebraska.

This is a suit to compel the specific performance by the appellant, Cheney, of a written agreement entered into May 28, 1880, between him and the appellee, Libby, whereby the former demised and let to the latter the possession and use of, and contracted, bargained, and agreed to sell to him, two sections of unimproved land in Gage county, Neb. The defendant claimed that the contract was forfeited, long before this suit was brought, by Libby's failure to comply with its stipulations. Upon that ground he resists the granting of the relief asked. The circuit court adjudged that the plaintiff was entitled to a decree.

The question to be determined is whether there was any such default upon the part of the plaintiff, Libby, as deprived him of the right to specific performance.

The sum agreed upon for the possession, use, occupancy, and control of the land was \$1,361.60 yearly, represented in Libby's notes, and in the taxes assessed and to be assessed against the land. The price for the land was \$8,960, of which \$1,600 was paid at the date of the contract. The balance was to be paid, "without notice or demand therefor," in annual installments, at the times specified in promissory notes, of even date with the contract, which were executed by Libby to Cheney at Tecumseh, Neb. The notes were made payable to the order of Cheney, at the office of Russell & Holmes, private bankers in that city. Eight of the notes represented the balance of the principal debt,—each one being for \$920,—and were payable, respectively, in 3, 4, 5, 6, 7, 8, 9, and 10 years after date. The remaining 10 notes represented the annual interest.

Libby agreed to meet the notes as they respectively matured, pay the taxes on the land for 1880 and subsequent years, and, during that year, (the weather permitting,) break 200 acres, and build on the land a frame barn of 16 feet by 20, and a frame dwelling-house of a story and a half. Cheney undertook to pay the taxes of 1879 and previous years, and bound himself to convey the land, in fee-simple, with the ordinary covenants of warranty, (reserving the right of way that might be demanded for public use for railways and common roads,) upon the payment by Libby of the several sums of money aforesaid at the times limited, and the strict performance of all and singular the conditions of the contract.

It was further stipulated between the parties that "time and punctuality are material and essential ingredients in this contract."

That if Libby failed to perform and complete all and each of the payments, agreements, and stipulations in the agreement mentioned, "strictly and literally," the contract should become void; in which event all the interests created by the con-

tract in favor of Libby, or derived from him, should immediately cease and determine, and revert to and revest in Cheney, without any declaration of forfeiture or re-entry, and without any right in Libby of reclamation or compensation for moneys paid or services performed.

That, in case the contract was forfeited, Cheney could take immediate possession of the land, with all the crops, improvements, fixtures, privileges, and appurtenances thereon or appertaining thereto; Libby to remain bound for all taxes then assessed against the premises, and all installments of principal or interest then due on the contract to be regarded as rent.

That whenever one-half of the purchase price was paid, with all accrued interest and taxes, Cheney should execute a deed, as provided for in the contract, and take notes and a mortgage for the remaining payments, to run the unexpired time.

That when Libby's right to purchase the land terminated by reason of non-performance of his covenants, or his failure to make the payments, or any of them, at the time specified, he should be deemed to have only the rights of a tenant, and to hold the land under the contract as a lease, subject to the statute regulating the relation of landlord and tenant; with the right in Cheney to enforce the provisions of the contract, and recover possession of the land, with all the fixtures, privileges, crops, and appurtenances thereon, as if the same was held by forcible detainer.

The agreement also contained these stringent provisions: That no court should relieve Libby from a failure to comply strictly and literally with the contract; that no modification or change of the contract could be made, except by entry thereon in writing signed by both parties; and that no oversight or omission to take notice of any default by Libby should be deemed a waiver by Cheney of the right to do so at any time.

Libby went into possession under the contract. He, and those in possession under him, had, prior to the commencement of this suit on the 26th of February, 1887, broken up and cultivated most of the land, and made improvements thereon of a permanent and substantial character. Nearly all of these improvements were made prior to the 1st of January, 1885. He met all the obligations imposed upon him with respect to the breaking up of the land and its improvement by the erection thereon of buildings. His evidence, which is uncontradicted, was: "We have broken up and cultivated about 1,200 acres; built five houses and stable and outbuildings to each house; made wells to each house; erected two wind-mills; fenced one whole section with wire and posts, and fenced half of other section with hedge; we have set out some fruit-trees and shrubbery,—all to the value of about ten thousand dollars. All was done under and in pursuance of this contract."

He also met promptly all the notes given for principal and interest maturing prior to 1885. The total amount paid by him prior to that date, including \$1,600 paid at the execution of the contract, was in excess of \$5,000.

But the defendant insists that there was such default upon the part of the plaintiff, with respect to the notes maturing May 28, 1885, as worked a forfeiture of the contract, and, consequently, that specific performance cannot be decreed. The precise grounds upon which this contention rests, as well as those upon which the plaintiff relies in support of his claim for relief, cannot be clearly understood without a careful scrutiny of all that passed between the parties in reference to the lands in question.

The plaintiff resided in Iowa, while the defendant resided at Jerseyville, Ill. The notes given by the former were upon blanks furnished by the latter's agent, who caused them to be made payable in Tecumseh, Neb., at the private bank of Russell & Holmes, through whom the defendant had, for many years prior to 1880, made collections, and with whom he had kept an account. The first payment under the contract was made in bank drafts delivered to the defendant's agent in Tecumseh. All the other notes falling due in 1880 to 1884, inclusive, (except the interest note maturing in 1882,) were paid by bank drafts sent to Russell & Holmes, who placed the proceeds to the credit of Cheney in their bank. The checks of the latter upon that bank, on account of those deposits, were always paid in current funds. The draft to pay the interest note for 1882 was also sent to Russell & Holmes, but, as Cheney had not transmitted that note to them, the draft was forwarded to him. He received it, and sent the note to Libby. In no single instance prior to 1885 did he make objection to the particular mode in which Libby provided for the payment of his notes, or intimate his purpose to demand coin or legal-tender notes in payment. In every instance, except as to the interest note for 1882, the notes were paid at the banking-house of Russell & Holmes, and by drafts sent to and used by them for that purpose.

But it is quite apparent from the evidence that Cheney, in 1885, indulged the hope that he could bring about a forfeiture of the contract for non-compliance upon the part of Libby with its provisions, and that he would, in that or some other way, get the land back. It is proper to advert to the circumstances justifying that conclusion.

On the 4th of March, 1885,—all previous installments having been punctually met,—Libby offered, in writing, to pay all the principal notes mentioned in the contract, as well as the interest note due May 28, 1885, if a deed was made to him. To this offer Cheney replied, under date of March 19, 1885: "Your letter of the 4th has just reached me. I have no papers with me, and cannot attend to the matter as you request. I expect to go to New Orleans to the Exposition, and to be at home in time to see to it properly. If I am behind time, no harm will come to you." Libby wrote again, under date of May 20, 1885, renewing the offer contained in his letter of March 4th. Under date of May 23, 1885,—only five days before the notes for 1885 matured,—Cheney replied: "Yours of 20th is received. I think it probable that I can do as you suggest, but I will be in

Beatrice [the county-seat of Gage county, where the lands are] between the 1st and 10th of June on other business, and will then make inquiries, and see if I can lend the money to good hands, and will then let you know more certainly."

On the 26th of May, 1885, Libby sent to Russell & Holmes a draft upon the First National Bank of Omaha, Neb., made by one Stuart, a private banker doing business at Madison, in the same state, for \$1,251.20, which was the amount of Libby's two notes for principal and interest that matured May 28, 1885. It was sent in payment of those notes, and was received for that purpose by Russell & Holmes. They accepted it for the amount of money named in it, and were therefore ready to take up Libby's two notes when presented for payment at their office.

On the 28th of May, 1885, A. W. Cross, of the First National Bank of Jerseyville, Ill.,—where Cheney resided,—appeared at the banking-house of Russell & Holmes, and made a deposit of \$5,000, all in current funds, and a good portion of it in bills of his own bank. While there he inquired of Russell & Holmes (without disclosing the reason for his inquiry) whether they kept "a legal-tender revenue, [reserve,] as national banks were required to do." He was told that they did not, but that a supply of legal tender was on hand. About 2 o'clock of the 1st of June—which, as May 31st fell on Sunday, was the last day of grace for Libby's two notes due in 1885, (Comp. St. Neb. c. 41, § 8)—one of Cheney's attorneys went into the bank of Russell & Holmes, and asked if he could begin \$5,000 in legal-tender notes in exchange for other currency. His request was complied with. At a later hour of the same day Cheney appeared in the bank, without having responded to Libby's offer, twice made, to pay all the notes for the principal debt, and the interest note maturing in 1885. He came there with checks, drawn by Cross, to be cashed, and asked, as an accommodation to him, that they be paid in legal-tender notes. He was promptly accommodated to the extent of \$2,500. But, when he asked for \$2,500 more in legal-tender notes, Holmes suspected there was a scheme to exhaust his bank of legal-tender notes, and refused to comply with this request. After Russell & Holmes had thus, by way of accommodation, paid to Cheney and his attorney \$7,500 in legal-tender notes,—but not until the hour for closing the bank, on that day, against the public had passed,—Libby's two notes were presented by Cheney, and payment thereof demanded in coin or legal-tender notes. The bank offered to pay in current funds, as they had previously done in respect to Libby's notes, but Cheney declined to take in payment anything except coin or legal-tender notes. The notes were then placed by him in the hands of a notary, who was conveniently present, and the latter presented them for payment, announcing that he would not receive anything except United States notes or legal-tender funds. Payment in such funds was refused by the bank, and the usual protest was made. The notary and Cheney then left the room, the latter saying, before leaving, that "he

would call in the morning." But he did not call the next or upon any subsequent day.

Within 15 or 20 minutes after Cheney and his notary left the bank, Holmes, of the firm of Russell & Holmes, went to the office of the notary to find Cheney and pay the notes in the funds demanded. But Cheney was not there, and the notes were in his hands. Inquiry was made at the principal hotel and at other places, but he could not be found. Holmes was informed that he had left town.

Libby having been notified of the protest of the notes, notwithstanding he had, in due time, sent a bank draft to Russell & Holmes to be used in paying them, directed Stuart, the banker at Madison, Neb., to go immediately to Tecumseh. The latter arrived there on the 9th of June, and, having learned what passed between Cheney and Russell & Holmes, determined to pay off the notes in such funds as Cheney demanded. He informed the notary, who had protested the notes for non-payment, that he was then ready, in behalf of Libby, to pay them in gold. The latter did not have the notes, did not know where Cheney had gone, and said that the latter "did not want the money, but that he wanted the land back."

Stuart having knowledge of Cheney's letter, in which he notified Libby of his purpose to visit Beatrice between the 1st and 10th of June, went to that place in search of Cheney, but could not find him.

Libby wrote to Cheney, under date of June 12, 1885, informing him that gold was deposited at Russell & Holmes' office to pay the two notes due May 28, 1885. This letter was received by Cheney in due course of mail. On the 20th of June, 1885, the latter inclosed to Libby twelve unpaid notes, (including the two due May 28, 1885,) saying that the contract of May 28, 1880, was "terminated and ended by your failure to pay the two notes due May 28, 1885, and otherwise to comply with the contract, which is now null and void." How Libby had "otherwise" failed to meet his obligations under the contract does not appear. Under date of June 23, 1885, Russell & Holmes advised Cheney by letter of the fact that they were authorized by Libby to pay, and they were ready to pay, the notes due May 28th, including protest fees, in legal-tender notes or coin. Libby, under date of June 25, 1885, replied to Cheney's letter, saying, "I refuse to accept said notes, excepting the two which were paid, and have this day sent them to your bankers, Messrs. Russell & Holmes, of Tecumseh, Neb., for your use and benefit, and subject to your order. I shall make payments as fast as they become due, and shall require you to execute a conveyance of the land in accordance with the terms of the contract. It will be useless for you to send me any of these notes, except you send them for payment." Under date of June 29, 1885, Russell & Holmes advised Cheney that they had received from Libby his notes, amounting to \$6,679.20, subject to his (Cheney's) order. The latter wrote July 9, 1885, in reply to Libby's letter of June 25th, that he did not recognize the notes placed with Russell & Holmes as being subject to his order.

On the 20th of August, 1885, Libby, by his attorney, made a tender to Russell & Holmes of \$120 in gold coin as a balance of one-half of the purchase money, and offered to surrender the contract and execute a mortgage and notes for the balance of the purchase money, as stipulated in the contract, and demanded a deed; of all which Cheney was notified. The latter replied, under date of August 22, 1885, that he would not receive any money from Libby, and refused to make a deed.

It further appears that the plaintiff punctually paid into the bank of Russell & Holmes the amounts of the notes due in 1886 and 1887. The funds remained in that bank and are now there, subject to Cheney's order, on presenting the notes. Of these payments he was promptly informed.

Shortly before the commencement of this suit Libby again offered to Cheney to pay in cash all the unpaid portion of the principal debt named in the contract, and all interest due at that date. He also renewed his offer to execute a mortgage on the land to secure all unpaid installments not due, and demanded a deed. But those offers being declined, the present suit was brought.

A. A. Goodrich, for appellant. S. P. Davidson, for appellee.

Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court.

The peculiar wording of the written contract renders it somewhat doubtful whether there was a sale of the lands to the appellee to be made complete by a conveyance of the legal title or defeated altogether, according to his performance or failure to perform the conditions upon which he was to receive a deed; or whether he was simply given possession, paying a fixed amount, annually, for use and occupancy, with the privilege of purchasing, and with the right to demand a conveyance in fee-simple, upon the performance of those conditions. Taking the whole contract together, we incline to adopt the former as the true interpretation. Such was the view taken by the supreme court of Nebraska of a similar contract as to land between Cheney and one Robinson. *Robinson v. Cheney*, 17 Neb. 673, 679, 24 N. W. Rep. 378. But it is not necessary to express any decided opinion upon this question; for, in any view, it is clear from the contract, not only that appellant could retain the legal title until the appellee's obligations under it had all been performed, but that he could resume possession immediately upon the failure of the appellee to meet, punctually, any of the conditions to be performed by him. Time may be made of the essence of the contract "by the express stipulations of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser." *Taylor v. Longworth*, 14 Pet. 172, 174; *Secombe v. Steele*, 20 How. 94, 104; *Holgate v. Eaton*, 116 U. S. 33, 40, 6 Sup. Ct. Rep. 224; *Brown v. Trust Co.*, 128 U. S. 403, 414, 9 Sup. Ct. Rep. 127. The parties in this case, in words too distinct to leave room for construction, not only specify the time when each condition is to be per-

formed, but declare that "time and punctuality are material and essential ingredients" in the contract, and that it must be "strictly and literally" executed. However harsh or exacting its terms may be, as to the appellee, they do not contravene public policy; and therefore a refusal of the court to give effect to them, according to the real intention of the parties, is to make a contract for them which they have not chosen to make for themselves. 1 Sugd. Vend. (8th Amer. Ed.) 410, (268;) *Barnard v. Lee*, 97 Mass. 92, 94; *Hipwell v. Knight*, 1 Younge & C. 401, 415. These observations are made because counsel for the appellant insists, with some confidence, that an affirmation of the decree below will necessarily be a departure from the general principles just stated.

But there are other principles, founded in justice, that must control the decision of the present case. Even where time is made material, by express stipulation, the failure of one of the parties to perform a condition within the particular time limited will not in every case defeat his right to specific performance, if the condition be subsequently performed, without unreasonable delay, and no circumstances have intervened that would render it unjust or inequitable to give such relief. The discretion which a court of equity has to grant or refuse specific performance, and which is always exercised with reference to the circumstances of the particular case before it, (*Hennessy v. Woolworth*, 128 U. S. 438, 442, 9 Sup. Ct. Rep. 109,) may and of necessity must often be controlled by the conduct of the party who bases his refusal to perform the contract upon the failure of the other party to strictly comply with its conditions. *Seton v. Slade*, 7 Ves. 265, 279; *Levy v. Lindo*, 3 Mer. 81, 84; *Hudson v. Bartram*, 3 Madd. 440, 447; *Lilley v. Fifty Associates*, 101 Mass. 432, 435; *Potter v. Tuttle*, 22 Conn. 512, 519. See, also, *Ahl v. Johnson*, 20 How. 511, 518.

To this class belongs, in our judgment, the case before us. Although the contract between Cheney and Libby called for payment in dollars, the latter might well have supposed, unless distinctly informed to the contrary, that the former would be willing to receive current funds; that is, such as are ordinarily received by men of business or by banks; and such funds were received in payment of all of Libby's notes falling due in 1880 to 1884, inclusive. While this course of business was not an absolute waiver by Cheney of his right to demand coin or legal-tender paper in payment of notes subsequently falling due, such conduct, during a period of several years, was calculated to produce the impression upon Libby's mind that current or bankable funds would be received in payment of any of his notes; and therefore, upon every principle of fair dealing, Cheney was bound to give reasonable notice of his purpose, after 1884, to accept only such funds as under the contract, strictly interpreted, he was entitled to demand. No such notice was given. On the contrary, the just inference from the testimony is that Cheney designed to throw Libby off his guard, and render it impossible for the latter, or for the bankers to

whom he sent drafts to be used in paying his notes, to supply the requisite amount of coin or legal-tender paper on the very day the notes matured, and at the moment of their presentation for payment. The efforts of Russell & Holmes, within a few moments after Cheney left their bank on the 1st of June to find him, and to pay off the notes in legal-tender paper, and the efforts of Libby, by his agent, as soon as he was informed of Cheney's demand for payment in coin or legal-tender paper, to reach him, and to pay off the notes maturing in 1885, in lawful money, and his repeated offers, subsequently, to pay them in such money, showed the utmost diligence, and sufficiently excuse his failure to pay in coin or legal-tender paper on the very day his notes matured. To permit Cheney, under the circumstances disclosed, to enforce a forfeiture of the contract, would enable him to take advantage of his own wrong, and to reap the fruits of a scheme formed for the very purpose of bringing about the non-performance of the contract.

But it is contended that the provision in the contract forbidding its modification or change, "except by entry thereon in writing signed by both parties," coupled with the provision that no court should relieve Libby from a failure to comply strictly and literally with the contract, stands in the way of a decree for specific performance. It is sufficient, upon this point, to say that such provisions—if they could in any case fetter the power of the court to do justice according to the settled principles of law—cannot be applied where the efficient cause of the failure of the party seeking specific performance to comply strictly and literally with the contract was the conduct of the other party. If the defendant had agreed, in writing, signed by himself alone, to accept current funds, and not to demand coin or legal-tender notes, and, notwithstanding such agreement, he had demanded coin or legal-tender notes, under circumstances rendering it impossible for the plaintiff to meet the demand on the day limited by the contract, would he be permitted to say that the contract was forfeited for the failure to make payment according to its provisions? We suppose not, although, according to his argument, such an agreement, not having been signed by both parties and indorsed on the contract, would not estop him from insisting upon a strict and literal compliance with its terms.

It results from what has been said that the failure of the plaintiff, Libby, in person or by agent, to pay the notes maturing in 1885 in coin or legal-tender paper, at the time they were presented by Cheney for payment at the banking-house of Russell & Holmes, did not work a forfeiture of the contract, and does not stand in the way of a decree for specific performance.

In respect to the notes falling due in 1886 and 1887, the evidence satisfactorily shows that the plaintiff, at the times and place appointed for their payment, offered, and was then and there ready, to pay them in lawful money, but, the notes not being on either occasion in the hands of Russell & Holmes for collection, he could not make actual payment, but left the money at

their bank to be paid over to Cheney whenever the notes were presented at that place. The notes due in those years were, it is true, in the manual possession of Russell & Holmes, but they were not in their custody by direction of Cheney, for collection or for any other purpose. Libby did all that he could do with respect to the notes falling due in those years in order to comply "strictly and literally" with the contract. Indeed, after the surrender by Cheney in 1885 of the notes due in that and subsequent years, and his formal notification to Libby that he regarded the contract as forfeited and would not receive any money from him, Libby was not bound, as a condition of his right to claim specific performance, to go through the useless ceremony of tendering payment at the banking-house of Russell & Holmes of the notes maturing in 1886 and 1887. *Brock v. Tidy*, 13 Ohio St. 306; *Deichmann v. Deichmann*, 49 Mo. 107, 109; *Crary v. Smith*, 2 N. Y. 60. In *Hunter v. Daniel*, 4 Hare, 420, 433, it was said: "The only remaining point insisted upon was that the making of every payment was a condition precedent to the right of the plaintiff to call for the execution of the agreement, or, in fact, to call for the benefit of it; and it was argued that the bill could not properly be filed before the plaintiff had, out of court, fully performed his agreement. The general rule in equity certainly is not of that strict character. A party filing a bill submits to do everything that is required of him; and the practice of the court is not to require the party to make a formal tender where, as in this case, from the facts stated in the bill, or from the evidence, it appears that the tender would have been a mere form, and that the party to whom it was made would have refused to accept the money." Whether that be a sound view or not with reference to the particular contract here in question, Libby did, in fact, make a proper tender of payment as to these notes. Before the bringing of this suit he had paid, and offered to pay, more than one-half of the price for the land and all accrued interest and taxes, and therefore was entitled by the terms of the contract to a deed, he executing notes and a mortgage for the remaining payments to run the unexpired time, as stipulated in the agreement.

The court below found that the notes falling due in 1885, 1886, and 1887 were paid; that the plaintiff had deposited with the clerk for the defendant a mortgage on the land to secure the payments due 8, 9, and 10 years after the date of the contract; and that he had fully done and performed every obligation imposed upon him to entitle him to a deed. It was adjudged that the defendant, within 40 days from the decree, execute, acknowledge, and deliver to the plaintiff a good and sufficient deed, with the usual covenants of warranty, (excepting the right of way that may be demanded for public use for railways or common roads,) conveying to him the land in question, and in default of which it was adjudged that the decree itself should operate, and have the same force and effect, as a deed of the above description.

We are not able to concur in the finding

that the notes falling due in 1885, 1886, and 1887 had been paid when this decree was passed. If those notes had been placed by Cheney with Russell & Holmes for collection, and the latter had collected the amounts due on them, then they would have been paid; for, in such case, that firm would have been the agent of the payee to collect the notes, and the money received by them would have belonged to him.

In *Ward v. Smith*, 7 Wall. 447, 450, the question arose as to whether a bank at which certain bonds were made payable was the agent of the holder to receive payment. The court said: "It is undoubtedly true that the designation of the place of payment in the bonds imported a stipulation that their holder should have them at the bank, when due, to receive payment, and that the obligors would produce there the funds to pay them. It was inserted for the mutual convenience of the parties. And it is the general usage in such cases for the holder of the instrument to lodge it with the bank for collection, and the party bound for its payment can call there and take it up. If the instrument be not there lodged, and the obligor is there at its maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay. When the instrument is lodged with the bank for collection, the bank becomes the agent of the payee or obligee to receive payment. The agency extends no further, and without special authority an agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. In the case at bar only one bond was deposited with the Farmers' Bank. That institution, therefore, was only agent of the payee for its collection. It had no authority to receive payment of the other bonds for him or on his account. Whatever it may have received from the obligors to be applied on the other bonds, it received as their agent, not as the agent of the obligee. If the notes have depreciated since in its possession, the loss must be adjusted between the bank and the depositors; it cannot fall upon the holder of the bonds." See, also, *Adams v. Commission*, 44 N. J. Law, 638, where this question is elaborately examined; *Hills v. Place*, 48 N. Y. 520; *Gas Co. v. Pinkerton*, 95 Pa. St. 62, 64; *Wood v. Savings Co.*, 41 Ill. 267.

Russell & Holmes, then, did not become the agent of Cheney to receive the amount of the notes, by reason simply of the fact that the notes were made payable at their bank. The funds left by Libby with them to be applied in payment of the notes of 1885, 1886, and 1887 are therefore his property, not the property of Cheney. The utmost effect of Libby's offer, within a reasonable time after June 1, 1885, to pay the note of that year in lawful money, and of his offers, at the appointed times and place, to pay the notes of 1886 and 1887, was to prevent the forfeiture of the contract, and to save his right to have it specifically performed, so far as that right depended upon his paying those notes. But they must be

actually paid by him before he is entitled to a deed, or to a decree that will have the force and effect of a conveyance. Under the circumstances it was not absolutely necessary that he should have brought the money into court for the defendant at the time he filed his bill. His offer in the bill to perform all the conditions and stipulations of the contract was sufficient to give him a standing in court. *Irvin v. Gregory*, 13 Gray, 215, 218; *Hunter v. Bales*, 24 Ind. 299, 303; *Fall v. Hazelrigg*, 45 Ind. 576, 579. But the decree of specific performance ought not to become operative until he brings into court for the defendant the full amount necessary to pay off the notes for principal and interest falling due in 1885, 1886, and 1887. *Caldwell v. Cassidy*, 8 Cow. 271; *Haxton v. Bishop*, 3 Wend. 13, 21; *Hills v. Place*, *supra*; *Wood v. Saving Co.*, *supra*; *Webster v. French*, 11 Ill. 254, 278; *Carley v. Vance*, 17 Mass. 389, 391; *Doyle v. Teas*, 4

Scam. 202, 261, 267; *McDanel v. Kimbrell*, 3 G. Greene, 335. The defendant is not entitled to interest after the respective tenders were made, because it does not appear that the plaintiff has, since the tenders, realized any interest upon the moneys left by him for Cheney at the bank of Russell & Holmes. *Davis v. Parker*, 14 Allen, 94, 104; *January v. Martin*, 1 Bibb, 586, 590; *Hart v. Brand*, 1 A. K. Marsh. 159, 161; 2 Sug. Vend. (8th Amer. Ed.) 314, 315, (627, 628.)

The decree below is affirmed. But it is adjudged and ordered that the said decree be and is hereby suspended, and shall not become operative until the plaintiff brings into the court below for the defendant the full amount of the notes for principal and interest executed by him to the defendant, and made payable on the 28th days of May, 1885, 1886, and 1887, without interest upon any note after its maturity.

CHICAGO, M. & ST. P. RY. CO. v. DURANT et al. SAME v. HOSPES. SAME v. STAPLES. SAME v. UNION DEPOT ST. RY. & T. CO.

(46 N. W. 676, 44 Minn. 361.)

Supreme Court of Minnesota. Oct. 7, 1890.

Appeal from district court, Washington county; McCLUER, Judge.

W. H. Norris, for appellant. *Fayette Marsh*, for E. W. Durant and others. *J. N. & I. W. Castle*, for E. L. Hospes and Isaac Staples. *Searles & Gail*, for Union Depot St. Ry. & T. Co.

VANDERBURGH, J. The demurrers to the complaint interposed in behalf of defendants Durant, Hospes, Hersey, Staples, the Union Depot Company, and O'Gorman, receiver, were sustained by the trial court, and the complaint held sufficient as to the other defendants. From the order sustaining the demurrer the plaintiff appeals, and the principal question presented for our determination is whether the complaint states a cause of action in respect to the defendants above named. Generally, in equitable actions of this kind, the merits can be best determined upon proofs after answer; but we will examine and consider such questions as are fairly before us on this appeal.

1. If the action were brought solely against the defendants who executed the contract for the right of way, whom, for convenience, we will style "obligors," though equitable relief is demanded, a recovery might be had for damages, and treating it as an action for damages, the defendants would, if they required it, be entitled to a jury trial. *Davison v. Associates*, 71 N. Y. 334. But certain lots, through which the right of way was bargained for, are alleged to have been conveyed to certain other defendants, who are joined in the action, and who are not parties to the agreement, and against whom equitable relief, by way of specific performance, is sought. The two causes of action—one for damages and one for the special relief—cannot properly be united, and this is one ground of the demurrer. The action, then, must be treated as an equitable one for specific performance, with incidental relief, by way of compensation for such portion of the property in question as cannot be reached; and the sufficiency of the complaint must be determined solely in respect to the right of the plaintiff to such relief.

2. It is charged in the complaint that, in order to induce the plaintiff to construct a line of its railroad from a point on its River Division from Hastings to the city of Stillwater, the defendants Staples, Durant, Hospes, Hersey, and Sabin, with one Torinus, since deceased, on the 15th day of July, 1881, agreed in writing with this plaintiff that the city of Stillwater would and should give this plaintiff a right of way, 56 feet wide, through certain real property, as described in the complaint; and that on its part the plaintiff, in and by the same agreement, in consideration of the premises, undertook and

agreed, among other things, that it would at once begin the construction of such branch line, and continue the same with all practical dispatch until the completion thereof; and that it did in all things well and truly fulfill and perform such agreement on its part. There is no doubt as to the sufficiency of the consideration to uphold the undertaking of the defendants, or that the parties are mutually bound, subject to the conditions of the contract. *Railroad Corp. v. Babcock*, 6 Metc. (Mass.) 346.

3. In respect to the defendants in whose favor the demurrer was sustained, it is not claimed that any of them now own or are interested in the property in question here, except the Union Depot Company, and O'Gorman, receiver. The last named are not parties to the agreement, but are properly joined as having some interest in the property. But the decree of the court for specific performance of the contract could only be made operative against them, or any other persons than the original obligors, in so far as they have acquired from the latter portions of the right of way contracted for with notice. As to such lands, such parties would stand in their shoes, and be bound; but as to the lots acquired by the Union Depot Company of other parties, by purchase or condemnation, the contract is entirely nugatory, and in respect to the several tracts of land designated in the complaint as having been so acquired by the Union Depot Company, it could not be bound in this action. From the terms of the contract providing that the city would give a right of way, and the specification of the ownership of the several lots set forth in the complaint, it will not be implied that the defendants at any time owned or had title to any of them, save as therein set forth. From the complaint it appears that the Union Depot Company acquired title to the north 49 feet of lot 2, in block 28, from Helen M. Torinus and Louis E. Torinus, her husband. What the latter's interest was, does not appear. The defendant Sabin, one of the signers of the agreement in question, acquired, by purchase from Torinus, an undivided half of the south 35 feet, in width, of lot 7, and of the north 56 feet of lot 8, September 16, 1881. Sabin also purchased of defendant Durant and another, September, 1881, the north 15 feet in width of lot 7, and the undivided half of the south 35 feet in width thereof, and the undivided half of the north 56 feet in width of lot 8; and at the same time purchased of Torinus the other undivided half of south 35 feet of lot 7, and north 56 feet of lot 8. Sabin also purchased lot 5, and a portion of lots 5, 7, and 8, described in the complaint, was conveyed by him to the Union Depot Company, and is included in the right of way, 56 feet in width, described in the agreement. It is also alleged that the title in fee to the south 30 feet in width of lot 8 to lot 9, and the north 75 feet in width of lot 10, block 28, appear to be in the city of Stillwater, since 1875, as and for a part of Nelson street, and as part and parcel of the "Levee," so called. It further appears that the depot company have acquired divers

other parcels of the same block from other persons, not parties to the contract, and have also granted to the plaintiff a certain portion of the lots 2, 3, 4, 5, 7, 8, 9, 10, 11, in block 28, lying within such 56-foot strip, or right of way. The defendant Sabin is the only one of the signers of the contract who appears to have title to any of the land in question, in block 28, and his interest is confined to that part of lots 5, 7, and 8, above described, and not already conveyed to the depot company. The only land in block 28, within the right of way, which, in case specific conveyance were decreed under the contract, would be subject to be so conveyed, is the land held by Sabin, and so much of the land of the depot company within the right of way not already conveyed to the plaintiff by it as it derived from Sabin, as above stated. As before intimated, land procured by the depot company from strangers to the contract would not be affected by it. As to block 27, the obligors, by the same contract, further agreed to purchase so much of block 27 as lay east of the alley, and to grant such right of way, as aforesaid, through the same to the plaintiff. As respects the lots in this half block, through which the right of way in question was in fact located, it appears that on September 15, 1881, the Union Depot Company, defendant, acquired title from Isaac Staples to one-half of lot 1, and lots 3, 4, and 5; and March 1, 1882, from defendant Hersey and others, to the other half of lot 1; and March 23, 1882, to lot 2, from Seymour, Sabin & Co., of which firm defendant Sabin was a member. It does not appear, however, what interest Hersey and Sabin had in the lots conveyed.

4. The city has not furnished the right of way, as agreed, and the defendants have not caused it to be done, or procured it themselves, through either block. The question now arises whether, upon the facts herein stated, a case is made for the interposition of a court of equity so as to warrant a decree for specific performance as to the defendants Union Depot Company and Sabin, and to award a judgment for damages against other defendants, by way of compensation for the deficiency. The court will not undertake to compel the defendants, jointly or severally, to purchase the specific property, or to procure the right of way from the city. And it is not a case for compensation, because, conceding that the court might compel the depot company and Sabin to convey a partial interest representing a relative or proportionate share of individual obligors, as above described, the same would be relatively so small, as compared with the whole amount embraced in the contract, that the compensation or damages would apparently be the main object of the suit. In such cases a court of equity will not assess damages as compensation, but only where they are incidental to the principal ground of relief,

and the court will leave the party to his action at law, unless he will consent to accept the part subject to conveyance without damages. *Earl of Durham v. Legard*, 34 Law J. Ch. 590. In some cases, however, where the vendor shows title to a portion only of the land contracted, or has wrongfully parted with part, justice may be done by an apportionment of the consideration, if the vendee consent to take part with an abatement of the price. 2 Lead. Cas. Eq. (4th Ed.) pt. 2, p. 1146. So, where the vendee knows at the time of entering into the contract (as may be implied in this case from the terms of the contract) that the vendor has title to a part only of the land, compensation will be denied. *Wat. Spec. Perf.* § 506; 5 Wait, Act. & Def. 781. This is not a case between vendor and vendee. By the contract the right of way was to be procured by or from others by gift or purchase. The plaintiff did not contract for a conveyance from the defendants. It did not rely upon the individual ownership of the obligors. The city was to give the right of way; and, as to block 27, the defendants were to purchase the entire half block jointly, and jointly bear the burden. It was not fairly within the contemplation of the parties that the interests which the individual obligors might have in some of the land embraced in the proposed right of way should be made subject to enforced conveyance under the contract, if unfulfilled in its scope and purpose by the obligors, who jointly entered into it. Equity, it is true, looks at the substance of the contract, and, when the agreement can be substantially, though not literally, carried out, without changing the nature of the contract, or substituting a new one, and do justice between the parties, it will be so enforced. The doctrine of compensation rests upon this principle. And so where land is held as tenants in common by several persons, who have jointly agreed to convey the same, some of whom are not bound, or are deceased, those who are liable, or who survive, may be compelled, in a suit on the contract, to convey their individual or proportionate interests as tenants in common. *Hooker v. Pyncheon*, 8 Gray, 550. But such is not this case. The contract did not contemplate a conveyance of individual interests, but the acquisition of the right of way by the public, and by the joint act or purchase by the obligors; and, as to block 27, an essential condition and inducement to the parties was the purchase of the half block, and not the right of way merely. In any view of the case, and apart from the question of laches, considering the nature of the contract, the state of the title, the indefiniteness and uncertainty in the description set forth in the contract, we think that the parties should be left to their action at law, and the interposition of a court of equity is not warranted. Order affirmed.

HAFFEY v. LYNCH.

(38 N. E. 298, 143 N. Y. 241.)

Court of Appeals of New York. Oct. 9, 1894.

Appeal from supreme court, general term, first department.

Action by Michael H. Haffey against Sarah Lynch for specific performance of a contract for the sale of land. From a judgment of the general term (23 N. Y. Supp. 59) affirming a judgment dismissing the complaint, plaintiff appeals. Reversed.

Charles Strauss, for appellant. Henry H. Anderson, for respondent.

EARL, J. At an auction sale of the defendant's real estate the plaintiff purchased a parcel of land described in the complaint at the price of \$7,800, and paid 10 per cent. of the purchase price, besides certain fees and expenses. The parties signed a written contract specifying the terms of sale, and the time and place of full performance by the parties. By the written contract the defendant was to convey the land "by the usual deed containing full covenants with warranty." The defendant did not tender to the plaintiff such a deed as he claimed he was entitled to, and then he commenced this action against her to compel the specific performance of the contract. Until the trial of the action it appeared that she had at the time of the sale such a title to the land as she was bound to give. But subsequently one Nathaniel Jarvis, Jr., claiming the land in fee, brought an action of ejectment against her to recover the land, and filed a *lis pendens*. The plaintiff knew of this claim and the *lis pendens* when he commenced this action; and solely on account of the existence of the *lis pendens*, and such knowledge thereof, the court refused specific performance, and dismissed the complaint. We think the learned court fell into error, and that, upon the undisputed facts found, it should have given to the plaintiff judgment for specific performance.

We must first notice the issue joined by the pleadings. The plaintiff alleged in his complaint the contract; that he had performed the same, and was ready and willing to perform the same upon receiving such a conveyance as he was entitled to; that after several postponements of time for the performance of the contract, at the request of the defendant, her attorney tendered to him a deed of the land, at the same time saying to him that she could not give him a valid and marketable title to the land, because it was incumbered; that he rejected the deed on the ground of the alleged incumbrance upon the land, at the same time notifying her that he was ready and willing to perform on his part if she would give him such a deed as he was entitled to; that she refused to give him such a deed; that the title to the land was incumbered and rendered unmar-

ketable by the *lis pendens* filed in the ejectment action; that the defendant could at all times have obtained the cancellation and discharge of the *lis pendens*, and could have conveyed to him such a title as the contract entitled him to. She, in her answer, admitted the making of the contract; denied that he had performed, or was ready and willing to perform, the contract, on his part; admitted the commencement of the ejectment suit, and the filing of the *lis pendens*; alleged that she had tendered to him such a deed as she was bound to give; denied that she was at any time unable or unwilling to convey the land; and alleged that she could at all times since the execution of the contract have conveyed the title of the land to him according to the contract, had she been so disposed, and that she has at all times been ready and willing so to do. It thus appears that the issue between the parties was as to the performance of the contract, the plaintiff alleging that he had performed, and was ready and willing to perform, and the defendant alleging that she had performed, and was ready, willing and able to perform, on her part. On the trial the plaintiff was the sole witness sworn, and the trial judge, after finding the ownership of the land by the defendant, and the making of the contract, found as follows: "That the plaintiff has in all things performed all the terms and conditions of said contract, and has been, on his part, ready and willing to fulfill the same, and accept a conveyance of the fee of the said property." "That the said defendant, through her attorneys, has, prior to the commencement of this action, refused to make said conveyance under the said agreement, notwithstanding the plaintiff's frequent requests therefor." "That such refusal on the part of the defendant to make such conveyance was due to the fact that one Nathaniel Jarvis, Jr., had, after said sale, but before the day fixed for the delivery of the deed thereunder, commenced an action in ejectment in this court against said defendant, claiming the ownership of the premises in question, and had filed a notice of the pendency of said action in the office of the clerk of the city and county of New York, on March 6, 1889." "That thereafter, and before the trial of this action, the said ejectment suit was brought to trial, and the complaint therein was dismissed, and from the judgment entered on which dismissal an appeal was taken to the general term of this court, which court affirmed said judgment; and no appeal from said order of the general term has been taken to the court of appeals, and the time to do so has now expired." "That the said plaintiff has expressed his consent at the trial of this action to accept from the defendant a conveyance of said land by the usual deed containing full covenants with warranty, subject to the reservations contained in the eighth paragraph of the said terms of sale." "That less than three years have passed since the

rendering of judgment and the filing of the judgment roll in the said decision of *Jarvis v. Lynch*." And he found, as conclusions of law, "that the sale having been made in good faith, and the question as to the title of the said premises having arisen since the sale, the defendant should not be compelled to give a warranty deed, or procure a policy of title insurance of the Lawyers' Title Insurance Company, insuring the title to the said premises to the plaintiff;" "that the defendant is entitled to judgment dismissing the complaint upon the merits of the action;" "that such judgment should be without prejudice to the right of the plaintiff to bring an action for damages for breach of the contract set forth in complaint."

The plaintiff has been defeated in his action thus far on the ground that it was impossible for the defendant to perform her contract at the time of the commencement of the action, and that he knew it was. She did not set up such a defense in her answer, but, on the contrary, alleged that she was able and ready to perform her contract, and there was no proof showing that it was then impossible for her to perform the contract. There was no evidence showing what basis, if any, the claim of title to the land by Jarvis had. It may have been colorable, and not real or substantial. It did not appear that she had made any effort whatever to remove the incumbrance of the *lis pendens*. It was her duty to perform the contract, and to make all reasonable efforts to remove any obstacle which stood in the way of her performance. The plaintiff was not in fault for refusing to accept a deed which the defendant at the time declared would convey an incumbered title. He was entitled to a marketable title. *Moore v. Williams*, 115 N. Y. 586, 22 N. E. 233; *Vought v. Williams*, 120 N. Y. 257, 24 N. E. 195. It is a general rule in equity that the specific performance of a contract to convey real estate will not be granted when the vendor, in consequence of a defect in his title, is unable to perform. In such cases specific performance is denied because the court cannot enforce its judgment, and because, also, it would be oppressive to the vendor. But if the defect in the title existed at the date of the contract, or was due to some fault or to some act of the vendor subsequent to the contract, the court will generally entertain an action for specific performance, and retain jurisdiction for the purpose of awarding damages for the breach of the contract. But where, as in this case, the defect in the title arises after the making of the contract, without any fault of the vendor, and the vendee knew of the defect in the title when he commenced his action, the court will not retain the action for the purpose of awarding the damages. *Wiswall v. McGowan*, Hoff. Ch. 125; *Morss v. Elmendorf*, 11 Paige, 277. This rule was adopted because the vendee should not commence a fruitless action in equity simply to recover there his

damages for a breach of contract. The rule has been modified since the Code practice, which authorizes the joinder of legal and equitable causes of action; and, while the equitable relief will be denied in such a case, now the action will be retained, and the issue as to the breach of contract and damages will be sent to a jury for trial. *Sternberger v. McGovern*, 56 N. Y. 12. But this rule was adopted in equity not solely because at the time of the commencement of the action the defects in the title existed, to the knowledge of the vendee, but also because the case was such that at the time of the rendition of the judgment the court could not grant the equitable relief. The rule and the ground upon which it is based have no application to a case where the defect has disappeared at the time of the trial, and the court can then give an effective judgment for the equitable relief demanded; and no case can be found, prior to this, where an equity court has denied specific performance because the vendor's title was defective at the commencement of the action, but valid and perfect at the time of the trial. In such a case, why should not the vendor perform? He is able to, and the vendee is entitled to performance unless some other defense has intervened, and the court is able to enforce performance. Here the plaintiff was willing to take such a title as the defendant could convey at the trial. The ejectment suit had finally resulted in favor of the defendant. The *lis pendens* had ceased to be operative, and could, if necessary, have been removed. The fact that Jarvis could have paid the costs and taken a new trial under the statute is of no importance. There was final judgment against him, and the contingency that he might take a new trial is of no more importance than the contingency that some other person might at some time commence an action to recover the same land. Equity courts, in awarding relief, generally look at the conditions existing at the close of the trial of the action, and adapt their relief to those conditions. The plaintiff in an equity action, as a general rule, should not be turned out of court on account of any defense interposed to his action, if at the time of the trial the facts are such that if he then commenced his action he would be entitled to the equitable relief sought. If a vendor has no title, or a defective title, to land which he contracts to sell, and subsequently obtains a perfect title, he can be compelled by his vendee to perform his contract. *Fry*, Spec. Perf. (3d Ed.) 480. And why should the vendor not be compelled to perform if he perfects his title while the action for specific performance is pending? A perfect title by the vendor is no part of the vendee's cause of action, and he is just as much entitled to the equitable relief, and the equity court is just as competent to give it, whether the title of the vendor was perfected before or after the commencement of the action. It does not appear that anything oc-

curring after the commencement of the action which should bar the relief asked by the plaintiff. There are no complications growing out of the lapse of time, and no material change in the situation of the parties, or of the land in controversy. We therefore see no reason to doubt, upon the facts found, that the plaintiff was entitled to specific per-

formance of the contract; and the judgment should be reversed, and a new trial granted, costs to abide event.

FINCH, O'BRIEN, and BARTLETT, JJ., concur. PECKHAM and GRAY, JJ., dissent. ANDREWS, C. J., not sitting.

Judgment reversed.

GOTTHELF v. STRANAHAN.

(34 N. E. 286, 138 N. Y. 345.)

Court of Appeals of New York. June 6, 1893.

Appeal from city court of Brooklyn, general term.

Action by Charles Gotthelf against James S. T. Stranahan to compel specific performance of a contract for the sale of lands. From a judgment of the general term (19 N. Y. Supp. 161) affirming a judgment for plaintiff, defendant appeals. Modified.

George G. Dutcher, (Wm. C. De Witt, of counsel,) for appellant. George G. & F. Reynolds, for respondent.

ANDREWS, C. J. The original contract, made on the 7th day of January, 1891, was by its terms to be completed by a conveyance and payment of the unpaid purchase money on the 9th day of February in the same year. The vendee was to pay for the property the sum of \$22,500, as follows: \$2,000 on the execution of the contract, \$4,750 on the execution of the deed, and the balance of \$15,750 in five years, with interest, to be secured by mortgage on the land. The vendor was to convey the land by warranty deed in fee simple, free from all incumbrance. The vendee, on the execution of the contract, paid the sum of \$2,000 as provided. If the contract had been performed on the 9th day of February, 1891, according to its terms, the question now presented would not have arisen. The assessments had not then been laid and, if the deed had been given on that day, they would have become a charge on the land subsequent to the conveyance, and the defendant would have been under no obligation, legal or equitable, to pay them. They would have attached as a charge upon the title acquired by the plaintiff. But by the mutual assent of the parties the completion of the contract was postponed from time to time, in all for a period of three months, until May 4, 1891. The first postponement, until February 16, 1891, was for the accommodation of the plaintiff; the others were for the accommodation of the defendant, to enable him to clear the land of squatters who had gone upon it without permission and erected shanties and hovels in which they lived, and between whom and the defendant, in some cases, an irregular sort of tenancy had grown up by the payment and receipt from time to time of small sums as rent. During this period of three months two assessments on the property for local improvements were laid and confirmed by the city of Brooklyn,—one on the 3d day of March, 1891, for \$901.12, for the grading and paving of Bush street; and one on the 20th day of April, 1891, for \$1,079.33, for the grading and paving of William street. This action is brought by the vendee against the

vendor to compel a specific performance of the contract of sale. The defendant is ready and willing and has offered to convey the premises with covenant of warranty as of the 9th day of February, 1891, the day originally fixed for the execution of the deed. The plaintiff insists that the vendor is bound to warrant the title as against the assessments mentioned. This is the controversy in the case, and the point for determination is whether the plaintiff, upon equitable principles, is entitled to the relief he seeks, and to cast upon the defendant the burden of paying the assessments. He does not ask to be relieved from the contract. He elects to have a decree for performance upon such conditions as the court shall determine, in case it shall be held that upon principles of law or equity he is not entitled to demand a covenant by the defendant covering the lien created by the assessments.

The premises contracted to be sold consisted of a block and part of a block of land in one of the outlying wards of Brooklyn, which, when the contract was made, was partly covered by water, and was unfenced and commons. Bush street, adjoining the southerly side of the land, was a traveled road, and had been such for many years. It was graded to some extent, but had not been paved. It was an ordinary country road. One of the assessments was for the contemplated improvement of Bush street. William street, to which the other assessment related, was mostly under water. In view of the peculiar system of local improvements prevailing in Brooklyn, one question presented is whether the assessments in question constituted incumbrances on the land in May, 1891, when the defendant offered to convey, within the true meaning of the contract of sale. The charter of Brooklyn is unique in respect to its system of local improvements. The district of assessment is to be prescribed, and the estimated cost of contemplated local improvements is required to be assessed on the district benefited, and a warrant for the collection of the assessments issued, and at least one-third of the aggregate assessment must have been collected before any contract for making the improvement is authorized to be made; and the city may, even after the assessments have been collected, decline to make a contract, or to go on with the improvement, and may discontinue the proceedings, returning the money collected on the assessments. Laws 1888, c. 583, tit. 19, §§ 1-8, inclusive. In other cities, assessments for local improvements follow the performance of the work. In Brooklyn they precede the execution, and are collectible in advance. The contemplated improvements of Bush and William streets, for which the assessments in question were laid have not yet been made. There is no explanation of the delay. When the proceedings were initiated does not appear, and, referring to

the charter provisions, there can be no inference that any step whatever had been taken when the contract of sale was executed, or prior to the 9th of February, 1891, when, by the original contract, the deed was to have been given. The parties entered into a contract for the sale of unimproved land. The consideration to be paid and received was presumably based on the value of the land in its existing condition. William street had no existence except on the city map, and Bush street was an ordinary road. Whether this condition would be changed at any time, and whether William street would be raised and made dry land, and Bush street be improved and brought to the condition of an ordinary city street, could not be known by the parties to the contract. If they anticipated that at some time the city would enter upon the improvement of this section of the city, they knew that any charge which might be imposed on the property embraced in the contract for the expense of such improvement would represent the benefit received by it from the improvement, as the theory of such assessment is that the value of the land would be enhanced by at least an equivalent amount. It is impossible to suppose that the parties contemplated when the contract was executed that incumbrances created by the force of public law for improvements initiated after the making of the contract and intermediate that date and the time fixed for the conveyance should be paid by the vendor. If the contract can have this construction, then the plaintiff is entitled to property not in the condition it was in when he contracted to purchase it, but an improved estate, improved at the expense of the vendor by the act of the city, which he could not control, initiated after the contract was made. This construction would compel the vendor to pay out of the purchase money the cost of an improvement which by so much has increased or will increase the value of the property, and the vendee would acquire property which he did not pay for.

The question as to the true meaning of the contract to convey free from all incumbrances is quite different from that which would be presented by an assessment made intermediate the date of the contract and the time fixed for the conveyance for a local improvement made before the contract was entered into. In that case the purchaser buys with the improvements made, and presumably pays a price fixed with reference to the land in its existing condition. The case of periodical taxes for the support of government, assessed and laid between the date of a contract and the time fixed for the conveyance, would constitute an incumbrance within the meaning of the covenant. The time of the imposition of such taxes is known in advance, and unless excepted from the covenant would be deemed to be covered thereby. But under the charter of Brooklyn assessments for local im-

provements are made in advance of the execution of the work. They represent, or are supposed to represent, benefits thereafter to be secured to the property assessed. The time when improvements will be initiated cannot be known.

The contract to convey free from incumbrances ordinarily has reference to incumbrances or liens actually existing when the contract is executed, or thereafter created, or suffered by the act or default of the vendor. While the assessments in question constituted, under the charter of Brooklyn, liens on the lands assessed from the time of their confirmation by the common council, and are, in a strict sense, incumbrances thereon, we are of opinion that they are not incumbrances within the meaning of the contract. They did not diminish the value of the subject of the contract. The plaintiff will acquire what the defendant intended to sell and what he expected to receive, and, but for the postponement of the time of the execution of the deed, the plaintiff would have taken his title before the assessments were laid. This incident ought not to impose upon the defendant a loss pro tanto of so much of the purchase money. But even if the contract, by its true interpretation, imposes upon the defendant the legal obligation to pay the assessment, this is not decisive of the right of the plaintiff to relief by way of specific performance. This equitable remedy cannot be claimed as a matter of right. It is discretionary with the court to grant or withhold it in furtherance of justice or to prevent injustice. Where, by reason of circumstances attending the making of the contract, such as fraud, accident, mistake, or where unconscionable advantage has been taken, or where, by reason of circumstances which have intervened between the making of the contract and the bringing of the action, the enforcement of the equitable remedy would be inequitable, and produce results not within the intent or understanding of the parties when the bargain was made, and there has been no inexcusable laches or inattention by the party resisting performance, in not foreseeing and providing for contingencies which have subsequently arisen, the court may and will refuse to specifically enforce the contract, and will leave the party to his legal remedy. The cases are very numerous under this head, and no hard and fast rule can be formulated by which it can be readily determined how the discretion of the court in a given case should be exercised. But it seems to us to be very clear that to enforce the contract in this case by requiring the defendant to covenant against the assessments in question would violate the spirit of the contract, and convert the equitable power of the court into an instrument for the accomplishment of rank injustice. The case of *Willard v. Tayloe*, 8 Wall. 564, contains an able discussion of the principles governing the courts in administering relief by way of specific perform-

ance of contracts, and Mr. Justice Field, in his opinion in that case, so fully cites the authorities that a further reference to them here is unnecessary. We think the judgment of the special and general terms should be modified by excepting from the scope of the covenant in the deed to be given by the defendant the assessments in question, and that, as modified, the judgment should be affirmed, with costs to the defendant in all courts. All concur, except GRAY, J., not voting. Judgment accordingly.

CORBIN v. TRACY et al.

(34 Conn. 325.)

Supreme Court of Errors of Connecticut. Sept. Term, 1867.

Bill in equity, brought by the petitioners, a joint stock corporation, to the superior court for Hartford county, to compel the specific performance of a contract to assign a patent right. The superior court (Loomis, J.) passed a decree in favor of the petitioners, and the respondents filed a motion for a new trial and a motion in error. The case is sufficiently stated in the opinion.

C. E. Perkins, in support of the motions. Mr. Hubbard and C. E. Mitchell, contra.

CARPENTER, J. It appears that the contract set out in the plaintiffs' bill was not, at the time of its execution, duly stamped pursuant to the laws of the United States. On the 26th day of March, 1867, the collector of the first collection district of this state caused said instrument to be stamped, and then and there entered upon its margin the following certificate:

"I have this day affixed the proper stamp, required by law, to this instrument, and satisfactory evidence having been furnished that the omission to affix a stamp at the proper time was the result of inadvertence, and without design to evade the law, the penalty is remitted. Hartford, March 26, 1867. H. A. Grant, Collector."

To the admission of this instrument, thus stamped, in evidence, the respondents objected, but the court received it. The correctness of this ruling is the only question presented by the motion for a new trial.

The law of the United States (Stat. 1865-66, p. 142) makes the instrument, if executed without a stamp, "with intent to evade the provisions of this act," "invalid and of no effect." The act further provides that the collector of the revenue shall, upon the payment of the price of the proper stamp required by law, and of a penalty of fifty dollars, affix the proper stamp to such instrument, and note upon the margin thereof the date of his so doing, and the fact that such penalty has been paid; and the same shall thereupon be deemed and held to be as valid, to all intents and purposes, as if stamped when made or issued. But this provision does not apply to this case as the respondents seem to suppose; for there is no pretense that this instrument was executed without a stamp with the intent to evade the provisions of this act, but, on the contrary, the proper officer has expressly found that the omission to fix stamps was the result of inadvertence, and without design to evade the law.

There is, however, a proviso in the act which is applicable to this case. That proviso is as follows: "That when it shall appear to said collector, upon oath or other-

wise, to his satisfaction, that any such instrument has not been duly stamped at the time of making or issuing the same, by reason of accident, mistake, inadvertence, or urgent necessity, and without any willful design to defraud the United States of the stamp, or to evade or delay the payment thereof, then and in such case, if such instrument, &c., shall within twelve calendar months after the first day of August, eighteen hundred and sixty six, or within twelve calendar months after the making and issuing thereof, be brought to the said collector of revenue to be stamped, and the stamp tax chargeable thereon shall be paid, it shall be lawful for the said collector to remit the penalty aforesaid, and to cause such instrument to be duly stamped." The act further provides that such instrument "may be used in all courts and places in the same manner and with like effect as if the instrument had been originally stamped."

The certificate of the collector brings this case within the spirit and letter of this part of the act, and the contract was properly received in evidence.

A new trial is not advised.

2. Under the motion in error, it is objected that the petitioners have not made out a case for the interference of a court of equity,—that courts of equity in this state will not interfere to enforce agreements to sell personal property unless the circumstances are such as to make a trust, because there is in such a case a remedy at law by an action for damages.

The objection assumes that there is a distinction, in questions of this character, between real and personal property. If any such distinction exists, it does not go to the extent claimed.

The ground of the jurisdiction of a court of equity in this class of cases is that a court of law is inadequate to decree a specific performance, and can relieve the injured party only by a compensation in damages, which, in many cases, would fall far short of the redress which his situation might require. Whenever, therefore, the party wants the thing in specie, and he cannot otherwise be fully compensated, courts of equity will grant him a specific performance. They will decree the specific performance of a contract for the sale of lands, not because of the peculiar nature of land, but because a party cannot be adequately compensated in damages. So in respect to personal estate; the general rule that courts of equity will not entertain jurisdiction for a specific performance of agreements respecting goods, chattels, stocks, choses in action, and other things of a merely personal nature, is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy. 2 Story, Eq. Jur. §§ 717, 718.

The jurisdiction, therefore, of a court of equity, does not proceed upon any distinction between real estate and personal estate, but

upon the ground that damages at law may not, in the particular case, afford a complete remedy. 1 Story, Eq. Jur. §§ 716-718, and cases there cited; *Clark v. Flint*, 22 Pick. 231. When the remedy at law is not full and complete, and when the effect of the breach cannot be known with any exactness, either because the effect will show itself only after a long time, or for any other reason, courts of equity will enforce contracts in relation to personalty. 3 Pars. Cont. (5th Ed.) 373.

An application of these principles to the case before us relieves it of all difficulty. The contract relates to a patent right, the value of which has not yet been tested by actual use. All the data by which its value can be estimated are yet future and contingent. Experience may prove it to be worthless, another and bet-

ter invention may supersede it, or it may itself be an infringement of some patent already existing. On the other hand it may be so simple in its principle and construction as to defy all competition, and give its owner a practical monopoly of all branches of business to which it is applicable. In any event its value cannot be known with any degree of exactness until after the lapse of time; and even then it is doubtful whether it can be ascertained with sufficient accuracy to do substantial justice between the parties by a compensation in damages. On the whole we are satisfied that justice can only be done, in a case like this, by a specific performance of the contract.

There is therefore no error in the decree complained of.

The other judges concurred.

HICKS et al. v. TURCK et al.

(40 N. W. 339, 72 Mich. 311.)

Supreme Court of Michigan. November 1, 1888.

Appeal from circuit court, Clinton county, in chancery; Vernon H. Smith, Judge.

This is a suit by John Hicks, Robert M. Steel, Josiah Upton, and Cornelius Bennett against William S. Turck and Townsend A. Ely, for the specific performance of a contract. Defendants appeal from an order overruling their demurrer to the bill.

James L. Clark and Geo. P. Stare, for appellants. O. L. Spaulding, for appellees.

SHERWOOD, C. J. The bill in this case is filed to obtain a decree for the specific performance of a contract reading as follows:

"Riverton, Neb., October 31, 1885.

"Due David S. French, attorney in fact for Hicks, Bennett & Co., eighteen thousand three hundred and sixty-six dollars, (\$18,366.00,) being the balance on consideration of one-half interest in personal property and lands this day sold Robert M. Steel, John Hicks, William S. Turck, and Townsend A. Ely; above sum to be paid by assignment of a certain mortgage on lands in Gratiot county, Michigan, to said David S. French, attorney, for \$2,000; and balance of sixteen thousand three hundred and sixty-six dollars (\$16,366) to be paid by promissory note due and payable on or before five years from date, with annual interest at seven per cent. per annum, said note secured by mortgage on the undivided one-half interest in said ranch property, as collateral security for payment of said sum of sixteen thousand three hundred and sixty-six dollars, and interest as aforesaid. Wm. S. Turck.

"Townsend A. Ely."

The bill states that at the time the note was given the complainants were a firm located and doing business under the name of Hicks, Bennett & Co., in Michigan, and were seized of a large quantity of lands in the county of Franklin, in the state of Nebraska, the particular description of which is fully set out in the bill; that on that day said firm by David S. French, its attorney in fact, conveyed by full covenant warranty deed the lands described in the bill to John Hicks and Robert Steel, who resided at St. Johns, Mich., and the defendants, who resided at Alma, Mich., for the sum of \$32,732; that the purchasers upon said sale entered upon said premises, and ever since have had the actual possession thereof; that on the same day Hicks, Bennett & Co. sold to the grantees in said deed all the cattle, stock, hay, grain, farming implements, tools, and other personal property on said land for the sum of \$10,000; that in consideration of the premises, and in payment to the complainants for the undivided one-half of the said real and personal property, Turck and Ely, who knew all about the lands, the title

of complainants thereto, and the condition of the personal property, agreed to pay to complainants \$21,366, being one-half of the total purchase price of the land and personal property, the payments to be made as follows: \$3,000 in their promissory note due in two years, and which they gave, and that they would secure and pay the balance of the purchase price by assigning to the said French, who was attorney in fact of the complainants, a certain real-estate mortgage of \$2,000 on lands in Gratiot county, Mich., and for the remaining sum of \$16,366 would at once execute and deliver to French, for complainants, their promissory note for that amount, due on or before five years from the date thereof, with annual interest at 7 per cent, and secure the payment of the same by mortgage on the undivided half of the lands so deeded to them; that the said \$2,000 mortgage was assigned, as promised by the said defendant Turck, but the said defendants refused to and have not made the note and mortgage to complainants for the \$16,366, as they agreed to do, and still refuse to comply with complainants' request for them so to do. Complainants further say and aver in their bill that they have complied in all things with and fully kept their agreement with said defendants, and performed all its requirements on their part in the premises, and are now entitled to have said note and mortgage from said defendants as they promised to make it, in accordance with the written agreement hereinbefore referred to, and which was, after being made by defendants, duly given to said French, for the complainants, who now have the same. The complainants ask the court, upon the foregoing facts, to decree that defendants specifically perform their agreement with the complainants, and execute and deliver to them said note and mortgage. The defendants appeared in the case, and demurred to complainants' bill, assigning two grounds of demurrer: (1) That the facts set up in the bill are not sufficient to entitle complainants to the relief prayed; (2) that complainants have a complete and adequate remedy at law touching all matters set up in the bill. The cause was heard before Judge Smith in the Clinton circuit, who made a decree overruling the demurrer, and allowing defendants 20 days in which to answer.

We are satisfied this decree was proper. The defendants had received the full consideration for what the complainants asked. The complainants might have had a remedy at law; but we are by no means sure it would be an adequate one. On the contrary, the remedy at law, when resorted to, is liable to a very great variety of perplexities and embarrassments arising from the want of the note promised, the refusal to give which is a gross violation of their contract, for which the demurrer concedes no excuse can be given. The note was liable to run

five years, and complainants had the right to have the amount owing thereon during all the time it did run secured by the mortgage. The land was not within the jurisdiction of the courts in this state. It could be easily transferred to bona fide holders, and the perils of insolvency are not beyond the possibilities among business men, as all experience shows. All these are circumstances of more or less embarrassment when the remedy at law is resorted to. It is but equitable and just that this contract should be specifically performed upon the showing made in this bill. This bill is not filed for an accounting, nor to enforce payment of a debt, but to compel a party to comply with his promise, after receiving the full consideration upon

which it was made, to make and execute evidence of indebtedness, and give security for the payment thereof. There is no proceeding at law which can accomplish this. Equity alone can take cognizance of such a case, and do justice between the parties. The bill furnishes a clear case for the exercise of that sound legal discretion which the court must always use in awarding specific performance, and the learned circuit judge was right in so holding. The decree below will be affirmed, and the cause remanded, with instructions to the circuit judge to allow defendants 20 days in which to answer the bill after remittitur shall have been filed. The complainants will recover their costs. The other justices concurred.

GAGE v. FISHER.

(65 N. W. 809, 5 N. D. 297.)

Supreme Court of North Dakota. Nov. 11, 1895.

Appeal from district court, Burleigh county; W. H. Winchester, Judge.

Action by J. R. Gage against Asa Fisher. Judgment for defendant, and plaintiff appeals. Reversed.

G. W. Newton and S. L. Glaspell, for appellant. Alexander Hughes, for respondent.

CORLISS, J. We have reached the conclusion in this case that we must decide against the defendant and respondent, on his own theory. Taking the view of the facts which is most favorable to him, we are yet compelled to hold that he has neither any defense to the note sued on, nor any valid counterclaim against the plaintiff for money paid by him to plaintiff in part payment of such note. We will state our reasons for this conclusion as briefly as the complicated nature of the case will permit.

The action is on a promissory note for \$3,000 given by defendant to plaintiff. The consideration for the note was the sale by plaintiff to defendant of 10 shares of the stock of the First National Bank of Bismarck, N. D. The date of this transaction was December 19, 1893. The capital stock of the bank was \$100,000, divided into 1,000 shares of \$100 each. For some time prior to 1888, plaintiff and defendant had both been directors of this bank, and defendant had been president thereof. In 1888 plaintiff was dropped from the directory, and in 1889 the defendant also ceased to be a director. The control of the bank was then in the hands of a number of stockholders, who acted in unison, and who were more or less hostile to defendant and plaintiff. Among these stockholders were George H. Fairchild, H. R. Porter, and Daniel Eisenberg. This group of stockholders will be designated in the course of this opinion as the "Fairchild interest." The defendant, for the purpose of securing control of the bank, began purchasing its stock, and in the summer of 1892 he found himself the owner of 489 shares of such stock, and in the possession of a proxy to vote 16 shares more, owned by a Mrs. Shaw. Had this condition of affairs remained unchanged until the next annual stockholders' meeting, in January, 1893, the defendant would have been master of the situation, and would have secured full control of the bank, electing his own board of directors, and, through them, such officers of the corporation as he might see fit to elect. While this condition existed, the defendant claims that he was induced to part with his control over the Shaw stock at the suggestion of plaintiff, and under his promise to allow him (the defendant) to control, or in other words to direct, the voting of this

stock at the next annual stockholders' meeting, in January, 1893. Relying on this promise of the plaintiff to defendant, who, unquestionably, could have voted the Shaw stock at such meeting, had he so desired, defendant notified Mrs. Shaw that she could sell this stock to the Fairchild interest. The plaintiff, the defendant, and Mrs. Shaw were all hostile to the Fairchild interest; and the motive which prompted defendant in releasing his control over the Shaw stock, and in suggesting to Mrs. Shaw that she sell it to the enemy, was apparently a desire to induce the Fairchild interest to assume the heaviest possible burden, without at the same time giving them control of the majority of the stock. Defendant, having purchased 2 more shares, was now the owner of 491 shares; and, when plaintiff promised him control of his 10 shares, defendant felt sure of a majority, and therefore permitted the control of the Shaw stock to pass from him. Plaintiff now held the balance of power. The Fairchild interest began to bid for his stock. Finding that plaintiff, despite his promise to allow defendant to control his stock at the meeting, intended to sell to the enemy unless he (the defendant) purchased it for the sum of \$5,000, he finally yielded to this demand, and the contract of sale was entered into on this basis. It is not claimed, however, that plaintiff, from the start, intended to inveigle by his promises the defendant into a position where he could take advantage of the necessities of his situation to extort from him an exorbitant price for the stock. Fraud is not claimed, except as it is urged that plaintiff's subsequent conduct was fraudulent in contemplation of law. Two thousand dollars of the purchase price was paid at the time of the sale, and the note in suit, for \$3,000, was given for the balance of the consideration. Subsequently the defendant paid \$1,000 on this note, and thereafter this suit was brought to recover the remaining \$2,000 due thereon, with interest. The defendant interposed as a counterclaim a claim to recover back the \$3,000 so paid; having, as he insists, rescinded the contract, and offered to restore to plaintiff the 10 shares of stock delivered under it. The trial court rendered judgment in his favor, both on the plaintiff's claim against him, and on his claim against the plaintiff; directing that the note be canceled, and that defendant recover from plaintiff the consideration paid, namely, \$3,000. It is true that the plaintiff claims, and he so testified, that the agreement between him and the defendant was that he would give defendant the preference in purchasing the stock, in case he offered as much for it as the Fairchild interest; and, if this be the case, he was acting strictly under the contract, in demanding the sum of \$5,000 for his stock from the defendant. In that event, both law and good morals would approve the course. But the trial court found that the contract was as we have stated, and we will

assume, for the purpose of this decision, that this finding is correct. The defendant certainly cannot, and he does not, claim that he proved a case more favorable to himself than the findings, nor does he pretend that he can ever establish a stronger case on another trial.

Taking these findings as the basis of our decision, we are very clear that the court erred in deciding the case in favor of the defendant. The court erred in its conclusions of law that the facts found established a defense to the note, and also a valid counterclaim for the \$3,000 paid on account of the purchase price. We regard the contract for the sale of the 10 shares of stock for \$5,000 as entirely legal, and we do not consider that the defendant is in position legally to claim that, because an unconscionable price was extorted from him on account of the necessities of the situation, he has any right, after having, with full knowledge of the facts, submitted to the demand, to rescind the contract he deliberately made. If it is true (but we express no opinion on this question of fact) that the plaintiff, after having induced the defendant to part with the control of the corporation, by letting the Shaw stock slip from him on promise to substitute his (plaintiff's) stock for the Shaw stock, and to allow defendant to use the plaintiff's stock as he (the defendant) could have used the Shaw stock at the next annual meeting, his subsequent conduct in repudiating his agreement was an act of gross perfidy, and the using of his power, under such circumstances, to coerce the defendant into paying an exorbitant price for this stock, which was worth in the general market not over \$500, was base and dishonorable in the extreme. But the decision of this case turns on a larger question,—the question of public policy. There is no pretense that plaintiff was guilty of any fraud in the sale of the stock. The parties both dealt at arm's length. There was no concealment of any fact. There was no misrepresentation. Whatever relation of confidence which theretofore existed between the plaintiff and defendant must have ceased, whatever esteem which the defendant had entertained for the plaintiff must have instantly perished, when he was confronted by the plaintiff with this, to the defendant, unconscionable demand that he pay him \$5,000 for stock which, as defendant understood, the plaintiff had agreed he was to have the right to use at the meeting without compensation. Whatever defendant did at this time must have been done, not cheerfully, in a spirit of confidence, but reluctantly, with anger in his heart, and therefore with no disposition on his part to yield to any demand, except so far as coerced by the necessities of his position.

It is said that plaintiff having, by his promises, induced the defendant to place himself in the plaintiff's power, the plaintiff should not be allowed to take advantage of the sit-

uation to extort from him an exorbitant price for the stock. The fallacy of this reasoning lies in its untenable assumption that defendant, at the time he bought the stock for \$5,000, under the stress of necessity, could have maintained an action against plaintiff to compel the specific performance by him of his contract to allow defendant to vote his (the plaintiff's) stock. If, at the time defendant agreed to pay \$5,000 for this property, he was powerless to secure redress in a court of equity,—if at that time the plaintiff could not be compelled to permit him (the defendant) to vote the stock,—then plaintiff had a perfect legal right to sell to whom he pleased, for such price as he could obtain, and therefore had an undoubted legal right to sell to defendant for \$5,000, so long as defendant, being under no other pressure than that of his necessities, agreed to pay that sum for it. Defendant has no right to insist that he was unexpectedly placed in this peculiar position, relying on the promise of plaintiff; for, if it was a promise which a court of equity would not enforce, he had no right to rely on such promise. He was bound to know that the plaintiff might refuse to carry out his agreement, and that in that event he (the defendant) would be powerless to compel its performance, but must, to save himself from being baffled in his scheme, buy the stock at such a figure as it could be purchased for. Even assuming the contract to allow defendant to control the stock to be valid, so that its breach would subject plaintiff to liability for damages, still defendant cannot use the breach of that promise as a basis for rearing upon it this argument that plaintiff took advantage of his necessities, unless such contract could be specifically enforced in equity. Plaintiff had a legal right to take advantage of his necessities, and exact such price as he could under the circumstances secure, if he could not be compelled by a court of equity to allow defendant to vote the stock. If plaintiff could break this promise without liability for damages, because it was void, he could charge what he chose for the stock, and defendant would have no legal ground for complaint. So if the breach of this promise, assuming it to be valid, subjected him to liability only for damages, he yet could break it, and compel the defendant to buy the stock and pay him what he asked for it, without rendering himself liable to the charge of having, in legal contemplation, extorted an unconscionable contract from the defendant. Suppose that the contract was valid, and that its breach would have subjected the plaintiff to liability for \$500 damages. He might have broken it, and then have taken the position that, while he was liable for these damages, he yet had the undoubted legal right to break such contract and incur such liability, and thereupon sell the stock to whom he pleased, without being liable for anything more; and, if the defendant desired to purchase on the

same terms as another person had offered, he had a legal right to make a new contract of sale with him (the defendant), and the contract would be as valid as a sale to a stranger. The defendant could not complain that an unfair advantage had been taken of him, for, if it is the law that a court of equity will not enforce such an agreement as the original one in this case, but will leave the party to his action for damages, then defendant was bound to know that he was all the time at the mercy of the plaintiff, who might at any moment repudiate the contract, without other liability than for damages; and the defendant was in this position because he had failed to take the precaution to secure a promise that would fully protect him. He has no legal right to appeal to equity for relief because the plaintiff took advantage of this struggle for supremacy to exact from him (defendant) an enormous price for his stock, if he (the defendant) failed to secure from plaintiff such a contract to protect him against such exaction as a court of equity would enforce for his protection. Before this promise to allow the defendant to vote the stock was made, plaintiff might have sold his stock to defendant for \$5,000 without the possibility of any rescission of the contract. If defendant saw fit to let the Shaw stock go, without securing in place of it an agreement that he could enforce in equity against the plaintiff, and without securing the plaintiff's stock itself, he voluntarily relinquished his vantage ground without taking the precaution to protect himself legally, and trusted himself and his interests to the honor of the plaintiff; knowing full well, as he testifies himself, that the plaintiff, in the impending struggle for supremacy, would be sorely tempted to desert him, and, being only human, might fall.

If we should affirm this judgment, we would give the defendant all the benefit he could have obtained from a decree of specific performance, rendered before the stockholders' meeting, that defendant be allowed to vote the stock. Defendant would recover his money; plaintiff would have back his stock; and it is undisputed that defendant has in fact voted the stock in the manner he desired to vote, and has, through the use of this stock, secured control of the corporation. We are satisfied that, both on principle and under sound authority, the true rule is that a court of equity should never specifically enforce a contract by which one person agrees that another should control his stock without purchasing it, where the sole ground of the appeal to equity is the desire of the party making the appeal to secure control of a corporation through the use of the stock he is thus seeking to control. It is a general rule that a court of equity will not enforce a specific performance of a contract for the sale of personal property. Corporate stock comes within the scope of this rule, unless there are peculiar features calling for the in-

terposition of a court of equity. But, when such peculiar features exist, equity will decree specific performance. *Eckstein v. Downing* (N. H.) 9 Atl. 626; *Appeal of Goodwin Gas-Stove & Meter Co.* (Pa. Sup.) 12 Atl. 736; *Cook, Stock, Stockh. & Corp. Law*, §§ 737, 738; *White v. Schuyler*, 1 Abb. Prac. (N. S.) 300; *Treasurer v. Mining Co.*, 23 Cal. 390; *True v. Houghton*, 6 Colo. 318; *Bumgardner v. Leavitt* (W. Va.) 13 S. E. 67. When the only peculiar feature is the desire of the plaintiff, with the aid of the stock he is seeking to obtain, to secure the control of a corporation, this, perhaps, so far from being a ground for taking the case out of the ordinary rule, may be a reason for denying the relief sought. While it is not illegal for a stockholder to buy up a controlling interest in a corporation, and so absolutely rule its affairs, and while it is also true that agreements to vote stock together are not, when carried out, illegal, in the sense that the law regards the vote as void or voidable, yet it may be contrary to public policy for a court of equity to decree specific performance of contracts touching the control of stock, where the sole object of the person who is seeking to enforce the contract is thereby to secure control of the corporation. We do not say that such a contract is necessarily void, as repugnant to public policy, but we are by no means clear that a court of equity would specifically enforce it. It may be that sound public policy demands that a court of equity should never lend its aid to the enforcement of a contract relating to stock, when the sole object of the person who wishes it enforced is to give that person control of the corporate affairs. Efforts are often put forth to secure the management of a corporation, which are inspired by laudable motives. But it is also true that many of these schemes to obtain the control of a corporation are conceived and carried on in a spirit inimical to the interests of the minority stockholders, and not infrequently for the purpose of so managing the affairs of the corporation as to force them to sell their holdings at practically such a figure as the majority stockholders should dictate. Should courts of equity adopt the practice of giving to a minority stockholder the right to enforce specific performance of a contract to buy stock, simply to enable him to control the corporation, or, what is still more indefensible, the right to vote or control the voting of stock that he does not own, to enable him to secure control of the corporation, they would find that in many cases they had suffered their functions to be perverted by designing men; that they had in fact been lending to dishonorable schemes such effectual aid as to insure their consummation. Proof that the object was legitimate, that the motive was pure, would furnish no guaranty that the real purpose was not to wreck or mismanage the corporate affairs. In no case can a court determine with certainty just what course the minority

stockholder, when armed by the court with this absolute power over the corporation, will pursue when he has attained his vantage ground. It is therefore possible that the question whether specific performance should be decreed ought not to turn on the court's surmise or guess as to the ulterior purpose of the person who is seeking to secure control; but because there is always danger that such purpose may be dishonest, and because the court can never surely know the truth as to the real motive, it may be that courts of equity should inflexibly refuse to aid the minority stockholder in his effort to obtain control. In this case the defendant's motive appears to have been honorable, and we have no doubt that such is the fact. He was merely seeking to take the management of the bank from persons who, in his judgment, were mismanaging it, and resume control of its affairs, that it might be built up for the benefit, necessarily, of all stockholders. But perhaps this fact should not influence us. If the specific enforcement of such a contract is to turn on the opinion of the court touching motives, it is obvious that in many cases dishonest projects will receive effectual equitable aid. The decision of the Pennsylvania supreme court in Foll's Appeal, 91 Pa. St. 434, strongly supports the view that equity would not specifically enforce a contract for the sale of stock where the only ground for invoking the aid of the court is the peculiar value of the stock to the person who has contracted to buy it, because of his desire to secure control of the corporation. The bill in that case was filed to compel specific performance of a contract to purchase stock in a national bank. The basis of the application to equity was the desire of the plaintiff to secure control of the bank. The court unanimously held that, on grounds of public policy, the relief should be denied. The court said: "While the legal right of the complainant to buy up sufficient of the stock of this bank to control it in the interest of himself and friends may be conceded, it is by no means clear that a court of equity will lend its aid to help him. A national bank is a quasi public institution. While it is the property of the stockholders, and its profits inure to their benefit, it was nevertheless intended by the law creating it that it should be for the public accommodation. It furnishes a place, supposed to be safe, in which the general public may deposit their moneys, and where they can obtain temporary loans upon giving the proper security. There are three classes of persons to be protected,—the depositors, the noteholders, and the stockholders. We have no intimation that the bank, as at present organized, is not prudently and carefully managed. The stock, as now held, is scattered among a variety of people, and held in greater or lesser amounts. It is difficult to see how the small stockholders, who have their modest earnings invested in it, the depositors, who use it for the safe-

keeping of their moneys, or the business public, who look to it for accommodation in the way of loans, are to be benefited by the concentration of a majority of its stock in the hands of one man, or in such way that one man and his friends shall control it. * * * We are in no doubt as to our duty in the premises. We are of opinion that the end sought to be attained by this bill is against public policy, and for that reason we refuse our aid."

It is true that some stress was laid by the court on the fact that the plaintiff was operating with borrowed capital, in his efforts to secure control of the bank. But this fact was not treated as decisive, and it is clear from the whole trend of the opinion that the absence of this fact would not have resulted in a different ruling in the case. Moreover, this fact was adverted to as tending to show that the object was to speculate, and not to invest funds in corporate stock. But in the case at bar the defendant never intended to invest a dollar in plaintiff's stock until he was compelled to do it to enable him to accomplish his real purpose, which was to secure control of the bank. In *Moses v. Scott* (Ala.) 4 South. 742, after stating that a vote based upon a prior agreement to vote as a unit would not necessarily be illegal, the court say, at page 744: "Whether an agreement to vote as a unit, or as an agreed majority may dictate, for any given length of time, is a contract so binding in its terms that no party to it can withdraw from it or disregard it without the consent of his fellows, may be a different question. Possibly public policy may exert an influence in the solution of this problem. And even if such a contract be lawful, and on its face exert a continuing force, the grave question comes up, will a court of chancery, in its enlightened discretion, lend its aid to the enforcement of a contract of so doubtful policy?" However, we are not called upon to settle this interesting question in this case. The case before us presents a stronger one against the exercise of the equitable powers of the courts to enforce specific performance than a contract for the purchase of stock; for here the contract was to give the minority stockholder the right to dominate and direct the judgment of the plaintiff, as stockholder, in the voting of his stock, without owning the stock himself. Every other stockholder in the bank had the right to demand that the plaintiff should, if he desired so to do, exercise at the very time of the annual meeting his own judgment as to the best interests of all the stockholders, untrammelled by dictation, and unfettered by the obligation of any contract. We know of no case where a court of equity has enforced such an agreement. We regard as controlling on this question the rule that an irrevocable proxy to vote stock is revocable. See *Cook, Stock, Stockh. & Corp. Law*, § 610, note 6.

There is another reason, and to our mind a

still stronger reason, for holding that defendant could not have secured in a court of equity a decree specifically enforcing this contract. The plaintiff's promise to allow the defendant to control his stock was based upon an illegal consideration,—one condemned by public policy,—and the promise was therefore not binding in law. The trial court found that before defendant suffered the Shaw stock to pass beyond his control, and before plaintiff had agreed to permit defendant to control his stock, defendant had informed the plaintiff that it was his purpose to vote his own and the Shaw stock to make plaintiff one of the directors of the bank, and that it was also his purpose to cause him (plaintiff) to secure employment in the bank when the new board of directors was elected; that he desired the advice and co-operation of plaintiff in securing such control, and the selection of suitable persons to put in the directory to carry out his plans, etc. The court also found that thereafter plaintiff represented to defendant that he did not need the Shaw stock "to accomplish his said purpose," that he had better let the Fairchild interest purchase that stock, and that he (the plaintiff) would not permit his stock to be bought or controlled by the Fairchild interest, but that he would vote his stock with the defendant's stock at the next annual stockholders' meeting, for the persons agreed upon by plaintiff and defendant for directors, and would in every way aid and assist defendant in the consummation of his plans for securing the possession, control, and management of the bank and its affairs. These findings make it apparent that one of the considerations, if not the main consideration, which influenced plaintiff in agreeing to give defendant control of his stock, was the previous statement of defendant that he intended to make plaintiff a director, and see that he was employed in the bank by the new board of directors to be elected at the approaching stockholders' meeting. That both parties understood that at least a portion of the consideration for plaintiff's co-operation with defendant in the project to obtain control of the corporation was the promise of defendant to give him employment in the bank is apparent from a written contract subsequently entered into between the parties. On the 19th of December, but entirely separate from the contract of sale, the defendant signed and delivered to plaintiff, who accepted the same, the following memorandum of agreement: "Bismarck, N. D., Dec. 19, 1892. In consideration of J. R. Gage joining me in effecting the controlling interest of the capital stock of the First National Bank of Bismarck, I hereby agree to furnish said J. R. Gage a position as cashier of said bank at a salary of not less than \$100 per month, payable monthly, beginning at the 11th day of January, 1893, and during his ability to perform his duties as cashier, provided such control is assumed at such time.

Asa Fisher." In connection with this agreement the court made a finding of fact which conclusively shows that, all along, one of the inducements to plaintiff's promise to vote his stock with defendant's stock was the promise of the latter to give him a place in the bank. "That said agreement was signed by the defendant, Fisher, and was then and there, on said 19th day of December, 1892, delivered to plaintiff, J. R. Gage, by the defendant, and was then and there accepted and retained by said plaintiff, and he, the said plaintiff, then and there promised to perform said agreement on his part; that said contract, interpreted and explained by the circumstances under which it was made and the subject to which it relates, was intended by each of the parties thereto as follows: That the plaintiff would vote his said ten shares of stock at the annual meeting of the stockholders of said bank, to occur in the month of January following, for the persons agreed upon by the plaintiff and defendant for the directors of said bank, and that he would aid, assist, and co-operate with the defendant in carrying out the plans which they had previously discussed and agreed upon for the management of said corporation, as hereinbefore set forth, and that the defendant would use his influence with the said persons proposed and agreed upon for directors, when chosen, to elect the plaintiff to the position of cashier of said bank, at a salary of not less than \$100 per month, during his ability to perform said duties."

It is apparent from the findings that this written agreement represents the previous oral understanding between the parties, reduced to writing. It is not claimed that the parties entered into three different contracts. There were only two agreements made. One related to the control of the stock by defendant without buying it. The other was the contract of sale. The court expressly finds that this written contract was no part of the contract for the sale of the stock. That one of the considerations which induced plaintiff to enter into an agreement to vote his stock with defendant's stock was the defendant's promise to secure his employment in the bank, is apparent from the findings to which we have referred; and as it is not pretended, and does not appear, that two different contracts relating to the control of plaintiff's stock by defendant preceded the contract of sale, we can find no escape from the conclusion that the promise on which defendant relied in parting with the Shaw stock was a promise made by plaintiff under the expectation, justified by defendant's promise, that he (plaintiff) was to have a place on the board of directors, and also a position in the bank, at a salary. We are strengthened in this view by the consideration that, unless the promise to give plaintiff employment was part of the original arrangement, the subsequent written promise of defendant would be without consideration. If plaintiff, for a suf-

ficient consideration, had already promised to let defendant control his stock, an agreement on the part of defendant to give him an additional consideration for the right which was already his would be a purely gratuitous promise, not binding in law. So far from its appearing that defendant regarded that he was making such a promise, he shows by the written agreement signed by him that the sole consideration running to plaintiff for his agreement to permit defendant to control his stock was defendant's promise to secure him a position as cashier in the bank. It is impossible to conceive that so shrewd a man as the defendant would have promised in writing to give plaintiff a position in the bank, if such had not been part of the original understanding; for, unless it was part of it, the defendant had already secured, by his contract with plaintiff, all he could ever obtain by making additional promises. The case would be similar to that of a person, after having secured a contract for the sale to him of stock for a specified consideration, promising in writing that in consideration of such sale he would give the owner of the stock a place in the corporation. Such a promise would not be made by a reasonable being under such circumstances. The fact that such a contract was made in this case is convincing to our minds that the real consideration running to plaintiff for his original promise to let defendant control the stock was the promise of defendant to give him employment in the bank. This was what induced plaintiff to make the promise. At least, we are satisfied that it was one of the inducements. The contract was therefore contrary to public policy and void. At least a portion of the consideration was illegal, and hence the promise founded on it was a promise which no court would enforce. The law in such a case leaves both parties where it finds them. To neither will it give redress. That a contract relating to the purchase or control of corporate stock, founded in whole or in part upon a promise to secure for the person who owns the stock employment in the corporation, and an office therein, is illegal and void, is a doctrine supported by the unanimous voice of the decisions. *Woodruff v. Wentworth*, 133 Mass. 309; *Noel v. Drake*, 28 Kan. 265; *Guernsey v. Cook*, 120 Mass. 501; *Forbes v. McDonald*, 54 Cal. 98; *Cone's Ex'rs v. Russell* (N. J. Ch.) 21 Atl. 847; *West v. Camden*, 135 U. S. 507, 10 Sup. Ct. 838. In the case last cited the court, referring to a contract, one element of which was a promise to give one of the parties to it permanent employment as manager of a corporation in which he was a stockholder, said: "It was a contract, the purpose and effect of which was to influence the defendant, as a stockholder and officer of the company, 'in the decision of a question affecting the private rights of others, by considerations foreign to those rights,' and the defendant, by the contract, was placed under direct and very powerful 'induce-

ment to disregard his duties to other members of the corporation, who had a right to demand his disinterested action in the selection of suitable officers.' He was to be in a relation of trust and confidence, which would require him to look only to the best interests of the whole uninfluenced by private contracts. We think this salutary rule is applicable in this case, notwithstanding the alleged contract was not corruptly made for private gain on the part of the defendant. There were other stockholders in the company. The defendant and the Standard Oil Company, for whose benefit it is alleged the contract was made, were not all the stockholders; and it seems to us that it was certainly the right of those other stockholders to have the defendant's judgment, as an officer of the company, exercised with a sole regard to the interests of the company." It cannot be claimed that the illegal parts of this contract could have been separated from the remainder, and the agreement sustained to that extent. The case falls within no exception to the general rule that where a part of a contract is illegal the whole agreement is void. It was not a case where the contract had been executed on one side, and the person who had received the benefit of it was asked to pay only the legal consideration he had agreed to pay, the illegal consideration being waived. In such a case the agreement can be sustained to the extent of the legal consideration. *Casady v. Woodbury County*, 13 Iowa, 113; 1 Pars. Cont. 380. So far as any consideration ran to plaintiff, there was only a single consideration to induce him to make his promise to allow defendant to vote his stock, i. e. the promise to give him employment in the bank. But even if he had been induced to make this promise for money, in addition to the agreement to give him a position in the bank, still the legal part of the consideration could not have been separated from the illegal, for no court could say, in the light of the actual contract, that he would have made the promise to allow his stock to be voted by another solely for the cash consideration. To separate the legal from the illegal consideration, under such circumstances, and then sustain and enforce the contract as so radically altered, would be to make a new contract for one wrongdoer, to enable him to enforce against the other wrongdoer, who would be no more culpable, an agreement which he never made. See *Greenh. Pub. Pol.* p. 17, rule 21, and page 24, rule 25, and cases cited; 2 *Add. Cont.* pt. 2, bottom paging, 762, and cases in note 1; *Tobey v. Robinson*, 99 Ill. 222-233; *Comp. Laws*, § 3533. For both of the reasons set forth in this opinion, we are clear that, at the time plaintiff and defendant made the contract of sale sought to be rescinded by defendant, the latter was powerless to compel the plaintiff to carry out his promise to allow defendant to vote his stock, and that, therefore, as defendant, to secure control of the bank, saw fit to buy the plain-

tiff's stock for the sum of \$5,000, he could not, after availing himself of all of the advantages growing out of the possession of such stock, rescind the sale, on the theory that he was coerced by his necessities into making a hard bargain.

The confidential relations existing between the plaintiff and defendant would not transmute into a contract binding in equity a contract which otherwise would not be enforced by a court of equity. Equity will not grant or withhold relief because the promisor was or was not trusted by the promisee, but it will withhold relief, in all cases of this character, irrespective of the question of confidential relations, because public policy demands that equitable aid should not be extended to what is in fact an illegal scheme. Nor is there any force in the contention that the case is brought within the scope of the doctrine that a court will relieve a party who has made a contract under the stress of great necessity. As we have already demonstrated, the defendant has only himself to blame for trusting to a promise the fulfillment of which equity would not compel. He was in no different position from that which he would have occupied had the promise of plaintiff never been made. And it is too clear to justify argument that had plaintiff demanded \$5,000 for this stock, without having made any prior promise to permit defendant to control it, the defendant, if he saw fit to yield to this demand, would have been entitled to no relief on the ground that it was a hard bargain, extorted from him by the necessities of his situation. It would be a novel and dangerous doctrine that a party who, in his anxiety to secure property, had paid more than its market value, could appeal to equity

to relieve him, because he had been impelled by his desires to pay a large price for the thing bought. The cases cited by counsel for defendant do not lay down any such doctrine. They are cases where one person has taken advantage of the financial distress of another to extort from him an unconscionable contract. See *Hough's Adm'rs v. Hunt*, 15 Am. Dec. 569, and note. Neither can it be said that the defendant was compelled to pay more for the stock than the market price. The strife of the controlling factions to secure control of the majority of the stock, to be used at the approaching stockholders' meeting, had temporarily given to this stock a value above its intrinsic value. To the purchaser of it, it meant victory and supremacy in the management of corporate affairs. Why should defendant claim that an exorbitant price had been extorted from him, if he was paying only what plaintiff could have secured from the opposing faction, had defendant declined to buy at that figure? The counsel for the defendant, in his learned and exhaustive brief, and in his very able oral argument before the court, has presented everything that could possibly be urged in favor of the case he represents; and this, too, with great ingenuity and force. But while we fully agree with him that, if the facts found be true, his client has a just grievance in the forum of conscience, yet we are unable, because of the considerations of public policy to which we have alluded, to give him any legal redress. The judgment of the district court is in all things reversed, and that court is directed to modify its conclusions of law in accordance with this opinion, and to enter judgment for the plaintiff for the full amount due on the note, for principal and interest. All concur.

NEW ENGLAND TRUST CO. v. ABBOTT.

(38 N. E. 432, 162 Mass. 148.)

Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 18, 1894.

Report from superior court, Suffolk county.

Action by the New England Trust Company against Abbott, executor of the will of Josiah G. Abbott, deceased, to compel a transfer to the company of certain shares of its stock held by defendant's testator, and to enjoin defendant from further prosecuting an action at law to recover the dividends on said shares. Judgment for plaintiff.

W. G. Russell and J. L. Stackpole, for plaintiff. L. S. Dabney and F. J. Stimson, for defendant.

MORTON, J. This is a bill brought by the plaintiff to compel the transfer to it, by the defendant, as executor of the will of Josiah G. Abbott, of certain shares in the plaintiff corporation, which were held by said Abbott at his decease, and which, it is alleged, he agreed, when the certificates were issued to him, should be appraised at his death by the directors, and transferred to the plaintiff at the appraisal, if the directors so elected. The bill also seeks to enjoin the defendant from prosecuting an action at law brought by him against the plaintiff to recover certain dividends upon said shares that have been declared by it.

The plaintiff was organized in 1869, under a special charter (Acts 1869, c. 182), with a capital of \$500,000, which was afterwards increased to \$1,000,000. The terms of the alleged agreement are found in the by-laws, of which all that is now material is as follows:

"Art. 7. Any member of this corporation who shall be desirous of selling any of his shares, the executor or administrator of any member, deceased, and the grantee or assignee of any shares sold on execution, shall cause such, their shares, respectively, to be appraised by the directors, which it shall be their duty to do on request, and shall thereupon offer the same to them for the use of the corporation at such appraised value; and, if said directors shall choose to take such shares for the use of the corporation, such member, executor, administrator, or assignee shall, upon the payment or tender to him of such appraised value thereof, and the dividends due thereon, transfer and assign such share or shares to said corporation; provided, however, the said directors shall not be obliged to take said shares at the appraised value, unless they shall think it for the interests of the company; and if they shall not, within ten days after such shares are offered to them in writing, take the same, and pay such member, executor, administrator, or assignee the price at which the same shall have been appraised, such

member, executor, administrator, or assignee shall be at liberty to sell and dispose of the same shares to any person whatever.

"Art. 8. The directors shall have power, and it shall be their duty, to sell and dispose of the shares which may be transferred as aforesaid to the corporation, whenever, in their judgment, it can be done with safety and advantage to the corporation; and in all sales made by the directors, under any of the aforesaid provisions, it shall be their duty to sell the shares to such persons as shall appear to them, from their situation and character, most likely to promote confidence in the stability of the institution; no greater number than one hundred shares being assigned to any one person, nor, in the case of a person already a member, a greater number than will be sufficient to increase his previous number to one hundred shares."

These by-laws were adopted before any certificates of stock were issued. Afterwards, but before the capital was increased, article 7 was duly amended by adding to it the following:

"It shall be the duty of such executor, administrator, grantee, or assignee to offer said shares for appraisal, and to be taken by the corporation, if it shall so elect, whenever requested by the actuary or secretary, and no dividends or interest shall be paid or allowed after a failure to comply with such request: provided, that such request shall not be made until after the payment of one dividend and the expiration of six months from the death of the owner or sale as aforesaid, but the offer may be made at any earlier period if the party shall prefer."

Every certificate contained on its face, as part of the certificate, the provision that "said shares are transferable only in person or by attorney, duly constituted, on the books of the company, and in the manner and upon the conditions expressed in the by-laws of the company, printed upon the back of this certificate." On the backs of the certificates were printed by-laws 7 and 8. By-law 7 was printed as amended on the backs of those issued after the increase. There were also on the stubs from which the certificates were detached, in the certificate books, two receipts given and signed by the defendant's testator at the time the two certificates were issued to him in the original and increased capital, which were each as follows: "Received the above certificate subject to the conditions and restrictions therein referred to, and to the by-laws of the company, to which I agree to conform." The defendant contends that these by-laws are void. We have not found it necessary to consider that question, and we express no opinion upon it. We think that the case may well stand on the ground that the defendant's testator entered into an agreement with the plaintiff to do what the plaintiff now seeks to compel his executor to do. It is manifest that a stockholder may make a

contract with a corporation to do or not to do certain things in regard to his stock, or to waive certain rights, or to submit to certain restrictions respecting which the stockholders might have no power of compulsion over him. In *Adley v. Whitstable Co.*, 17 Ves. 315, 322, Lord Eldon says: "It has been frequently determined that what may well be made the subject of a contract between the different interests of a partnership would not be good as a by-law. For instance, an agreement among the citizens of London that they would not sell except in the markets of London would be good; yet it has been declared by the legislature that a by-law to that effect is void." See, also, *Davis v. Proprietors, etc.*, 8 Metc. (Mass.) 321; *Bank of Attica v. Manufacturers' & Traders' Bank*, 20 N. Y. 505, 6 Cook, Stocks & S. § 408. In the present case the certificates were issued to the defendant's testator in consideration of the payment by him to the corporation of the amount due for the stock, and of the agreements with it on his part which they contained. By accepting them without objection, and by signing the receipts, he must be held to have agreed to the conditions printed on the backs of the certificates. The fact that the conditions were contained in by-laws which may have been invalid as such does not render his agreement void, if the contract was in substance one which the corporation had power to make. We think that it had such power. It is held in this state that a corporation, unless prohibited, may purchase its own stock (*Dupee v. Water Power Co.*, 114 Mass. 37); and we see nothing opposed to public policy in such an agreement as this, with corporations like this. If honestly carried out by the directors, it tends to secure a trustworthy body of stockholders, from which those having the care and management of the affairs of the corporation naturally would be selected. It certainly cannot be contrary to public policy that the managers of this and similar institutions should be persons of skill who possess the confidence of the public. The restraint upon alienation is no greater than is often agreed to. In England it is not unusual to find in the deeds of settlement or articles of association under which corporations or joint-stock companies have been organized, and which correspond to the charter and by-laws here, provisions requiring the stockholder, in case he wishes to transfer his stock, to offer it to the directors, or to submit to them the name of the transferee for approval. *Bargate v. Shortridge*, 5 H. L. Cas. 297; *Poole v. Middleton*, 29 Beav. 646; *Ex parte Penney*, 8 Ch. App. 446; *Moffatt v. Farquhar*, 7 Ch. Div. 591; *Chappell's Case*, 6 Ch. App. 902. No objections seem to have been made to these provisions. In this state, the legislature, in numerous instances, has provided, in the charters of corporations like this, that the shares shall be transferable according to

such rules and regulations as the stockholders shall establish, and not otherwise. It is hardly possible that the legislature was ignorant of the construction which has been put upon the power thus conferred, and which in the case of the first corporation of the kind chartered in the commonwealth, the Massachusetts Hospital Life Insurance Company (Acts 1818, c. 180), was shown, it is said, by the adoption of by-laws from which those in this case were copied. It is true that this charter contains no provision in regard to by-laws or to the transfer of shares; but the policy of the legislature cannot be affected by such an omission, especially in view of the fact that many of the charters since granted contain this provision.

Neither do we think that the agreement is void for the reason that it authorizes the plaintiff to invest, as the defendant contends, in its own stock, or because it compels the defendant to submit to the appraisal of the directors. If the enumeration in its charter of certain things in which it may invest is to be construed as excluding, among others, its own stock, we think that the object of the agreement is not to secure the transfer of the shares to the plaintiff as an investment, but to enable the directors to dispose of it to such person or persons as shall appear to them, from their situation and character, most likely to promote confidence in the stability of the institution; and though, pending its disposition by the directors, it may, for convenience's sake, be placed with the company's securities, and dividends, if declared, collected upon it, that does not alter the essential character of the tenure upon which the company holds it. It is settled that one may agree to sell his property at a price to be determined by another, and that he will be bound by the price so fixed, even though the party establishing it was interested; provided the interest was known, and no objection made by the parties, and no fraud or bad faith is shown. *Brown v. Bellows*, 4 Pick. 179, 189; *Palmer v. Clark*, 106 Mass. 373, 389; *Haley v. Bellamy*, 137 Mass. 357, 359; *Fox v. Hazelton*, 10 Pick. 275; *Strong v. Strong*, 9 Cush. 569; *Benj. Sales* (6th Am. Ed.) § 88, note 3.

The defendant objects that there was no real appraisal, and that he did not offer the stock for appraisal. The records of the plaintiff show that at a directors' meeting, at which were present 16 directors, it was voted that the defendant's stock be appraised at \$220 per share, and taken for the use of the corporation. The directors were not bound to give the defendant notice or a hearing (*Palmer v. Clark*, supra); and we must assume that they gave the matter such attention as, in their opinion, was necessary, and that the appraisal correctly expresses their judgment, after taking into account such matters as they thought should be considered. There is nothing to show that they were

so mistaken about the facts that what they did was in no fair sense an appraisal of this stock, but of something else. It is said that they omitted the good will. If so, it was, at most, an error of judgment, which would not invalidate the appraisal. It was not a condition precedent to the appraisal that the defendant should offer the stock. The agreement of defendant's testator was, in substance, that the stock should be appraised by the directors, and that it might be taken at the appraisal by them if they so elected; and that has been done. The offer was for the purpose of fixing a time from which the 10 days should begin to run at whose expiration the stockholder could dispose of his stock if the directors had not elected to take it. If the directors appraised the stock, and voted to take it at the appraisal, an offer was unnecessary.

Lastly, the defendant contends that the plaintiff is not entitled to specific performance, because the stock was greatly undervalued, and because the plaintiff has a remedy at law. It is evident that to remit the plaintiff to an action at law for damages would defeat the very purpose of the contract, and would not, we think, furnish an adequate remedy. No stock in the plaintiff company has ever been sold in the market, and all the shares that have been transferred have been transferred to the plaintiff, and disposed of by the directors in the manner provided. About three-fourths of the stock of the original subscribers has been thus transferred. There is no evidence that the testator ever objected to this mode of dealing with it; and we see no good reason why the plaintiff should be obliged to accept damages for which it might be difficult to lay down a clear rule, instead of performance. *Railroad Corp. v. Babcock*, 6 Metc. (Mass.) 346; *Cushman v. Manufacturing Co.*, 76 N. Y. 365. The case would perhaps stand differently if the shares were bought and sold in the market like most stocks. *Adam v. Mesinger*, 147 Mass. 185, 17 N. E. 491. The defendant does not charge the directors with any fraud in the appraisal. He expressly disclaims that. It is well settled that where one

agrees that another may fix the price for certain property, or the sum to be paid for material or services, the decision of the party selected cannot be impeached by showing that he has committed an error of judgment, or failed to avail himself of all the information which he might have obtained, or has valued the property too high or too low. *Palmer v. Clark*, supra; *Flint v. Gibson*, 106 Mass. 391; *Robbins v. Clark*, 129 Mass. 145; *Railroad Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035; *Stevenson v. Watson*, 4 C. P. Div. 148; *Sharpe v. Railway Co.*, 8 Ch. App. 597; *Richards v. May*, 10 Q. B. Div. 400; *Tullis v. Jacson* [1892] 3 Ch. Div. 441; *Ranger v. Railway Co.*, 5 H. L. Cas. 72. The evidence that was offered by the defendant relating to the value of the stock was therefore rightly excluded. It is equally well settled that specific performance of an agreement to convey will not be refused merely because the price is inadequate or excessive. The difference must be so great as to lead to a reasonable conclusion of fraud, mistake, or concealment in the nature of fraud, and to render it plainly inequitable and against conscience that the contract should be enforced. *Chute v. Quincy*, 156 Mass. 189, 30 N. E. 550; *Lee v. Kirby*, 104 Mass. 420; *Park v. Johnson*, 4 Allen, 259; *Railroad Co. v. Babcock*, 6 Metc. (Mass.) 346, 352; *Cathcart v. Robinson*, 5 Pet. 271; *Underhill v. Van Cortlandt*, 2 Johns. Ch. 339; *Belchier v. Reynolds*, 2 Keny. pt. 2, p. 87; *Weekes v. Gallard*, 21 Law T. (N. S.) 655; *Fry*, Spec. Perf. (3d Am. Ed.) § 424, note 1. It is to be observed that this is a suit directly between the company and a stockholder, to enforce a contract made with the company by the latter, and that the rights of third parties are not involved. Many of the cases cited and relied upon by the defendant are cases where the rights of third parties are involved, and therefore inapplicable to this.

The result is that the plaintiff is entitled to a decree compelling the defendant to convey the shares upon payment by it of the amount of the appraisal, with interest, and enjoining him from prosecuting the action at law. Ordered accordingly.

CONGER et al. v. NEW YORK, W. S. & B. R. CO.

(23 N. E. 983, 120 N. Y. 29.)

Court of Appeals of New York, Second Division. March 18, 1890.

Appeal from supreme court, general term, second department.

Action by Clarence R. Conger and another against the New York, West Shore & Buffalo Railroad Company. A judgment in favor of defendant, entered upon the decision of the special term, was affirmed at the general term, and plaintiff again appeals.

Clarence R. Conger, for appellants. *Calvin Frost*, for respondent.

HAIGHT, J. This action was brought to compel a specific performance of a contract. The Jersey City & Albany Railway Company was incorporated for the purpose of constructing and operating a railroad from Fort Montgomery, in the county of Orange, to a point on the Hudson river opposite to the city of New York. As such incorporation it entered into a written agreement with one Catherine A. Hedges, the plaintiffs' grantor, in and by the terms of which she gave to the company a right of way across her premises in Rockland county upon certain conditions, one of which was that the company should locate a station in the gorge commonly known as the "Long Clove," and stop thereat five express trains each way daily. Subsequently the Jersey City & Albany Railway Company was consolidated with the North River Railway Company, under the name of the North River Railroad Company, and that company was consolidated with the defendant, which was incorporated for the purpose of constructing and operating a railroad from the New Jersey state line, through the state of New York, to the city of Buffalo. The defendant has entered upon the lands of the said Catherine A. Hedges, and constructed its road-bed across the same, but it has not constructed any station thereon in the Long Clove gorge, or stopped any of its express trains thereat. The trial court has found as facts that a suitable station for the accommodation of passengers, and the receipt and delivery of freight, at the Long Clove gorge, could be built by the defendant only at a considerable expense, because of the nature of the ground at that point; that the place where the plaintiffs demand that the station be located is near the mouth of a long tunnel, and at a sharp curve in the defendant's railroad, upon the side of a steep mountain approached by steep grades in both directions; that it is sparsely settled.

and if a station were established there it would be of no use to the public; that very little, if any, benefit would result to the plaintiffs, by the erection of a station, or the stoppage of the trains thereat; that the public convenience would not be promoted, but the public travel would be delayed; and, as a conclusion of law, that a specific enforcement of the agreement would work hardship and injustice to the defendant, and such enforcement will not subserve the ends of justice; that specific performance should be denied, and the plaintiffs left to their action for damages for a breach of the contract. The evidence sustains the findings of the trial court, which have been affirmed by the general term. The questions for our consideration are therefore narrowed to a determination as to whether the conclusions of law reached are justified under the findings of fact.

It has been the well-settled doctrine of this court that the specific performance of a contract is discretionary with the court, and that performance will not be decreed where it will result in great hardship and injustice to one party, without any consideration, gain, or utility to the other, or in a case where the public interest would be prejudiced thereby. *Clarke v. Railroad Co.*, 18 Barb. 350; *Trustees v. Thacher*, 87 N. Y. 311-317; *Murdfeldt v. Railway Co.*, 102 N. Y. 703, 7 N. E. Rep. 404; *Day v. Hunt*, 112 N. Y. 191-195, 19 N. E. Rep. 414.

As we have seen, the Long Clove gorge is located upon the side of a steep mountain, in a sparsely settled district, and is approached by a steep grade, and that a passenger station, with an approach thereat, could be constructed only at a considerable expense. These are reasons worthy of consideration, but, if there were no others, the trial court might not have deemed them sufficient to refuse specific performance. But they are followed by another, which gives additional force and weight, and that is that the public travel will be delayed by the stoppage of the trains, and that the public convenience will not be promoted. The defendant is a corporation organized under the laws of the state, and is a common carrier of passengers and freight. Its duties are largely of a public nature, and it is bound to so run its trains and operate its road as to promote the public interest and convenience, and, in view of the fact that but little if any benefit would result to the plaintiffs by the erection of a station and the stoppage of trains thereat, as found by the trial court, it appears to us that that court properly refused to decree specific performance and remanded the plaintiffs to their action for damages. The judgment should be affirmed, with costs. All concur, except BROWN, J., not sitting.

ROSS et al. v. PARKS.

(8 South. 368, 93 Ala. 153.)

Supreme Court of Alabama. Nov. 18, 1890.

Appeal from chancery court, Jackson county; Thomas Cobbs, Chancellor.

Bill to enforce specific performance of a contract to convey land. The title to the land in controversy was in one Jeremiah French. On the 15th day of December, 1887, French agreed, in writing, to convey the land to the complainant, Parks, if Parks would pay him \$200 by December 15, 1888. At the execution of this option, 50 cents was paid, and expressed in the contract as the consideration. This contract to sell, or option, was signed by French and his wife, but was not signed by Parks. It was recorded in the probate office, and defendants, Ross and McClendon, had actual notice of its execution. After the execution of this contract, French moved to Texas. Subsequently, Ross and McClendon sent an agent out to Texas where French was, and through said agent offered French \$300 for the land in controversy, and thereby, on November 21, 1888, procured a deed from French and his wife, conveying to Ross and McClendon the legal title to the land in controversy. Before the expiration of his option, under the contract of French, Parks paid French the \$200 purchase money as therein agreed, and received a deed to said lands from said French and his wife, which was executed on and bore the date of 23d of November, 1888. On December 21, 1888, the said Ross and McClendon brought an action of ejectment against Parks to recover the possession of the land in controversy, of which Parks was in possession. Thereupon, on January 29, 1889, Parks filed the bill in this case against said Ross and McClendon, and prayed to have the ejectment suit enjoined; the deed made by French and wife to Ross and McClendon canceled; and to have Ross and McClendon specifically perform the contract entered into by French and wife,—making to the complainant a good and perfect title to the land in controversy. On a final hearing upon the pleadings and proof, the chancellor granted the relief prayed, and the defendants now appeal, and assign this decree as error.

J. E. Brown and Watts & Son, for appellants. L. W. Days and D. D. Shelby, for appellee.

COLEMAN, J. A general rule governing cases of specific performance is that the contract must be mutual, and that either party is entitled to the equitable remedy of a specific performance. Exceptions to this general rule are well established, and one class of contracts to which the exceptions may be applied are those which are unilateral in form. Pom. Cont. §§ 167, 168. The exception as to unilateral contracts has been

fully recognized and adopted in this state. The case of *Moses v. McClain*, 82 Ala. 370, 2 South. 741, was for a specific performance of the following contract: "For and in consideration of the sum of one dollar in hand paid, I hereby give A. J. Moses an option on my lands and improvements situated near Sheffield, and known as my 'House Place,' containing one hundred and twenty acres, more or less, for the sum of eight thousand dollars. * * * This option good for 2 days. [Signed] J. W. McClain." It was contended that Moses, the covenantee, bound himself by no writing, and not having bound himself, he could not in this proceeding hold McClain bound; that the contract not being mutually binding, chancery will not compel its specific performance. The court declared as follows: "Mutuality is frequently said to be one of the conditions of a rightful suit for specific performance. The authorities, however, do not carry it to the length contended for. Where the contract is fair, just, and reasonable in all its parts, and the party sought to be charged has so bound himself as to meet the requirements of the statute of frauds, the election of the other contracting party to treat the contract as binding, and to enforce it, meets all the requirements of the rule;" citing *Wilks v. Railroad Co.*, 79 Ala. 180; 3 Pom. Eq. Jur. § 1405, and notes; *Wat. Spec. Perf. Cont.* § 201; *Cherry v. Smith*, 39 Am. Dec. 150. The case of *Johnston v. Trippe* (C. C.) 33 Fed. 530, is an authority directly on the point in question, the contract being almost identical in its provisions. The different authorities are very generally quoted and commented on, and the conclusion the same as held by this court. The evidence fails to show that there was such forcible entry and unlawful detainer as to deprive complainant of his right to file a bill to remove a cloud from title, but the equity of the bill does not depend upon that principle. "The complainants, holding the equitable title, bring their bill to compel a conveyance of the legal title by those who hold it in trust for them. In such a case, the jurisdiction in no wise depends upon possession." *Gray v. Jones* (C. C.) 14 Fed. 83; *Shipman v. Furniss*, 69 Ala. 562.

The doctrine is well settled that when the vendor, after entering into a contract of sale, conveys the land to a third person, who has knowledge or notice of the prior agreement, such grantee takes the land impressed with the trust in favor of the original vendee, and holds it as trustee for such vendee, and can be compelled, at the suit of the vendee, to specifically perform the agreement by conveying the land in the same manner, and to the same extent, as the vendor would have been liable to do had he not transferred the legal title. Pom. Cont. § 465, and note. The same rule is declared in *Dickinson v. Any*, 25 Ala. 424; *Meyer v. Mitchell*, 75 Ala. 475. It may be stated as a sound principle of law, if an owner of land in writing gives

another an option on land, for a valuable consideration, whether adequate or not, agreeing to sell it to him at a fixed price, if accepted within a specified time, it is binding upon the owner, and upon those who purchase from the owner with a knowledge of such agreement. *Moses v. McClain*, 82 Ala. 370, 2 South. 741; 33 Fed. 530, *supra*; *Mauil v. Vaughn*, 45 Ala. 134, and authorities. Under such circumstances, the fixed time is a material part of the contract, and when supported by a valuable consideration, the owner of the land cannot revoke the offer before the time has expired within which the

offer may be accepted. We do not declare that if no specified, definite time was fixed by the parties, and the contract of offer was not supported by a valuable consideration, such an offer could not be revoked. We express no opinion upon this question. *Johnston v. Trippe* (C. C.) 33 Fed. *supra*; *Wilks v. Railway Co.*, 79 Ala. 185; *Falls v. Gaither*, 9 Port. 617; *Cherry v. Smith*, 3 Humph. 19; 1 Story, Cont. § 496; 1 Pars. Cont. *481, bottom p. 511; *Bish. Cont.* § 325; *Benj. Sales.* § 42.

We find no error in the decree of the chancellor. Affirmed.

JOHNSTON v. TRIPPE.¹

(83 Fed. 530.)

Circuit Court, N. D. Georgia. December 19, 1887.

in equity. Bill for specific performance by complainant J. L. Johnston against R. B. Trippe, defendant. On demurrer.

G. A. Howell, for complainant.
Hopkins & Glenn, for defendant.

NEWMAN, J. This is a bill filed by complainant against defendant to enforce the specific performance of a certain conditional or optional contract for the sale of land. The bill, after stating some preliminary correspondence and negotiation between complainant and defendant, relative to the sale of certain land in White county, Georgia, by the latter to the former, alleges that in January, 1887, defendant prepared and executed the following written instrument:

"Georgia, Fulton County. This agreement witnesseth, that the undersigned R. B. Trippe, of said state and county, agrees that if said J. Lamb Johnston, of Charleston, S. C., or any one for him, pays or causes to be paid to the said R. B. Trippe, one thousand dollars, on or before January 20, 1888, that the said R. B. Trippe, for himself, his heirs and assigns, covenants and agrees that he will make to the said Johnston good and sufficient title to lots of land numbers 9 and 25, in 3d district, White county, said state. And it is further agreed that if a draft for \$50.00 this day drawn by R. B. Trippe, with this option bond attached, is paid at sight, then said R. B. Trippe will make said title, if nine hundred and fifty dollars is paid him on or before January 20, 1888; if said sums of money are not paid within the time mentioned, that is, \$50.00 on sight draft and \$950.00 within twelve months from this date, then this bond to be null and void; and it is understood that if the balance of one thousand dollars (i. e., \$950.00) is not paid by January 20, 1888, the \$50.00 paid on sight draft is forfeited to said R. B. Trippe, and that this option bond is null and void, otherwise of full force and effect.

"Witness my hand and seal, this January 20, 1887.

"[Signed]

R. B. Trippe.

"Witness:

"[Signed] J. H. Curtright, M. L. Cohen."

This instrument was sent, about the time of its execution, by defendant to complainant by mail to his home in Charleston, South Carolina, and received by complainant. De-

fendant also drew on complainant a sight draft for \$50, which was sent, with the foregoing written instrument, to Charleston. His draft was honored and paid at once by complainant, and defendant received the \$50. Some time after this, defendant wrote to complainant, saying he had an offer of \$1,500 for the land, and offering, if complainant would release him from his obligation, to return the \$50 paid him, and to pay complainant \$50 in addition, if the other sale was made. In the same letter defendant stated that the bond sent by him to complainant was not legally binding anyway. Complainant promptly replied, both by wire and letter, to defendant, refusing to release him from his obligation to convey the land in pursuance of the before stated contract. In the same letter in which the complainant refused to release defendant, he instructed defendant to submit his deeds to complainant's attorney, and that, upon their approval by him, complainant would pay the balance, \$950. This defendant failed and refused to do, but wrote complainant that he declined to furnish the titles or convey the land in accordance with his contract; and in the same letter inclosed a check payable to his, defendant's, order, and indorsed by him in blank, which he tendered as a repayment of the \$50. This letter was received by complainant in Nacoochee, Georgia, on the night of March 17, 1887. On the next day, March 18th, complainant went to Atlanta, the home of defendant, sought an interview with him, and immediately returned to him the \$50 check which he had received from him; stating to defendant that he refused to receive it; and defendant now has the check in his possession. Complainant at the same time tendered to defendant \$950 in cash, and demanded that defendant make complainant a good and sufficient title to the land in controversy, which tender defendant refused, and refused to convey, and repeatedly refused to carry out his contract with complainant. A tender is made in the bill of \$950; and the prayer is for a decree for specific performance against defendant, with an alternative prayer for damages, in the event specific performance cannot be obtained. An amendment has been filed to this bill, which amendment alleges that the property described in the bill, bargained by defendant to complainant, is now worth the sum of \$3,000, and also that the damages to complainant resulting from such refusal and the failure of the defendant to perform his contract, exceed \$3,000. To this bill a demurrer has been filed, which demurrer is on two grounds: First, that this court has no jurisdiction of the subject-matter in the bill stated; and, second, that the complainant has not shown a right to any relief against defendant.

The first ground is based upon the fact that the amount in controversy, as shown by the original bill, is not sufficient to give this court jurisdiction; the bill having been filed since the passage of the act of March

¹ That equity will not specifically enforce a contract wanting in definiteness or mutuality, see *Bourget v. Monroe* (Mich.) 25 N. W. Rep. 514; *Hall v. Loomis* (Mich.) 30 N. W. Rep. 374; *Moses v. McClain* (Ala.) 2 South. Rep. 741; *Recknagle v. Schmalz* (Iowa) 33 N. W. Rep. 365; *Durkee v. Cota* (Cal.) 16 Pac. Rep. 5; *Fogg v. Price* (Mass.) 14 N. E. Rep. 741.

3, 1887. This objection seems to be obviated by the amendment since filed, fixing the value of the land at \$3,000 and the damages at not less than that sum. There was very little discussion upon this point, in the argument, and it was not strongly urged. The serious and main question in the case arises under the second ground of the demurrer, that the complainant has not shown a right to any relief against defendant. The question made is that this contract between defendant and complainant lacks the element of mutuality, which is necessary to authorize a court of equity to decree a specific performance. That is to say, that, as complainant was not compelled by his contract to take the land and pay defendant the remainder of the purchase money, defendant could not be required to carry out the agreement. There is a general rule of law, undoubtedly, that this element of mutuality must exist to justify enforcement of specific performance. Fry, Spec. Perf. § 286; Wat. Spec. Perf. § 196. It is also true that there are clear exceptions to this rule. In Fry on specific performance it is stated in section 291, as follows: "The contract may be of such a nature as to give a right to the performance to the one party which it does not give to the other; as, for instance, where a lessor covenants to renew upon the request of his lessee, or where the agreement is in the nature of an undertaking. But the more accurate view of such cases as the first,—perhaps of all that could be treated as wanting mutuality,—seems to be that they are conditional contracts; and when the condition has been made absolute, as, for instance, in the case above stated, by a request to renew, they would seem to be mutual, and capable of enforcement by either party alike."

In Wat. Spec. Perf. § 200, in discussing the matter of exceptions to this general rule, the author says: "But it is well settled that an optional agreement to convey, or to renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it, though such an agreement can perhaps scarcely be called an exception; for, being in fact a conditional contract, when the condition has been made absolute by a compliance with its terms, the contract becomes mutual, and capable of enforcement by either party. A contract for the sale of real estate, at the option of the vendee only, upon election and notice, may not only be specifically enforced, but the refusal of the vendor to accept the purchase money will not destroy the mutuality, though the vendee could thereupon withdraw his election."

The decisions upon this question have been numerous, and it has been discussed ably

and at length by many courts of high authority. The case very generally referred to and relied upon to sustain the rule requiring that a contract must be mutually binding to justify its enforcement, is the decision of Lord Redesdale in the case of *Lawenson v. Butler*, 1 Schoales & L. 13. A careful examination of that case and the argument and reasoning of the Lord Chancellor will show that the decision was put mainly upon the ground that where parties enter into an agreement, each supposing the other to be bound thereby, and it transpires that one was not bound, such party could not have specific performance of the contract by the other. He says, in concluding the opinion, (page 21:) "No man signs an agreement but under a supposition that the other party is bound, as well as himself; and therefore, if the other party is not bound, he signs it under a mistake. That mistake might be a ground for relief in equity, but is surely not a ground for specific performance. Under these circumstances, the impression upon my mind is that I must dismiss the bill. This agreement was signed in mistake. It is manifest that Butler could not have executed a lease in compliance with it; and as he could not, it is manifest that this is not the agreement he meant to sign."

From a note to this case, (page 21,) it would seem that the Lord Chancellor was not himself entirely satisfied with the decision, as he proposed that the case lie over until the next day to look into the cases cited, when plaintiff's counsel stated that they were content with a dismissal of the bill without costs, and it was ordered accordingly. These comments upon and citations from this much-quoted case, are not made to question the existence of the general rule alluded to, but to show that its application, even in its origin, was a matter of difficulty, and its extent uncertain.

Counsel for defendant relied in argument here mainly on the cases of *Marble Co. v. Ripley*, 10 Wall. 339; *Tyson v. Watts*, 1 Md. Ch. 1; *Duvall v. Meyers*, 2 Md. Ch. 401; and *Peacock v. Dewese*, 73 Ga. 570. In the case of *Marble Co. v. Ripley*, other questions were made growing out of complex and intricate partnership relations; but one reason why specific performance should not be decreed was want of mutuality. After stating this as a reason why specific performance should be refused in that case, the court proceeds to give what is termed a "still more satisfactory reason for withholding a decree for specific performance." But want of mutuality was undoubtedly recognized as applicable to that case. In the later case of *Butler v. Thomson*, 92 U. S. 412, the court, in the opinion, uses the following language: "There may be an offer to sell subject to acceptance, which would bind the party offering, and not the other party until acceptance. The same may be

said of an optional purchase upon a sufficient consideration." The court then alludes to a class of cases under the statute of frauds where one party signed a contract and the other did not. The language as quoted seems to me to indicate a recognition by the court of offers to sell subject to acceptance, and optional purchases upon sufficient consideration, as exceptions to this general rule requiring mutuality of obligation in the contract. It would be far from clear that *Marble Co. v. Ripley*, even standing alone, should be regarded as controlling in this case; but the language used in the later case of *Butler v. Thomson* shows clearly, I think, that that court would not so regard it. The two cases from the Maryland Chancery Decisions referred to may be disposed of with the remark that in neither case cited were the facts at all like the facts that are presented in the case now before this court. In the case of *Peacock v. Dewees*, the supreme court of Georgia held that the contract sought to be enforced in that case lacked the element of mutuality, and stated that as one reason why specific performance would not be decreed. The court also stated, however, that "the agreement is gratuitous, and entirely voluntary on the part of the defendant in error. A court of equity never decrees a specific performance of a voluntary or gratuitous contract. Code, § 3189. Any fact showing the contract to be unjust or unfair or against good conscience, justifies the court in refusing to decree a specific performance. Code, § 3190." The undertaking of the two *Deweese*s in that case was entirely without consideration to them. *Peacock* agreed to make such tests of the land for the discovery of minerals as were "satisfactory to himself." The two *Deweese*s had their land tied up by this option for six months without receiving any remuneration therefor, and it was evidently the view of the court that the agreement by *Peacock* to make such tests as were "satisfactory to himself" was not such a consideration as would support the contract. This may be gathered, I think, from the use of the language "voluntary or gratuitous contract." This, then, was an optional agreement to sell, wholly without consideration.

I have thus far given attention principally to the authorities relied upon by the eminent counsel for defendant in this case, without referring to the long line of decisions which, it seems, hold that contracts such as the one before the court will be enforced. In the case of *Fowle v. Freeman*, 9 Ves. 351, it was held that an agreement in writing for the sale of an estate was binding if signed only by the vendor, and followed by direction to his attorney to prepare a proper agreement for both parties to sign. In the case of *Ormond v. Anderson*, 2 Ball & B. 363, where the court dismissed the bill upon another ground, the following language was used in the opinion: "An objection has been made to the execu-

tion of this agreement, on the ground that it has not been signed by the plaintiff, and that the defendant could not have enforced it against the plaintiff. I am very well aware that a doubt has been entertained by a judge in this court, of very high authority, [referring to Lord Redesdale, in *Lawenson v. Butler*,] whether courts of equity would specifically execute an agreement where one party only was bound. There exists no provision in the statute of frauds to prevent the execution of such an agreement; and Sir James Mansfield, who certainly had great experience in courts of equity, lays it down in the case of *Allen v. Bennet*, [3 Taunt. 169,] that a contract signed by one party would be enforced in equity against that party, and that such was the daily practice of that court."

He proceeds to say that "in a case where the court finds a party who has been and is endeavoring to obtain some undue advantage, or has been playing what is called 'fast and loose,' the court would not assist him." In the case of *Clason v. Bailey*, 14 Johns. 484, the chancellor, after discussing, among other cases, those I have just cited, concludes thus: "I have thought, and often intimated, that the weight of argument was in favor of the construction that the agreement concerning lands, to be enforced in equity, should be mutually binding; and that the one party ought not to be at liberty to enforce, at his pleasure, an agreement which the other was not entitled to claim. It appears to be settled (*Hawkins v. Holmes*, 1 P. Wms. 770) that though the plaintiff has signed the agreement he never can enforce it against the party who has not signed it. The remedy, therefore, in such cases is not mutual. But, notwithstanding this objection, it appears from the review of the cases that the point is too well settled to be now questioned."

In a later case in New York—*In re Hunter*, 1 Edw. Ch. 1—the vice-chancellor uses the following language: "In the next place, it is said the covenant to sell is not mutual, the lessee not being bound to purchase, and that, as this is a 'one-sided' agreement, the court will not decree a specific performance. The cases of *Parkhurst v. Cortlandt*, 1 Johns. Ch. 282, and *Benedict v. Lynch*, Id. 370, have been referred to as establishing this point. Chancellor Kent there intimated that such was the rule; but in a subsequent case in the court of errors—*Clason v. Bailey*, 14 Johns. 484—he had occasion to review that opinion, which he found to be erroneous, and admits that the point is too well settled the other way to be questioned. The court may, therefore, in a proper case, where there is a covenant on one side, and no mutuality, decree a performance. Besides, in a case like the present, it may be peculiarly proper. The rent may have been fixed at \$500 as an inducement to the power of purchasing the property. This is a fair inference."

In the case of *Van Doren v. Robinson*, 16 N. J. Eq. 256, it is held that "the general prin-

ciple is that where the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other. But the principle does not apply where the contract, by its terms, gives the one party a right to the performance, which it does not give to the other party." And in the case of *Howralty v. Warren*, 18 N. J. Eq. 124, after stating the general rule as the existence of mutuality, and that unilateral or optional contracts are not favored in equity, the court proceeds: "But modern authorities have narrowed this doctrine down to cases in which there is no other consideration. And it is now well settled that an optional agreement to convey, or renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity, if it is made upon proper consideration, or forms part of a lease or other contract between the parties, that may be the true consideration for it."

A number of cases are then cited by the court to sustain this view, among them the cases I have just referred to. The language last quoted seems to me to be a very clear statement of the correct rule in this matter. In *Smith's Appeal*, 69 Pa. 474, the matter before the court being an optional contract for the sale of land, it was held that the contract would be enforced. In the case of *Rogers v. Saunders*, 16 Me. 92, 33 Amer. Dec. 637 the court cites the decision of Chancellor Kent in *Clason v. Bailey*, and states that this appears to be now the generally received doctrine. In *Vassault v. Edwards*, 43 Cal. 458, it is held that: "A proposal to sell real estate, reduced to writing and signed by the vendor alone, in which he recites that he has sold to the vendee the land for a price named, and has received a certain sum as a deposit, as part payment, which the vendor was to refund if the title was rejected or bad, the sale to be subject to a search of and approval of title, the vendee to have twenty days for the examination of the title, is a valid contract of sale entered into between the parties."

To the same effect is the case of *Schroeder v. Gemeinder*, 10 Nev. 355. The court, after stating that there are many exceptions to the rule in the cases, as to mutuality, says: "We think it may now be considered as well settled by all, or nearly all, of the modern authorities, that a court of equity, in actions for the specific performance of optional contracts and covenants to lease or convey land, will enforce the covenant, although the remedy is not mutual, provided it is shown to have been made upon a fair consideration, or where it forms part of a contract, lease, or agreement, which may be the true consideration for it."

Entering into the discussion of this ques-

tion, in many of the cases, is that part of the statute of frauds providing that contracts for the sale of land must be in writing, signed by the party to be charged thereby, or some person by him lawfully authorized. (This law as codified in Georgia, is in section 1950, Code 1882.) It is held in some of these cases that the question should be controlled by the language of the statute just quoted; and that, as the contract need be signed by only one party, viz., the party to be charged thereby, it is only necessary that he should be bound. It seems to me, however, that the question of mutuality is one distinct and apart from any question that might arise under the statute of frauds. It is a matter separate from, if not over and above it, and I have considered it in that view. I think it is settled by the above authorities, and others that might be cited, that where an owner of land gives another, for a sufficient consideration, an option or privilege to purchase the land within a given time, in writing, with full knowledge of the fact that he is bound and the other party is not, it is such a contract as will be enforced in equity at the instance of the party holding the option. Does such a contract indeed lack mutuality? The seller, for fair consideration, agrees to give the proposed purchaser a certain fixed time in which to make the contract mutual, by acceptance of the offer to sell. If he accepts within the specified time, both parties are fully bound.

Now, as to this case. Here, for a reasonable consideration, the sum of \$50, the defendant agrees that the complainant shall have the privilege of buying his land within a year; that is, the defendant sells to him for \$50 the privilege of purchasing the land within a year. That contract, the sale by defendant to complainant of the privilege of purchasing, is executed by the payment by complainant of the sum agreed upon. The remainder of the contract is conditional upon the complainant's accepting within a year the continuing offer of the defendant to sell him the land. I see no reason why a court of equity should not enforce such a contract. On the contrary, it seems to me it would be inequitable to refuse its enforcement. I am clear, therefore, that this case does not come within the class where lack of mutuality will prevent enforcement of the contract, and that it does come within a well-recognized exception to that rule, of optional sales upon fair consideration. This case is considered now, of course, upon the facts as stated in the bill. How it may be affected by what the defendant can hereafter show must be a matter for future consideration. My conclusion is that the demurrer must be overruled on both grounds, and it will be ordered accordingly.

O'CONNOR v. TYRRELL et al.

(30 Atl. 1061, 53 N. J. Eq. 15.)

Court of Chancery of New Jersey. Jan. 21, 1895.

Bill by Lawrence O'Connor against Peter Tyrrell and others for specific performance of a contract to convey land. On motion to dismiss bill. Motion denied.

Charles L. Corbin, for the motion. John Garrick, opposed.

McGILL, Ch. The motion is made in virtue of the 213th rule, and takes the place of a demurrer to the bill. The case presented by the bill is this: James Tyrrell, for himself, and as attorney in fact for others, who are cotenants with him of certain land in the city of Bayonne, on the 20th of April, 1894, agreed to sell that land to the complainant for \$7,250, of which \$250 was to be paid upon the execution of the agreement of sale, and the balance was to be paid upon the delivery of the deed, on the 21st of the following May,—\$5,000 in cash, and the remainder by assumption of the payment of a mortgage of \$2,000, by which the property was incumbered. Upon examination of the title, it was discovered that the power of attorney under which James Tyrrell assumed to act for his cotenants, who lived in Ireland, though duly executed, was defectively acknowledged by some of the cotenants. Therefore, it was agreed that, instead of having the power of attorney reacknowledged, the deed should be directly executed by all owners of the property, and be sent to Ireland for that purpose. As more time would be required in such execution than the terms of the contract of sale would admit of, a new agreement was entered into on the 8th of May, by which the former contract was annulled, and the 26th of June was fixed for the delivery of the deed, and the full consummation of the transaction. The latter agreement contains this stipulation. "Said party of the second part [O'Connor] shall have possession of said premises on the 14th day of May, 1894; and, in the event of the failure of said parties of the first part to deliver the deed at the time and in the manner hereinafter referred to, the said parties of the first part hereby agree to repay to said party of the second part the said sum of \$250, heretofore paid as part of the consideration money, and, in addition thereto, such sum, not exceeding \$1,250, as said party of the second part shall have paid upon the examination or guaranty of the title to said premises, or in the repair, improvement, or furnishing of the building, or ground, or the survey thereof, or shall have in any way incurred or expended in the preparation for the purchase of and taking of title to said premises, not exceeding the said sum of \$1,250; such payment to be accepted by said party of the second part as liquidated damages for any breach of this agreement by the said parties of the first part; and, in

event of the failure of said parties of the first part so to deliver said deed at the time herein stated, said party of the second part hereby agrees to surrender possession of said premises, within fifteen days from June 26th, 1894, to James Tyrrell, one of said parties of the first part hereto. And said party of the second part shall not, under any circumstances, be held to be liable for any rental for the occupancy of said premises." In pursuance of this agreement, the complainant paid \$250 in cash, broke up his home in the city of New York, and moved to the premises contracted to be conveyed to him, upon which he made repairs which have cost him nearly \$2,000. On the 26th of June, 1894, he duly tendered the \$5,000 he was then to pay, and demanded a deed, in accordance with the terms of the agreement. To which tender and demand, James Tyrrell replied that, as attorney in fact, he was unable to deliver the deed, and that he desired a statement of the complainant's expenditures, contemplated by the clause of the contract which has been quoted, in order to ascertain and pay the sum agreed upon as liquidated damages, and also that he desired to fix a day, within the terms of the contract, upon which the complainant would surrender to him possession of the land.

The only question presented in the argument was whether this court will compel a conveyance to the complainant, notwithstanding the provision for the payment of liquidated damages upon the breach of the contract; the contention in behalf of the defendants being that by the agreement the parties have expressly stipulated the measure of the damages which will result from the defendants' nonperformance of the agreement, and therefore equity will leave the complainant to the recovery of those damages, on the ground that an appeal to equity is unnecessary, since the legal relief, by agreement, has been rendered adequate.

For the breach of contracts the common law gives a single remedy. It requires the wrongdoer to pay a sum of money as compensation. When the contract broken is an obligation to pay money, that remedy amounts to specific performance. But there are many contracts, for the breach of which such a remedy is inadequate; and that inadequacy has given rise to the jurisdiction of chancery to enforce specific performance of contracts, requiring the performance or omission of the very acts agreed upon. The remedy is thus made identical with the right withheld, and the defendant is thereby deprived of the option, which the legal remedy practically gives him, to disregard the actual obligation by which he is bound, and pay a sum of money in the place thereof. Pom. Spec. Perf. Cont. § 3. The inadequacy of the legal remedy, by compensation in damages, is generally regarded as conspicuous in cases of agreements for the sale and purchase of real estate, each parcel of which differs in some respects from others.

Such property is usually bought because it possesses some feature which attracts by personal gratification, and determines the purchaser to make some particular use of it. The present case is not an exception to this usual condition. The description of the property discloses its boundary upon the shore of the Newark Bay, with its expanse of water, and the occupancy of it by the complainant indicates that he has determined to make it his residence, and his expenditures upon it give evidence of his appreciation of its situation and surroundings. It is thus made plain that compensation in damages will not be the full measure of relief which a breach of the contract by the defendants, in justice, demands. This situation primarily leads to a critical examination of the contract and the meaning of its clause which I have quoted, to ascertain the correctness of the defendants' assumption that a stipulated sum has been fixed as damages to be had for the mere non-performance of the contract by the defendants. That which was contracted for was the purchase and sale of land. A portion of the purchase money was to be paid at once, and the purchaser was to go into possession pending the execution and delivery of the deed, when the remainder of the purchase money was to be paid. It was in contemplation that he would proceed to repair, improve, and furnish the property. In the event of the defendants' failure to deliver the deed, he was to surrender the possession of the land to their agent; receive back the purchase money paid, together with his expenditures, not exceeding \$1,250. That repayment and surrender were expressly made dependent upon the failure of the defendants to deliver the deed. In this arrangement, which contemplated repayment upon the happening of the one event,—failure to deliver the deed,—was interpolated the parenthetical clause, that such repayment was to be accepted by the complainant as liquidated damages for "any breach" of the contract by the defendants. As the repayment was limited to a single event, and made payable upon the happening of that event only, the words "any breach," in the parenthetical clause, could

not have a broader significance than failure to deliver the deed, for the complainant was bound to accept the repayment only in that event. It is to be noted that, upon the defendants' failure to deliver the deed, the complainant is to have merely pecuniary reimbursement, and not compensatory damages. He is to have nothing for his disappointment, trouble, and discomfort. The inference from a submission to such inadequate damages is, I think, that a stronger meaning was intended to be given to the word "failure" than mere arbitrary refusal of the defendants to deliver the deed. "Failure" is the result of action which predicates earnest effort, and not mere inaction and refusal to do. It is in this sense, I think, that the word was used in this contract. It demanded from the defendants a bona fide effort to deliver the complainant a deed which would vest in him the title to the property. It was failure after such effort that was to constitute the breach for which reimbursement was to be accepted as satisfaction. It is obvious that the contract was not an alternative one, to convey or pay damages. Damages were to be paid upon a "breach" of the contract, which primarily required an honest effort to perform, and failure, and do not become a factor in the consideration of remedies until that precedent condition is performed. The professed inability of James Tyrrell to deliver the deed required does not prove the inability of him and his cotenants to carry out the contract upon their part. The case presented, then, is this: A certain sum is agreed upon as satisfaction to the complainant, if bona fide effort to make him title fails. So far as it appears by the bill, the defendants can make that title, and the aid of this court is invoked to compel them to do so. I think that, as the facts now appear, the complainant is clearly entitled to a decree, and that the case is not brought within the controversy referred to in *Crane v. Peer*, 43 N. J. Eq. 557, 4 Atl. 72, or affected by the intimation of Chancellor Halsted in *St. Mary's Church v. Stockton*, 8 N. J. Eq. 520, as the defendants' proposition suggests. The motion will be denied, with costs.

GRUBB et al. v. SHARKEY et al.

(20 S. E. 784, 90 Va. 831.)

Supreme Court of Appeals of Virginia. Dec. 22, 1894.

Appeal from circuit court, Botetourt county.

Bill by one Sharkey and others against one Grubb and others. Decree for complainants, and defendants appeal. Affirmed.

Benj. Haden and John H. Lewis, for appellants. J. H. H. Figgatt and C. M. Lunsford, for appellees.

LEWIS, P. This was a suit for specific performance. In April, 1887, the appellees conveyed to the appellants a tract of land containing about 19 acres, adjoining the lands of the Lynchburg Iron Company, situate in Botetourt county. Below and contiguous to this land is a grazing farm owned by the appellees, which, at the time of the conveyance to the appellants, was mainly, if not solely, watered by a stream flowing through both tracts. The land was purchased by the appellants for the purpose of erecting and operating thereon an ore washer. It was accordingly covenanted in the deed of conveyance that if the said stream should be made continuously muddy by the proposed ore washing, so as to render the water therein unfit for stock, the appellants would lay a $\frac{3}{4}$ -inch pipe from a certain spring branch above, so as to conduct a supply of clear water over the land to a designated point on the appellees' farm, and there erect a trough for the use of stock. The bill, which was filed in October, 1889, after setting out substantially the foregoing facts, alleges that this covenant has not been observed by the defendants (the appellants here); that they have not laid a pipe and erected a trough, as they covenanted to do, notwithstanding the water in the said stream has been continually muddy and unfit for stock, in consequence of washing ores on the land, since the date of the conveyance, and although they have often been requested so to do. The bill also states that the complainants have been compelled, in consequence of the defendants' default, to drive their stock a considerable distance to water, whereby they have been greatly inconvenienced and damaged. And the prayer of the bill is that the defendants be required to specifically perform their covenant, and to make proper compensation to the complainants for the damage sustained by them, etc.

The defendants being nonresidents, there was an order of publication. An attachment was also sued out, which was levied on the said 19 acres of land. At the May term, 1890, a decree was entered for the specific performance of the contract, with a further provision that the defendants pay to the complainants \$750 damages for the breach of the contract. At the ensuing October term, the defendants appeared, and filed their petition, praying that the decree be set aside, and that they be al-

lowed to make defense. They thereupon, with the leave of the court, demurred to the bill, and also answered. In their answer they stated, among other things, that since the commencement of the suit they had laid the pipe and erected a trough as they had agreed to do, and that this was done before the decree was entered. The cause was then referred to a commissioner, with directions to ascertain and report, among other things, what damages, if any, the complainants had sustained by reason of the alleged breach of the contract, in obedience to which the commissioner subsequently reported that they had been damaged to the amount of \$900. This finding was afterwards, upon exceptions to the report, reduced by the court to \$750, and by the same decree it was ordered that "performance of said contract be confirmed to the complainants."

1. A number of objections have been urged to this decree, none of which, in our opinion, are well founded. In the first place, the case stated in the bill is undoubtedly within the jurisdiction of a court of equity. The contract therein sought to be enforced is not one requiring personal labor, or the exercise of any peculiar skill or judgment, or involving the performance of continuous duties and supervision. On the contrary, it is such a contract as could be readily performed by almost any ordinary workman, and its nature is such that the remedy at law for its breach is inadequate. This brings the case within the general rule that a court of equity has jurisdiction to enforce specific performance of a contract by a defendant to do defined work upon his own property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages; as, for example, an agreement on the part of a railway company to make an archway under its tracks, or to construct a siding at a particular point for the convenience of an adjoining landowner. 1 Story, Eq. Jur. § 721a; Storer v. Railway Co., 2 Younge & C. Ch. 48; Greene v. Railway Co., L. R. 13 Eq. 44. It is, moreover, well settled that, as auxiliary to its authority to decree specific performance, a court of equity may award damages for a breach of the contract, to be assessed either by an issue of quantum damnificatus or by a master, at its discretion. Phillips v. Thompson, 1 Johns, Ch. 131; Nagle v. Newton, 22 Grat. 814; Campbell v. Rust, 85 Va. 653, 8 S. E. 664. This, indeed, is not disputed. But the appellants contend that their performance of the contract in question before the entry of the decree, although subsequent to the filing of the bill, left nothing to be specifically enforced, and consequently that the auxiliary power to decree damages was likewise at an end. In other words, the contention is that, after the pipe was laid and the trough erected, the suit was nothing more than a suit to recover damages, of which equity has not jurisdiction.

But this is a mistaken view. The court having acquired jurisdiction of the case upon equitable ground, no subsequent act of the defendants could oust that jurisdiction. It is a familiar principle, as laid down by Judge Staples in *Walters v. Bank*, 76 Va. 12, that, when a court of equity has once acquired jurisdiction of a cause, it may go on to a complete adjudication, even to the extent of establishing legal rights and granting legal remedies, which would otherwise be beyond the scope of its authority. That is a very strong case. The object of the suit was to subject the estate of a married woman to the payment of a certain negotiable note, upon which the appellant was indorser, or to require the appellant to pay it. In the progress of the case, it appeared that there was no separate estate, whereupon it was insisted that, as the supposed existence of a separate estate was the sole ground for going into equity, the court could proceed no further, and that the bill should be dismissed. But this view was rejected, and a decree rendered against the appellant for the debt, which this court affirmed, on the principle above stated. So it has been held that where the complainant was originally entitled to a specific performance, but pending the suit the subject-matter of the litigation is established or destroyed, he will not be turned round to his remedy at law, but

compensation or damages will be decreed him. 2 Story, Eq. Jur. § 794; *Nelson v. Bridges*, 2 Beav. 239; *Chapman v. Railroad Co.*, 6 Ohio St. 119.

2. As to the further point made by the appellants in the petition for appeal, upon the authority of *Pennoyer v. Neff*, 95 U. S. 714, that state courts have no power to render judgments or decrees in personam against nonresident defendants, who are summoned merely by publication, it is enough to say that here the defendants, after rendition of the decree of the May term, 1890, appeared and defended on the merits, thus submitting themselves to the jurisdiction of the court; so that the case stands upon the same footing, so far as the power and jurisdiction of the court are concerned, as if they had been personally served with process at the commencement of the suit.

3. Both sides complain of the amount of damages awarded; the appellants contending that the amount is excessive, while the appellees insist that the sum reported by the commissioner, viz. \$900, ought to have been allowed, and that the circuit court erred in reducing the amount to \$750. Without reviewing the evidence before the commissioner, we deem it sufficient to say that we see no reason to disturb the decree on this or any other point. It is therefore affirmed. Decree affirmed.

ROGERS LOCOMOTIVE & MACHINE
WORKS v. ERIE RY. CO.

(20 N. J. Eq. 379.)

Court of Chancery of New Jersey. Oct. Term,
1869.

This was a motion for a preliminary injunction. The argument was had upon a rule to show cause upon the bill filed and an affidavit of James Fisk, Jr., in reply to the allegation of the bill as to the insolvency of the Erie Railway Company.

The bill sets forth that the Erie Railway Company, by virtue of the provisions of the charter of the Paterson & Hudson River Railroad Company, of the lease of that road, and the acts of the legislature giving validity to that lease, and authorizing it to finish and extend that road to the Hudson river, and confirming the reorganization of the Erie Railway Company under its present name, became a common carrier between the city of Paterson and the present termination of its railway near the Hudson river, at the Long Dock; that it was bound to carry freight from Paterson to Long Dock at the rates fixed in these acts, which, for a locomotive engine of the size usually made and sent away by the complainants, would amount to \$31.80 for each locomotive; that the company or some of its directors have devised a scheme for the purpose of illegally increasing the rate to be charged for such transportation; that they procured the company to be chartered by the name of the "Union Locomotive Express Company," with power to forward and carry locomotives and other property; and that the Erie Railway Company or its stockholders or directors are using this express company, and combining with its directors, for the purpose of increasing the rates of transportation from Paterson to Long Dock; and that it has entered into an agreement with the express company that it should have the exclusive right of transporting locomotives over the road; that the express company have the power to charge for forwarding without any limit as to amount, and do actually charge \$250 for transporting each locomotive, and assume only the liability of forwarders, and the Erie Railway Company refuses to accept for transportation at its depot at Paterson any locomotive to be transported to Long Dock, or to transport the same, unless through the express company; that the complainant built two trucks, on which it was in the habit of placing its engines and drawing them over the street railway from the manufactory to the depot of the Erie Railway Company at Paterson, which were suitable to run upon that road, and which could be taken to Long Dock with the locomotives thus loaded upon them; that the Erie Railway Company, when these trucks so loaded were last tendered to it for transportation, caused them to be taken over its road in the opposite direction, into the state of New

York, and detains and keeps them there, so that the complainant has no means to offer its locomotives to the Erie Railway Company for transportation, and that this is done intentionally to carry out the fraudulent combination with the express company, so that the latter must be employed, at their exorbitant rates, to carry all the locomotives; and that new trucks cannot be constructed or provided under several months.

The bill further alleges that the manufacture of locomotives has become a large and important business in Paterson, and that the complainant and others have established their works there on faith of the means of transportation provided by law over the railway of the defendants; that being compelled to pay such sum for transportation will compel them to add the amount to the price of their locomotives, and will injure their business in competition with other establishments, and omission to deliver would make them liable to damages.

The bill alleges that this combination of the Erie Railway Company is a fraud upon the stockholders, because they receive by the agreement only \$10 for each locomotive transported by the express company, when, by law, they would be entitled to receive, and would receive from the complainant and others, more than three times that amount for the same service, if performed directly for them.

The bill prays for an injunction to direct and compel the Erie Railway Company to return the two trucks to Paterson into the possession of the complainant, and to transport to the wharf, at Long Dock, all locomotive engines of the complainant that may be delivered at the depot at Paterson, at the rates prescribed by law, and to direct and compel it to perform its duty as a common carrier; also to restrain it from removing the complainant's trucks out of its possession, and from preventing it from obtaining possession thereof, and restraining the other defendants, that is, Jay Gould, James Fisk, Jr., the Union Locomotive Express Company, N. Marsh Kasson, James G. Dudley, Henry J. Smith, and C. Valletta Kasson, from entering into any agreement or doing anything to prevent or hinder the Erie Railway Company from transporting the locomotives of the complainant over its road.

The bill charges that the Union Express Company was got up by Jay Gould, James Fisk, Jr., and Frederick A. Lane, three of the directors of the Erie Railway Company, in combination with N. Marsh Kasson, James G. Dudley, Henry J. Smith, C. Valletta Kasson, and P. K. Randall, as a contrivance to shift the duties of common carriers from the Erie Railway Company, and to enable the defendants, or some of them, to make illegal and exorbitant charges for transportation.

A. B. Woodruff, for the motion. L. Zabriskie, opposed.

THE CHANCELLOR. If the allegations of the bill are true, and they are supported by the affidavits annexed, and are not denied by answer or affidavit, they present a flagrant case of refusal to perform the duties imposed upon it by law, and for which its franchises were granted, by a corporation public in its object and almost such in its character. Railway companies have delegated to them as part of their franchises much of the sovereign power of the state, in consideration of their discharging part of what are the proper duties of government, that is, providing the means of commerce and intercourse by constructing the roads which are the avenues of that commerce. And when, being authorized, they assume to operate these roads, they have devolved upon them in consideration of that franchise the additional duty, which is not one of the proper functions of the government, of common carriers, and are obliged to transport all merchandise and passengers on the terms fixed in the grant through which they obtain their franchises. In this case the wrong is attempted to be aggravated by the charge that it is done through a corrupt combination between the directors of the company and others, by which these directors, in violation of their duties and trust, conspire for their own emolument to cause the company under their control to refuse to perform the duties imposed on it by law, in such manner that the public are injured by extortionate charges, and the stockholders defrauded of their just dues, and also in such manner that the state can cause the valuable franchises of which they are possessed as a right of property to be annulled and forfeited for the willful violation of the compact by which they were granted.

These allegations may not be true, and may be totally disproved at the hearing; but as their truth is sworn to, and is not denied, I am bound to treat them as true for the purposes of this application. So far as they relate to dereliction in duty to the stockholders of the Erie Railway Company, the complainant cannot have here any relief based upon them.

I will also assume for the purposes of this application that the Erie Railway Company having, as the legal assignees of the Paterson & Hudson River Railroad Company, and of their franchises, including the right to finish the road to the Hudson river and to tunnel Bergen hill, constructed the extension of the road to the Hudson river, holds it as part of that road, and subject to all the restrictions and duties imposed upon that road by the charter of the original company; and that it is therefore a common carrier, bound to transport goods over this extension, as well as over the residue of the road, at the rates fixed in the charter.

Whether this duty could be performed by delegating to another person or company who would discharge it in the same manner,

and for the same compensation, and with the same liabilities, need not be discussed here. They have attempted to delegate it to a company who do not attempt or offer to perform the duty as common carriers, or subject to the liabilities of common carriers, but only as forwarders, and who charge for this imperfect performance more than four times the rate authorized to be charged by the Erie Railway Company. They therefore do not provide any one to discharge the duty required of them, and they utterly refuse to perform it themselves, and have bound themselves by a contract that no one but the express company shall perform it. Such contract may be void, both as ultra vires and contrary to law, yet it is proper to be considered as showing the intention of the company not to perform this part of their duty.

The injury to the complainant, too, is of that nature, that while there may be a remedy at law, as by recovery of damages for injury, yet is such that cannot be adequately relieved by suits for damages. It is continually recurring, and will require continued and repeated suits, and continued litigation, and the expenses of each suit would make the recovery of the excess paid an inadequate remedy. I now assume that the Erie Railway Company is, and will remain, solvent. The affidavit of the proper officer of the company, which is legally before the court, clearly shows that the company is not solvent, or likely to prove so.

But, although the injury is proved, and the subject-matter is such that a court of equity will not refuse relief, on the ground that there is adequate relief at law, the question remains whether the injunction here applied for can be granted, or any part of it. There are injuries which this court cannot redress, although there may be no satisfactory remedy at law, and those which this court can redress, for which no preliminary injunction can issue.

The two chief objects for which the injunction is asked are to compel the railway company to return to the complainant its trucks, and to compel it to transport the locomotives of the complainant from Paterson to Long Dock at the legal rates of freight. These are to compel the company to act, not to refrain from acting. And the act commanded is the whole duty of the company, and its performance is the whole right of the complainant. It is not the case of a prohibition of keeping up a structure or maintaining some material object, the erection and continuance of which is the act that deprives the complainant of his right, and the destruction or removal of which would restore the enjoyment of it.

It is contended by the defendant that a mandatory injunction, or one which commands the defendant to do some positive act, will not be ordered, except upon final hearing, and then only to execute the decree

or judgment of the court, and never on a preliminary or interlocutory motion. Or that, if it ever does so issue, it is only in cases of obstruction to easements or rights of like nature, in which a structure erected and kept as the means of preventing such enjoyment will be ordered to be removed, as part of the means of restraining the defendant from interrupting the enjoyment of the right.

Although there is some conflict in the authorities and decisions, I am of opinion, after examining into them, that this position, with the limitation, is the established doctrine of the courts of equity, and that it is a proper and discreet limitation of the use of the preliminary injunction, as well as sustained by the weight of authority.

Justice Story, in 2 Eq. Jur. § 861, says: "A writ of injunction may be described to be a judicial process, whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ. The most common form of injunction is that which operates as a restraint upon the party in the exercise of his real or supposed rights, and is sometimes called the remedial writ of injunction. The other form, commanding an act to be done, is sometimes called the judicial writ, because it issues after a decree, and is in the nature of an execution to enforce the same."

Mr. Eden begins his treatise on Injunctions by saying: "An injunction is a writ issuing by the order and under the seal of a court of equity, and is of two kinds. The one is the writ remedial; for, in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or continuance of some act of the defendant, a court of equity administers it by means of the writ of injunction. The other species of injunction is called the judicial writ, and issues subsequent to a decree, and is properly described as being in the nature of an execution."

In *Drew*, Inj. p. 260, it is laid down: "It seems settled that equity has not jurisdiction to compel, on motion, the performance of any substantive act."

In 3 *Daniell*, Ch. Prac. 1767, it is said: "It is to be observed that the court will not, by injunction granted upon interlocutory application, direct the defendant to perform an act, but might, upon motion, order the defendant to pull down a building which was clearly a nuisance to the plaintiff."

Lord Hardwicke, in an anonymous case in 1 *Ves. Jr.* 140, restrained the further digging of a ditch, but refused, on motion before answer, to order the part dug to be filled up.

Chancellor Vroom, in *Attorney-General v. New Jersey R. & Transp. Co.*, 3 *N. J. Eq.* 141, says: "The injunction is a preventive remedy. It interposes between the complainant and the injury he fears or seeks to

avoid. If the injury be already done, the writ can have no operation, for it cannot be applied correctively, so as to remove it." In that case, the injury done was driving piles for a bridge, so as to obstruct navigation. A mandatory injunction to remove them would have remedied the whole evil.

In *Hooper v. Broderick*, 11 *Sim.* 47, a preliminary injunction to restrain a tenant from discontinuing to keep an inn was dissolved on the ground that it was mandatory, the same as if he was commanded to keep an inn.

In *Blakeman v. Navigation Co.*, 1 *Mylne & K.* 154, Lord Brougham, after a review of the cases (page 183) and quoting with approbation what Lord Hardwicke said in *Ryder v. Bentham*, that "he had never known an order to pull down on motion, and but rarely by decree," refused so much of the injunction prayed for as directed the defendant, Powell, to fill up the collateral pond. The cases of the *East India Co. v. Vincent*, 2 *Atk.* 83; *Spencer v. London and Birmingham Railway Co.*, 8 *Sim.* 193; and of *Durell v. Pritchard*, 1 *Ch. App.* 244, are to the same effect. And in the last case, Lord Romilly, *M. R.*, held that the court, upon final hearing, could not issue a mandatory injunction directing a wall to be taken down; yet the lords justices on appeal held that it had the power, but that in the case before them it should not be exercised, and dismissed the appeal.

There are cases in which mandatory injunctions have been ordered on motion, but they are all, or nearly all, cases in which some erection placed and maintained by the defendant to effect the injury complained of was ordered to be removed, or its maintenance forbidden, on the ground that the defendant effected the act he was restrained from doing by continuing such erection.

In *Robinson v. Lord Byron*, 1 *Brown*, Ch. 588, which is referred to as the leading case for mandatory injunction, Lord Thurlow ordered an injunction to restrain defendant from using his dams and other erections, so as to prevent the water from flowing to the complainant's mill in such quantities as it had ordinarily done before April 4, 1785. The effect of this may have been to compel the removal of the part erected after 1785. But as the case states the injury complained of to be that Lord Byron so used his dam and gates as to let the water flow irregularly, to the complainant's injury, I do not see in the report any direction, express or implied, to take down anything, or to do any act whatever.

In *Lane v. Newdigate*, 10 *Ves.* 192, the object of the injunction was to compel the restoring of a stop gate which was wrongfully removed. Lord Eldon would not order it to be restored, but restrained the preventing the use of the water by complainant by the removal of a stop gate, which was equivalent to an order to restore it, and was so intended.

In *Ranken v. Huskisson*, 4 Sims. 13, the court restrained the defendant from permitting an erection to remain. This was equivalent to an order to remove it; but it is like the others, simply removing that by which the defendant continued the nuisance to be restrained.

In *Mexborough v. Bower*, 1 Beav. 127, Lord Langdale ordered an injunction to restrain permitting the communication complained of, by which complainant's mine was flooded, to remain open. The injunction was to prevent the flowing of the mine, by restraining or removing the means by which the defendant continued to do it.

In *North of England Ry. Co. v. Clarence Ry. Co.*, 1 Colly. 507, the injunction prayed for was against maintaining a wall, and after the rights of the parties had been referred to, and settled in the court of the exchequer, Vice Chancellor Bruce hesitated to grant the injunction, although he held (page 521) that mandatory injunctions might be granted; yet he referred the case to Lord Chancellor Lyndhurst, who, it is stated, granted the injunction in nearly the terms of the prayer; but whether it included this mandatory part does not distinctly appear. The case established the right of the complainant to build a bridge over the railway of the defendant, and to rest the supports of the scaffolding on the soil; and the mandatory prayer was that defendants should remove a wall placed on their grounds to hinder it.

In *Greatrex v. Greatrex*, 1 De Gex & S. 692, the injunction was against preventing the plaintiffs from having access to the books of the firm, and against removing them from, or keeping them at, any other place than the place of business of the partnership, as the defendant had removed the books. This was equivalent to an order to restore them, but yet it did not command any act to be done.

In *Heracy v. Smith*, 1 Kay & J. 389, the injury was covering with tiles the chimneys from the butler's pantry of the complainant. Lord Hatherly (the present lord chancellor, then vice chancellor. Sir W. P. Wood), on the authority of *Robinson v. Lord Byron*, granted an injunction the effect of which was, and

was intended to be, to compel the defendant to remove the tiles; but he declined to adopt the mandatory form, but restrained the defendant from doing any act to prevent the smoke from arising. The substance of the judgment is grounded on the power of the court to remove an erection made by the defendant to effect the injury to be redressed, when that erection is the means by which the defendant continues to inflict the injuries from which the court intended to restrain; and the form of it is an acknowledgment of the general principle that an interlocutory injunction should not command the doing of any positive act.

A number of authorities and cases were cited on the argument to show that courts of equity will, in certain cases, decree the restitution of particular chattels; but these are all cases where it was so ordered upon final hearing. There is no case of any interlocutory injunction being granted or even applied for, for such purpose. It would be a simple and easy substitute for the action of replevin; and there is nothing in this case to warrant such order, even upon final decree. The value of these trucks can be fully recovered at law, and, as to the use of them in the meantime, new ones could be built sooner than a suit in equity be brought to final hearing.

I feel, therefore, constrained to refuse the injunction so far as these mandatory prayers are concerned. As to so much of the prayer as asks to restrain James Fisk, Jr., and the other defendants named in it, from entering into any agreement, or doing anything to prevent or hinder the Erie Railway Company transporting the complainant's locomotives, I think the injunction ought to be granted. They are conspiring with the Erie Railway Company to injure the complainants in a way for which the redress at law is not adequate, and therefore should be enjoined from doing any acts to that end.

I do not intend to intimate any opinion upon the question whether this court has power on the final hearing to give the complainants the relief they seek by compelling the Erie Railway Company to transport their locomotives at the established fares.

WHITECAR et al. v. MICHENOR et al.

(37 N. J. Eq. 6.)

Court of Chancery of New Jersey. May Term, 1883.

Bill for injunction. On motion for mandatory injunction. On order to show cause. On bill and answer.

S. K. Robbins and B. D. Shreve, for complainants. R. S. Jenkins, for defendants.

THE CHANCELLOR. The complainants are Rev. Dr. Charles H. Whitecar, a minister of the Methodist Episcopal denomination, who has been duly appointed for the present conference year to the charge over the Methodist Episcopal Church at Moorestown, and certain of the members of that church. The defendants are the trustees of that church. The bill states that the defendants, on the 29th of March last, closed the church against the members and congregation, and have kept it closed ever since. It prays an injunction to compel them to open it for the religious uses to which it was dedicated. It appears from the bill and the admissions of the answer that the church was organized under the rules, regulations, and discipline prescribed by the general conference of the Methodist Episcopal Church in the United States, and was duly incorporated on or about the 21st of August, 1815, under the act "to incorporate trustees of religious societies," by the name of "The Methodist Episcopal Church at Moorestown"; that Rachel S. Andrews, in September, 1858, conveyed to Deacon Brock, Caleb Fenimore, Thomas Marter, James Moore, John Ireland, Isaac Browning, and Paul Crispin, "trustees of the Methodist Episcopal Church at Moorestown, in the county of Burlington and state of New Jersey," the lot of land on which the church edifice is built, for the use and benefit of the members of the Methodist Episcopal Church at Moorestown, and that afterwards the members of that church built thereon the church edifice in question as a place of worship, according to the rules of faith of the Methodist Episcopal Church in the United States, and subject to its discipline, and that the church edifice has been used as such from the time of its erection until it was closed by the trustees on the 29th of March last; that on the 27th of that month the Rev. Dr. Wiley, one of the bishops of the Methodist Episcopal Church of the United States, and in whom, by the rules and regulations of the general conference, was reposed the power, and on whom was imposed the duty, of appointing for the present conference year the ministers for the various churches constituting the New Jersey Annual Conference, to which annual conference the church at Moorestown belongs, appointed Dr. Whitecar to that church for that year (being his second annual appointment to that church) as minister in charge, and the latter

accordingly entered upon the discharge of his duties, and in the course thereof proceeded to the church building on the 29th of March for the purpose of holding the usual prayer meeting there, but found the doors of the church locked and a notice thereon dated that day, and purporting to be given by the board of trustees and signed by its secretary, that the church would remain closed until further notice; that he and the members of the church there assembled were compelled to disperse without gaining entrance to the church; that the members present appointed a committee of six of their number to call with the minister upon the president of the board of trustees and learn the cause of the closing of the church and preventing the minister and the members from holding service therein; that the committee called on the president and made inquiry; that at the time another of the trustees was present with the president; that in reply to the inquiry the president said that he had not the keys and did not know where they were, and, at the same time, said to the committee that the trustees had the power and authority to close the church, but gave no reason for doing so; that the committee, on the same occasion, asked him to show them the deed of the church property, but he, while admitting that he had it in his house, where the interview took place, refused to show it to them. It also appears, by like statement and admission, that the trustees have kept the church locked ever since the date mentioned, the 29th of March, and have refused to permit it to be used for public worship or even for the meeting of the quarterly conference, which is presided over by the elder of the district. The defendants, by their answer, assert their loyalty to the Methodist Episcopal Church in all respects, and their willingness to obey its rules, regulations, and discipline so far as they comport with their legal obligations, as they understand them, under the before-mentioned deed of trust, and allege that their action in closing the church against Dr. Whitecar is in accordance with the expressed wishes and determination of the majority of the members of the church, and because they are of opinion that the welfare of the church demands that he should not be its pastor.

On the argument of this motion it was stated in behalf of the defendants, and it is so averred in the answer, that their action in closing the church was due to the fact that, in view of the trust in the deed for the land on which the church edifice is built, they considered it their duty to obey the wishes of the majority of the members of the church as to who should officiate as its settled pastor, notwithstanding those wishes may be in conflict with the rules, regulations, and discipline of the Methodist Episcopal Church. This view, however, is entirely erroneous. Not only so, but there is, in fact, no ground whatever for assuming that, by reason of anything in the

deed, they are under any obligation different from that which would devolve upon them merely as trustees of the church had the deed been made directly to the corporation and expressed no trust. The deed, as before stated, was made, not to the corporation, but to certain persons who, at the date of the conveyance, were the trustees of the church. It conveys the property to them with the addition of "Trustees of the Methodist Episcopal Church at Moorestown, in the County of Burlington and State of New Jersey," after their names, in trust for that church, and the only proper use and behoof of the members thereof. Neither the defendants nor any of them are parties to that deed, and neither they nor any of them claim by descent, grant, or devise from the grantees therein. They are merely trustees of the corporation, elected in February, 1882. Neither the legal nor the equitable title to the property is in them. The latter title is in the corporation, and they merely represent the corporation as trustees holding the title of the corporation on a simple trust which makes them bare depositaries of the title. *Morgan v. Rose*, 22 N. J. Eq. 583. And the case would not be different if they held the legal title under the deed. But they do not hold that title. By the act of incorporation the trustees did not acquire the authority which they claim to close the church building at their discretion. *Morgan v. Rose*, *ubi supra*.

Nor have they power, under the discipline of the church, to close it against the duly appointed preacher, though a majority of the members are desirous that they should do so. Nor have they such power under the trust in the deed. The trust is that the grantees therein named, and the survivors of them, their successors and assigns, will hold the property for the only proper use and behoof of the members of the Methodist Episcopal Church at Moorestown, their successors and assigns, forever. It is admitted that that church was organized under the rules, regulations, and discipline prescribed by the general conference of the Methodist Episcopal Church of the United States, and it is not denied that it has been so ever since. It was incorporated in 1815, now nearly seventy years ago. The very name of the corporation indicates its character and connection. As a Methodist Episcopal church it is subject to those rules, regulations, and discipline. It is not alleged that the appointment of the preacher was unauthorized or irregular, but that a majority of the members of the church desire that the preacher appointed shall not be permitted to act as the pastor of the church,—to discharge the duties of the place to which he has been duly appointed. It is not claimed that there is any warrant in the discipline of the church for the action of the trustees, nor that the discipline provides that the wishes of the majority of the members shall determine whether the preacher appointed to the charge shall act as such or not. If

the church belongs to the Methodist Episcopal connection, as it is admitted it does, there is no warrant of law, discipline, or usage for the acts of the defendants. What is known as the itinerancy of the preachers, and the absolute power of the bishops over the appointments of the preachers to the churches, is part of the discipline.

Chief Justice Gibson said, in *Com. v. Cornish*, 13 Pa. 288, 290, that in the Methodist Episcopal Church in England and America the election and ordination of the priesthood by the general or annual conference, the ordination of them by laying on of hands by a bishop and elders, and fixing of their appointments by the bishop, are cardinal points, the last of them a distinctive one. He adds that it is the rock on which the church is founded and on which it has prospered. Remove the church from it, he says, and it ceases to be Methodist; and he also says that the election and ordination of elders, and the fixing of their appointments, are regulated by articles which are fundamental. Said Judge Edmonds, in the case of *People v. Steele*, 2 Barb. 397, 413: "I am irresistibly conducted to the conclusion that the itinerancy of the priesthood, enforced by the power of the episcopacy, is now and for more than a century has been the well-established practice of this church, is clearly defined in the doctrines and discipline, and has been again and again understandingly and advisedly justified and defended by the highest ecclesiastical tribunal known in its constitution." In the case last cited, which is the leading case on the subject, and which in its circumstances was substantially identical with this, the very question presented here as to the right of the trustees of a Methodist Episcopal church to exclude the bishop's appointee was judicially decided against the trustees. There, as here, the trustees claimed to be supported in their action by the majority of the members of the church. See, also, *Brunnenmeyer v. Buhre*, 32 Ill. 183.

But it is urged by the defendants that according to the practice of this court there should be no mandatory injunction in this case before the final decision of the cause. On the filing of the bill an injunction was granted, but it was not mandatory in its character. It indicated that in the judgment of the court, on the case made by the bill, the defendants ought to be restrained from closing the church building against the preacher and the church. It did not, however, require them to open it, and they refused to open it under the non-mandatory prohibition. Their refusal was not a violation of the command of the writ, and the application for an attachment against them for contempt was therefore properly denied. The present application was subsequently made to me for a mandatory injunction. I thereupon granted an order to show cause why such an injunction should not be granted, and the defendants then put in their answer. The whole case is now before me, and the defendants have been heard upon the applica-

tion. I am of the opinion that judged by their answer, and assuming the truth of the facts therein alleged, they are without justification for the act complained of; and I see no reason, either jurisdictional or prudential, for refusing the writ. While the jurisdiction of the court to interfere by way of mandatory injunction should be exercised with the greatest possible caution, yet where the right to restrain the violation of which the injunction is asked for is clearly made out, and there is a present want of the use of that right, the court should not hesitate. The court is always very reluctant to grant a mandatory injunction on an interlocutory application, but where extreme or very serious damage would ensue from withholding it, as in cases of interference with easements or other cases demanding immediate relief, it will be granted.

Joyce, Prin. Inf. 57; Rogers Locomotive & Machine Works v. Erie R. Co., 20 N. J. Eq. 379; Thropp v. Field, 26 N. J. Eq. 82; Longwood Valley R. R. Co. v. Baker, 27 N. J. Eq. 166. In this case it is not reasonable, under the circumstances, to permit the defendants to deprive the church of the use of the edifice until the final hearing. The property is held by the defendants on a simple trust, and they are unwarrantably withholding the use of it from those for whose use they hold it. They have been heard and their defense fully laid before the court and considered. There will be an injunction commanding them to desist and refrain from continuing to keep the church closed at such times as to prevent the preacher, Dr. Whitecar, and the members of the church, from using it for the purpose of religious worship and church business.

WATSON v. SUTHERLAND.

(5 Wall. 74.)

Supreme Court of the United States. Dec., 1866.

Appeal from circuit court of the United States for the district of Maryland.

Watson & Co., appellants in the suit, having issued writs of fieri facias on certain judgments which they had recovered in the circuit court for the district of Maryland against Wroth & Fullerton, caused them to be levied on the entire stock in trade of a retail dry goods store in Baltimore, in the possession of one Sutherland, the appellee. Sutherland, claiming the exclusive ownership of the property, and insisting that Wroth & Fullerton had no interest whatever in it, filed a bill in equity, to enjoin the further prosecution of these writs of fieri facias, and so to prevent, as he alleged, irreparable injury to himself. The grounds on which the bill of Sutherland charged that the injury would be irreparable, and could not be compensated in damages, were these: that he was the bona fide owner of the stock of goods, which were valuable and purchased for the business of the current season, and not all paid for; that his only means of payment were through his sales; that he was a young man, recently engaged on his own account in merchandising, and had succeeded in establishing a profitable trade, and if his store was closed, or goods taken from him, or their sale even long delayed, he would not only be rendered insolvent, but his credit destroyed, his business wholly broken up, and his prospects in life blasted.

The answer set forth that the goods levied on were really the property of Wroth & Fullerton, who had been partners in business in Baltimore, and who, suspending payment in March, 1861, greatly in debt to the appellants and others, had, on the 27th October, 1862, and under the form of a sale, conveyed the goods to Sutherland, the appellee; that Sutherland was a young man, who came to this country from Ireland a few years ago; that when he came he was wholly without property; that since he came he had been salesman in a retail dry goods store, at a small salary, so low as to have rendered it impossible for him to have saved from his earnings any sum of money sufficient to have made any real purchase of this stock of goods from Wroth & Fullerton, which the answer set up was accordingly a fraudulent transfer made to hinder and defeat creditors.

It further stated that the legislature of Maryland had passed acts staying executions from the 10th of May, 1861, until the 1st of November, 1862; that previous to the 1st November, 1862, Wroth & Fullerton had determined to pay no part of the judgments rendered against them; and that from the 10th May, 1861, until the 1st November, 1862, judgments, amounting to between \$30,000 and \$40,000 had been rendered against them;

that between the date of the suspension, March, 1861, and the 27th October, 1862, they had sold the greater portion of their goods, and collected a great many of the debts due them, but had paid only a small portion of those which they owed; secreting for their own use the greater portion of the money collected, and with the residue obtaining the goods levied upon.

It added that there was no reason to suppose that the levy aforesaid, as made by said marshal, would work irreparable injury to the appellee, even if the goods so levied on were the property of the complainant, as property of the same description, quantity, and quality, could be easily obtained in market, which would suit the appellee's purpose as well as those levied upon, and that a jury would have ample power, on a trial at common law, in an action against the respondents, now appellants, or against the marshal on his official bond, to give a verdict commensurate with any damages the said appellee could sustain by the levy and sale of the goods aforesaid.

On the filing of the bill a temporary injunction was granted, and when the cause was finally heard, after a general replication filed and proof taken, it was made perpetual.

These proofs, as both this court and the one below considered, hardly established, as respected Sutherland, the alleged fraud on creditors.

The appeal was from the decree of perpetual injunction.

Mason, Campbell & McLaughlin, for defendants. Wallis & Alexander, contra.

Mr. Justice DAVIS delivered the opinion of the court.

There are, in this record, two questions for consideration. Was Sutherland entitled to invoke the interposition of a court of equity? and, if so, did the evidence warrant the court below in perpetuating the injunction?

It is contended that the injunction should have been refused, because there was a complete remedy at law. If the remedy at law is sufficient, equity cannot give relief, "but it is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity."¹ How could Sutherland be compensated at law, for the injuries he would suffer, should the grievances of which he complains be consummated?

If the appellants made the levy, and prosecuted it in good faith, without circumstances of aggravation, in the honest belief that Wroth & Fullerton owned the stock of goods (which they swear to in their answer), and it should turn out, in an action at law instituted by Sutherland for the trespass, that the merchandise belonged exclusively to him, it is well settled that the measure of dam-

¹ Boyce's Ex'rs v. Grundy, 3 Pet. 210.

ages, if the property were not sold, could not extend beyond the injury done to it, or, if sold, to the value of it, when taken, with interest from the time of the taking down to the trial.²

And this is an equal rule, whether the suit is against the marshal or the attaching creditors, if the proceedings are fairly conducted, and there has been no abuse of authority. Any harsher rule would interfere to prevent the assertion of rights honestly entertained, and which should be judicially investigated and settled. "Legal compensation refers solely to the injury done to the property taken, and not to any collateral or consequential damages, resulting to the owner, by the trespass."³ Loss of trade, destruction of credit, and failure of business prospects, are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law.

Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings in limine; brings the parties before it; hears their allegations and proofs, and decrees, either that the proceedings shall be unrestrained, or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case, must depend altogether upon the character of the case, as disclosed in the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued.

The remaining question in this case is one of fact.

The appellants, in their answers, deny that the property was Sutherland's, but insist

that it was fraudulently purchased by him of Wroth & Fullerton, and is subject to the payment of their debts. It seems that Wroth & Fullerton had been partners in business in Baltimore, and suspended payment in March, 1861, in debt to the appellants, besides other creditors. Although the appellants did not recover judgments against them until after their sale to Sutherland, yet other creditors did, who were delayed in consequence of the then existing laws of Maryland, which provided that executions should be stayed until the 1st of November, 1862. Taking advantage of this provision of law, the answer charges that Wroth & Fullerton, after their failure, collected a large portion of their assets, but appropriated to the payment of their debts only a small portion thus realized, and used the residue to buy the very goods in question, which Sutherland fraudulently purchased from them on the 27th of October, 1862, in execution of a combination and conspiracy with them to hinder, delay, and defraud their creditors. The answers also deny that the injury to Sutherland would be irreparable, even if the stock were his, and insist that he could be amply compensated by damages at law. After general replication was filed, proofs were taken, but, as in all contests of this kind, there was a great deal of irrelevant testimony, and very much that had only a remote bearing on the question at issue between the parties. It is unnecessary to discuss the facts of this case, for it would serve no useful purpose to do so. We are satisfied, from a consideration of the whole evidence, that Wroth & Fullerton acted badly, but that Sutherland was not a party to any fraud which they contemplated against their creditors, and that he made the purchase in controversy, in good faith, and for an honest purpose.

The evidence also shows conclusively, that had not the levy been arrested by injunction, damages would have resulted to Sutherland, which could not have been repaired at law.

The decree of the circuit court is, therefore, affirmed.

² *Conard v. Pacific Ins. Co.*, 6 Pet. 272, 282.

³ *Pacific Ins. Co. v. Conard*, 1 Baldw. 142, Fed. Cas. No. 10,647.

McHENRY v. JEWETT.

(90 N. Y. 58.)

Court of Appeals of New York. 1882.

Appeal from order which affirmed an order granting a preliminary injunction, restraining defendant from voting upon stock in person or by proxy, or from giving a proxy pendente lite.

W. W. MacFarland, for appellant. B. F. Dunning, for respondent.

ANDREWS, C. J. The complaint shows that the plaintiff is pledgor of shares of railroad stock transferred on the books of the company to the defendant as trustee for the pledgee, and the action is brought to restrain the defendant from voting upon the shares at the meetings of stockholders, which it is alleged he has heretofore done, and claims the right to do in the future by reason of his title and right as trustee of the stock. The order from which this appeal is taken granted a temporary injunction restraining the defendant, pendente lite, from voting on the shares. We think the injunction was improperly allowed, for the reason that it does not appear from the complaint that the plaintiff is entitled to the final relief for which the action is brought, and in such case a temporary injunction is unauthorized. Code, § 603. It is claimed on the part of the plaintiff that within the general rule that a pledgee has no right to use the thing pledged, the defendant is not entitled to vote upon the shares, which it is insisted is a use of the shares in violation of this rule. On the other hand, the defendant claims that the voting power passes to the pledgee of corporate shares transferred on the books of the corporation to the pledgee, as incident to the pledge, and according to the presumed intention of the parties. Without considering this question, but conceding the plaintiff's claim, it does not follow that he is entitled to an injunction restraining the defendant from voting on the shares. It is not sufficient to authorize the remedy by injunction that a violation of a naked legal right of property is threatened. There must be some special ground of jurisdiction, and where an injunction is the final relief sought, facts which entitle the plaintiff to this remedy must be averred in the complaint and

established on the hearing. The complaint in this case is bare of any facts authorizing final relief by injunction. It is true that it is alleged that the defendant by the use of the shares has been enabled to a great extent to control the management of the corporation in the interest of the New York, Lake Erie & Great Western Railway Company, with little or no regard to the best interests of the company issuing the shares. But there are no facts supporting this allegation, nor is it averred that the interests of the latter company have been prejudiced, or that the value of the shares has been impaired by the acts of the defendant. So also it is alleged that it is greatly against the plaintiff's interest as a shareholder to permit the defendant to vote upon the shares, and that the plaintiff will suffer great and irreparable injury if the defendant is permitted to do so. But no facts justifying these conclusions are stated, and the mere allegation of serious or irreparable injury, apprehended or threatened, not supported by facts or circumstances tending to justify it, is clearly insufficient. Neither injury to the plaintiff's property, inadequacy of the legal remedy, or any pressing or serious emergency, or danger of loss, or other special ground of jurisdiction, is shown by the complaint. The complaint therefore does not show that the plaintiff is entitled to final relief by injunction. *Corporation, etc., v. Mapes*, 6 Johns. Ch. 46; *Printing Establishment v. Fitch*, 1 Paige, 98; High, Inj. §§ 22, 34, 35, and cases cited. The preliminary injunction was granted upon the complaint, and an affidavit verifying the statements therein, without stating any additional facts. It is doubtless sufficient that a probable or prima facie case be made, to justify the granting of an injunction pendente lite, but where, as in this case, it clearly appears that the complaint shows no cause of action, then a preliminary injunction is unauthorized, and the granting of it is error of law, which may be reviewed by this court on appeal. Code, § 190, subd. 2; *Allen v. Meyer*, 73 N. Y. 1; *Wright v. Brown*, 67 N. Y. 1; *Collins v. Collins*, 71 N. Y. 270; *Paul v. Munger*, 47 N. Y. 469.

The order of the general and special terms should therefore be reversed, with costs. All concur, except RAPALLO, J., dissenting, MILLER and TRACY, JJ., absent.

Order reversed.

STEINAU v. CINCINNATI GAS-LIGHT & COKE CO.

(27 N. E. 545, 48 Ohio St. 324.)

Supreme Court of Ohio. May 5, 1891.

Error to circuit court, Hamilton county.

Action was brought in the court of common pleas by the gas company against the plaintiff in error to obtain an injunction. In its petition the company alleged the execution of the following contract: "This contract, entered into this 16th day of March, 1886, by and between the Cincinnati Gas-Light & Coke Company and Chas. J. Steinau, proprietor and occupant of the premises known as 'The Palace,' and situated No. 80 West Fourth street, between Walnut and Vine streets, witnesseth: First. The said the Cincinnati Gas-Light & Coke Company, for and in consideration of the continued use of not less than three-fourths the present average consumption of gas on said premises, or other premises which the party of the second part may occupy or remove to, hereby agrees and binds itself to supply, under existing rules and regulations, at the premises above described,—except in cases of unavoidable accident,—all the gas which may be required to properly illuminate the same, for a period of ten years next ensuing. The gas so furnished shall at no time be of less power or purity than the present legal standard. That it will accept in full payment for gas so furnished in accordance with the terms of this contract the sum of one dollar and thirty cents per thousand cubic feet, if paid at the office of said gas company within the first three business days after presentation of bill for gas supplied during the period covered by said bill, but in case such payment is not made within the time specified, then the price shall be one dollar and forty cents per thousand cubic feet. Second. That the said Charles J. Steinau, for himself, his heirs, or assigns, for and in consideration of the reduction in price above specified, hereby agrees to receive from the said the Cincinnati Gas-Light & Coke Company all the gas necessary for the proper illumination of the premises above described, or of other premises to which he may remove, in quantity not less than three-fourths of the present average consumption; and that he will not, during the period above named, introduce into or use on said premises oil lamps, electric lights, or other material or power for general illuminating purposes; or any other gas than that supplied by the said the Cincinnati Gas-Light & Coke Company. Third. It is further agreed and understood by both parties to this contract that if during the period above named the city council shall pass, and the gas company accept, any ordinance by virtue of which the price of gas to all private consumers in said city is reduced below the price above specified, then, in that case, the said Chas. J. Steinau shall

not thereafter be required to pay any price in excess of that named in said ordinance; but in all other respects this contract shall continue in force during the period aforesaid." It further alleged, in substance, that at the date of the contract the regular price for gas to private consumers was \$1.70 per thousand cubic feet, with a discount of 10 cents per thousand on monthly bills paid within 5 days after presentation. That price continued until February 28, 1887, when the price was fixed by the city council at \$1.25, with same rate of discount as before. The average monthly consumption of gas for the current year on the premises would be over 18,000 cubic feet if the defendant fulfilled his contract. The plaintiff duly performed all the stipulations and conditions of the contract on its part, and was ready, able, and willing to continue to do so. But the defendant, disregarding his obligations under the contract, refused to receive all the gas necessary for the proper illumination of the premises, and has introduced and is using for general illuminating purposes material or power other than the gas supplied by plaintiff, viz., the Edison incandescent light. "By means of the light so created the consumption of gas for illuminating purposes will be and has been largely reduced below the quantity agreed to be consumed on said premises, as stated in said contract, if not wholly done away with, and the company will lose the benefit of said contract and the gain and profit it is entitled to therefrom, and will suffer irreparable damage." Wherefore plaintiff asks that defendant be enjoined from using said electric light, or any material other than gas supplied by plaintiff, for general illuminating purposes on said premises, and for such other and further relief as the nature of the case may require. A demurrer to the petition was overruled, and final decree of injunction entered against the defendant. This judgment was affirmed by the circuit court. To reverse both judgments this error proceeding is brought.

Kramer & Kramer, for plaintiff in error.
E. A. Ferguson, for defendant in error.

SPEAR, J. (after stating the facts as above). In consideration of the continued use of not less than three-fourths the present average consumption of gas by Steinau, the company stipulated that it would furnish him, for 10 years, all the gas necessary for the lighting of his place of business at a price much lower than the then regular price, to be paid monthly. Steinau stipulated to receive the gas in quantity not less than three-fourths of the then average monthly consumption, for the time named, and further stipulated not to introduce or use electric lights or material for general illuminating purposes other than gas to be furnished by the company. No past consid-

eration appears. The obligations of each party are wholly in covenant, and are wholly executory. In other words, they are promises merely. The prayer is for injunction to restrain Steinau from using the electric light or any material for general illuminating purposes other than the gas to be furnished by the company. Injunction is frequently resorted to as a means of obtaining specific performance. In this case the purpose intended is to prevent the use of electric lights in order that Steinau shall thus be compelled to comply with his contract, and use the company's gas. The object thus sought is specific performance. Against the demand of the company it is insisted that a court of equity will not grant an injunction to restrain a breach of negative covenants where the result will be to effect specific performance of affirmative covenants unless the affirmative stipulations of the complaining party can be specifically enforced against him, and that the petition does not show but that the company has an adequate remedy at law. If either proposition is sound, the demurrer was improperly overruled. As already stated, the object of the proceeding is, and the result reached, if it is successful, will be, to specifically enforce the contract as against Steinau. It seems plain that, if the situation of the parties were reversed, and specific performance were sought against the company, the court would have no power to compel a full compliance by the company with its stipulations to furnish all the gas needed for the period provided for in the contract. It might be in the power of the court to enjoin the company from turning the gas off from Steinau's service pipes so long as he complied with its reasonable rules and regulations, and it is possible that the company could, by mandamus, be compelled to furnish gas to Steinau while it continued to use the franchises and privileges accorded it as a corporation by virtue of the statute and the ordinances of Cincinnati. But these partial remedies, if they might be available, would be wholly apart from the contract; and, be this as it may, it admits of no question that, upon any state of facts appearing by the allegations of this petition, it is beyond the power of any court to compel the company to manufacture and supply gas for a period of 10 years. How can the court order the company to continue the manufacture of gas for the purpose of supplying this consumer? How can it prevent this company from dissolving and going out of business, or from selling out to another which would not be bound by its personal contracts? The inquiry, then, is, if the contract could not be specifically enforced against the company, may it be specifically enforced in its favor? The authorities on the point are numerous, and, to some extent, conflicting. Mr. Pomeroy, in his work on Contracts, § 163, observes: "The peculiarly distinctive feature of the equitable doctrine is that the re-

medial right to a specific performance must be mutual. If, therefore, from the nature or form of the contract itself, from the relations of the parties, from the personal incapacity of one of them, or from any other cause, the agreement devolves no obligation at all upon one of the parties, or if it cannot be specifically enforced against him, then, and for that reason, he is not in general entitled to remedy of a specific performance against his adversary party, although otherwise there may be no obstacle arising, either from the terms of the contract or from his personal status and relations, to an enforcement of the relief against the latter individually." Again, (section 165,) he says that "it is a familiar doctrine that if the right to the specific performance of a contract exists at all it must be mutual. The remedy must be alike attainable by both parties to the agreement." To this general rule the courts have made an exception where peculiar skill and labor are involved, and this, apparently, upon the ground that the element of personal and artistic skill renders the chances of damages at law uncertain and conjectural. Of this class the case of *Lumley v. Wagner*, 1 De Gex, M. & G. 604, is perhaps the leading case. The defendant was a celebrated singer. She was under contract to sing for a certain period at the plaintiff's theater, and not to sing at any other. The court restrained her from the threatened breach of this negative covenant. Later cases have followed this, and the exception appears to be quite well established.

There are cases, besides those above referred to, both in England and in this country, which sustain the holding of the circuit court, (2 Ohio Cir. Ct. R. 286,) that "where there is a clear and continuing breach of a negative covenant in a contract, and where an injunction against the breach of it will do substantial justice between the parties by obliging the defendant to carry out his contract or lose the benefit of a breach of it, and the remedy at law is not adequate, or the damages for such a breach are not susceptible of proper assessment by a jury, a court of equity may properly restrain the defendant from such a breach, though the court might not be able to enforce a complete specific performance of the contract against the other party." *Singer Sewing-Mach. Co. v. Union Button-Hole, etc., Co.*, 1 Holmes, 253, Fed. Cas. No. 12,904; *Chicago, etc., Ry. Co. v. New York, etc., Ry. Co.* (C. C.) 24 Fed. 516; *People v. Gas-Light Co.*, 45 Barb. 137; *Dietrichsen v. Cabburn*, 2 Phil. Ch. 52. However, after a somewhat careful examination of the numerous cases cited by counsel, and many others, we are inclined to the conclusion that the general doctrine laid down by Mr. Pomeroy is sustained by the apparent weight of authority. *Hills v. Croll*, 2 Phil. Ch. 60; *Fothergill v. Rowland*, L. R. 17 Eq. 132; *Bailey v. Col-*

lins, 59 N. H. 459; *Pingle v. Conner*, 66 Mich. 187, 33 N. W. 385; *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala. 498, 3 South. 449; *Pullman Palace Car Co. v. Texas & P. Ry. Co.*, 4 Woods, 317, 11 Fed. 625; *Mearson v. Kaine*, 63 Pa. 335; *Tyson v. Watts*, 1 Md. Ch. 13; *Richmond v. Railway Co.*, 33 Iowa, 423. It is important to note that an essential element of the proposition quoted above is that the complaining party has no adequate remedy at law, and that his damages are not susceptible of proper assessment by a jury. It goes without saying that if this element is found wanting the rule laid down cannot apply. On the part of the company it is insisted that the condition referred to is present in the case at bar. Let us see. The stipulation of Steinau was that he would receive gas in quantity not less than three-fourths of the present average consumption. The contract was to continue for 10 years. It had been in force at the commencement of the action about one year. The "present average consumption" was a quantity easy of ascertainment. So long as Steinau used the quantity of gas specified he was in full performance of his contract. When he ceased taking that quantity he violated the contract, and when he established electric lights in his place, and proceeded to illuminate in that way, it was clear that he intended to wholly break and abandon the contract. The company had the right to regard the contract as at an end, and no pretense or claim of Steinau, so long as he refused to perform, could avail to prevent the company from so treating it. All contractual relations between the parties would then be terminated. By force of the ordinance, and at prices fixed by the ordinance, and subject to all reasonable regulations, the company might still be bound to furnish gas, but it could not be required to furnish a foot of gas under the contract. The contract being thus, by the action of Steinau, at an end so far as he was concerned, the company's cause of action was immediate. It could, if the damages were susceptible of proper assessment at any time, have an action at once for its

entire damages for the breach, and this remedy did not involve a multiplicity of suits. *James v. Allen Co.*, 44 Ohio St. 226, 6 N. E. 246, is a case, in principle, like this one. This court there held that where the offending party had wholly broken and abandoned the contract the party injured by the breach could bring his action at once, and recover his entire damages for the breach, and that one judgment upon such claim would be a bar to a future recovery. That rule, we think, applies to this case. What would stand in the way of adequate damages being awarded by a jury? The amount of gas agreed to be used each month, the duration of the time, the price to be paid per thousand, (subject to changes, if any, produced by the new ordinance,) were all shown by the contract. If, added to these facts, the jury should be put in possession of the amount of "gain and profit" the company were making per thousand, what would prevent a clear ascertainment of damages upon that basis, reduced probably on account of payment in advance? *Fothergill v. Rowland*, L. R. 17 Eq. 132; *Chicago, etc., Ry. Co. v. New York, etc., Ry. Co.* (C. C.) 24 Fed. 516. It is doubted by some members of the court whether a court of equity, in a case of specific performance, where the granting or refusal of relief may depend so largely upon the court's discretion, should exercise it in favor of the enforcement of covenants which deprive a party of new and valuable discoveries of science, and, in a measure, tend to create a monopoly by contract. But a decision of this question is not necessary to a disposition of the case at bar, and that, as well as whether a court of equity should, in any case, where full performance cannot be enforced, decree performance of negative covenants of one party, may properly be left to be determined when a case arises which necessarily requires a decision upon them. We are content to rest the decision of this case upon the ground that the remedy of the defendant in error is at law, and not in equity.

Judgment reversed.

MANHATTAN MANUFACTURING & FERTILIZING CO. v. NEW JERSEY STOCK-YARD & MARKET CO. et al.

(23 N. J. Eq. 161.)

Court of Chancery of New Jersey. May Term, 1872.

Bill for an injunction. Heard on a rule to show cause why an injunction should not issue.

Mr. McCarter, for complainant. I. W. Scudder and Mr. Winfield, for defendants.

ZABRISKIE, Ch. The complainant is a corporation of the state of New York, doing business at Communipaw. The defendant, the stock yard company, a corporation of this state, owns a large and extensive abattoir or slaughter-house at Communipaw. It has not, for some years, slaughtered animals there, but let to butchers the privilege of slaughtering their animals in the abattoir. Previous to August, 1870, the blood and other remains of animals thus slaughtered there by the butchers, not being removed or properly cared for, had created a stench which became a nuisance to the adjoining country, and the company was restrained by an injunction from permitting the business to be carried on there, unless on condition of having the blood and offal perfectly cared for. The butchers paid for the privilege of slaughtering there, and left the blood and offal on the premises, to be cared for by the stock yard company. These difficulties became a serious embarrassment in the enterprise. The complainant undertook to manage this, and to remove and manufacture the blood and other abandoned refuse left on the premises by the butchers, so as to prevent any public or private nuisance that might else arise from them.

To effect the objects of this arrangement, the stock yard company, on the 5th of August, 1870, made a lease to the complainant of certain premises adjoining the abattoir, for the specified business of manufacturing and preparing fertilizers and manures, and the materials for that purpose. The term was for twenty years from April 20th, 1867, with privilege of renewal, and the rent to be paid was fifteen per cent. of the net profits of the business. The lease contained this provision: "The parties of the second part shall also have the refusal and exclusive right of saving and taking all the blood of animals slaughtered in the abattoir and sheep-house of the parties of the first part, and of saving and taking the animal matter and ammonia from the rendering tanks of the parties of the first part, and of using the same in their business;" and also this agreement on part of the complainant: "Said parties of the second part hereby bind themselves to save all that is possible of the blood from the animals slaughtered, and the animal matter and ammonia from the tanks, to prevent any ef-

fluvia or stench from escaping, and to prevent any and all nuisance from being created in any manner whatsoever, either in saving the blood, animal matter, or ammonia, or in converting the same into articles of commerce."

The lease was executed by the president of the stock yard company, in the name of the company, by affixing its common seal and his signature. The execution was duly proved, and the lease recorded in Hudson county clerk's office, August 20th, 1870.

The complainant, on faith of the lease, erected on the demised premises expensive buildings and machinery for the purpose of the manufacture. These were completed by January 9th, 1871. In the meantime arrangements had been made by the complainant with the stock company and its employes for coagulating the blood on the premises, and for preventing nuisances arising from slaughtering in the abattoir. Part of this coagulated blood had, with complainant's acquiescence, been delivered to John J. Craven, one of the defendants, for making experiments or manufacturing it.

In April, 1871, the stock yard company leased its abattoir to Henry R. Payson and David H. Sherman, two of the defendants, who have since carried on the business under the name of D. H. Sherman & Co. The defendant, Isaac Freese, who was in the employ of the stock yard company as superintendent, and continued in the employ of D. H. Sherman & Co. in the like capacity, entered into partnership with the defendant Craven, who was also in the employ of the stock yard company at the making of its lease to the complainant, and with the defendant Sherman, under the name of "The Bergen Manufacturing Company," for the purpose of manufacturing albumen and fertilizers.

After January 9th, 1871, the complainant demanded all the blood of the animals slaughtered at the abattoir, but Craven made an arrangement with certain butchers who slaughtered there, for saving and taking the blood of the animals slaughtered by them, and this was permitted by Sherman & Co., and Freese, their superintendent; and a large part of the blood is thus taken and delivered to Sherman, Freese and Craven, and is lost to the complainant.

By the record of the lease to the complainant, Sherman, Craven and Freese had constructive notice of its contents, and also it is clear that they, as well as Payson, had actual notice. They do not deny this, but take the ground that the blood, like all other parts of the animal slaughtered, belongs to the butcher, and that they or the stock yard company can no more control or deliver it than they could control the flesh or hides. That the butchers having discovered that the blood has a merchantable value, have a right to dispose of it for their own benefit; and that

when they had determined to sell it, and not to abandon it, Craven was under no obligation not to buy it, and his firm might receive it through him without breach of faith.

This defence, at first sight, is seemingly good; but it wholly rests upon the correctness of the premises, to wit, that the stock yard company had not the right or power to control the disposition of the blood. It is not claimed that it had, before the complainant's lease, granted to any one the privilege of slaughtering there. If it had, for a term unexpired, it would have lost the control. Before that, they had permitted butchers to slaughter there without any provision about disposing of the blood or offal. It may, by custom, have been the effect of such contract, that the butcher might leave the blood and offal to be removed by the company. If left, the company was liable for any nuisance occasioned by it. It cannot be doubted that the company could have required, as a condition, that the butcher should remove the blood and offal. It had the right to prevent any one from using the abattoir who would not comply. Before the lease to the complainant, this condition would have been deemed a burden on the butchers, and might have injured the business of the company. It was in difficulty by reason of the nuisance caused by leaving these matters, and the injunction growing out of it. It was relieved by this lease. The consideration was the exclusive right to take the blood and offal which was secured by covenant to the complainant. After that, the company had the same right to demand of every one using the abattoir that he should leave these matters for the complainant, as it had to require him to remove them. This could have been annexed as a condition to every permission to use the abattoir, as well as the condition to pay for the use. And this, by its covenant, the company was bound to do. *D. H. Sherman & Co.*, as the lessees, are bound by the same covenant. And Freese, Craven and Sherman having notice of this obligation before they commenced their business, are bound to refrain from interfering with these rights of the complainant, and from taking the blood and other matters which it is enti-

tled to take. *Tulk v. Moxhay*, 2 Phila. 774; *De Mattos v. Gibson*, 4 De Gex & J. 276.

The facts that Freese and Craven transferred to the complainant their claim to a patent for making albumen from blood, and took part in the arrangements for the lease by the company in whose employ they were, and that Craven interfered by these negotiations with the butchers after he was repulsed in his attempt to get into the employ of the complainant, do not give greater validity to the complainant's right; they may show bad faith and vindictiveness, and that they are not entitled to any favorable consideration beyond their legal rights.

The injunction applied for is not a mandatory injunction; it is not to require the delivery of the blood, but to restrain Craven from taking it, and the other defendants from suffering or permitting any other person than the complainant to take it.

For this injury there is a remedy at law, but it is not an adequate remedy. The value of the blood is no measure of the injury, and it is hardly possible to compute the damages which the injury may occasion. And redress at law could only be obtained by a continued series of suits through the twenty or forty years of the complainant's term. It is a case peculiarly proper for the preventive remedy by injunction. *Shreve v. Black*, 4 N. J. Eq. 177.

The defendants, in their answers, deny that the seal of the stock yard company was affixed to the lease by authority of the directors. The bill alleges that the stock yard company made and executed the lease under its corporate seal, and sets out a lease with the seal affixed, and signed by the president. The answer of the company is not verified by any one who has knowledge of the facts. The present secretary swears that he believes the facts to be true. Any deed of a corporation, under its corporate seal and signed by the proper officer, is presumed to have been executed by authority of the corporation, until the contrary is clearly shown. *Leggett v. New Jersey Manuf'g & Banking Co.*, 1 N. J. Eq. 541. There is no proof here to overcome this presumption.

The injunction must issue as prayed for.

GODFREY v. BLACK.

(17 Pac. 849, 39 Kan. 193.)

Supreme Court of Kansas. April 7, 1888.

Error to district court, Sedgwick county; C. Reed, Judge.

Action of injunction, commenced by Robert Black against F. S. Roberts and M. O. Roberts, partners as Roberts Bros., and C. E. Godfrey, to restrain Roberts Bros. from subletting any portion of the Manhattan Hotel, situated in the city of Wichita, and to restrain C. E. Godfrey from occupying the hotel office as a real-estate and brokerage office. In his petition, Black stated, in substance, that he was the owner of the premises, and had constructed the building thereon to be used as a first-class hotel, and that he let the same to the Roberts Bros., to be used as an hotel, from the 1st day of July, 1885, to the 1st day of July, 1886, for a stipulated rent, payable in monthly installments. It was further provided in the lease, which was in writing, that Roberts Bros. might elect to take the premises for the further period of four years after July 1, 1886, upon the same terms, by giving to Black a written notice of such election at any time prior to the 1st day of May, 1886. In pursuance of that stipulation, Roberts Bros., within the time, elected to retain the lease for the additional four years, and gave written notice to that effect to the plaintiff. It was further provided in the lease that Roberts Bros. might carry on any business in the building incident to the hotel business; but it was expressly stipulated that they should not lease nor underlet, nor permit any persons to occupy the premises, without the consent of the plaintiff in writing having been first obtained. He alleges that he has never given Roberts Bros. any consent to occupy the building for any purpose other than that of an hotel, nor to lease or underlet the building or any part thereof, nor to permit any persons to occupy the same except as guests of the hotel. He alleges that the premises were to be occupied only as an hotel, and that it is injurious to the hotel to carry on, in the office thereof, the business of a real-estate agency and brokerage, and that it is such an injury as cannot be compensated in damages. Notwithstanding the premises, he avers that Roberts Bros. have leased to C. E. Godfrey a portion of the hotel building used as the hotel office; and that Godfrey, his agents and employes, are occupying the same as a real-estate office and place of business. He further states that Roberts Bros. are threatening and intending to continue said lease and underletting to Godfrey, and that Godfrey intends to occupy the room in the transaction of the real-estate business, against the protest and without Black's consent, and to his irreparable injury. He asks that injunction issue prohibiting Roberts Bros. from leasing or underletting the hotel building and premises, or any part thereof,

to Godfrey for a real-estate office, and restraining Godfrey and his agents and employes from occupying the office of the hotel, or any part thereof, as a real-estate office. The petition was verified and introduced in evidence in support of the application for a temporary injunction. In addition, the affidavits of several persons were offered, tending to show that the carrying on of a real-estate business in the office of a first-class hotel brings a crowd and an excitement which interferes with the convenience and comfort of guests, and tends to drive them away, and to render the hotel unpopular. C. E. Godfrey testified that he had leased from Roberts Bros. a space 8 by 20 feet, in the corner of the hotel office, and put a railing around and furnished the same, and was carrying on a real-estate business therein. Upon a hearing had upon due notice, a temporary injunction was granted against Godfrey during the pendency of the action, enjoining him, and his agents and employes, from further using any portion of the office of the hotel as a real-estate office. To reverse the order granting the temporary injunction, C. E. Godfrey brings the case to this court.

Sankey & Campbell, for plaintiff in error.
Campbell & Dyer, for defendant in error.

JOHNSTON, J. (after stating the facts as above). We see no reason to disturb the order granting the temporary injunction. The building in question was constructed for use as a first-class hotel, was rented for that purpose, and it was expressly specified in the lease that the lessee should not sublet the premises, or permit any one else to occupy the same, without the consent in writing of the lessor having first been obtained. In direct violation of the terms of the lease, Roberts Bros. sublet a portion of the hotel office, to be used by Godfrey in carrying on a business inconsistent with the hotel business, and which, the testimony says, detracts from the reputation and popularity of the house. They had no right to sublet or permit the hotel to be used by Godfrey, and he acquired no right by the agreement made with them.

It is claimed that injunction is not the proper remedy in such case; and actions to recover possession and to recover damages for trespass, where the defendants could have the issues submitted to a jury, are suggested. The lessor is not confined to these remedies, nor are they adequate. He has a right to insist that the covenants of the lease shall be observed, and that the premises shall be used only for the purposes agreed upon. It does not appear that the lease was to terminate upon a breach of the covenants; but, even if the lessor had a right to re-enter, that would not preclude him from obtaining equitable relief to prevent a forbidden use of the premises. Presumably the continu-

ance of the lease for the full term is beneficial to the lessor, and he is entitled to a performance in accordance with the contract made. Upon this ground the mere re-entry is held to be an inadequate remedy, as it does not leave the lessor in as good a position as the enforcement of performance by the tenant would leave him in. *Bodwell v. Crawford*, 26 Kan. 292, is cited as an authority against maintaining the action. The two cases are very dissimilar. There no contractual relation existed between the parties, and the possession of the premises by the defendant was wholly unauthorized. In giving the opinion in that case, the writer carefully distinguished it from those like the present one; holding that injunction to restrain parties from putting leased property to a use not authorized by the lease could be maintained. In speaking of a re-entry by the landlord, it was there remarked: "True, he may perhaps declare the lease forfeited, and recover the property; but he may not desire to do this. He may not be able to lease for the same rent, or to an equally responsible tenant; and the lessee ought not to be permitted to compel the lessor either to take back the property or tolerate a forbidden use." *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241; 2 High, Inj. §§ 1138, 1144.

Neither is the right of the lessor to bring an action to recover compensatory damages for the trespass a sufficient ground for withholding the remedy of injunction. Equitable relief may be properly extended in some cases against trespass. An action at law against the trespasser here would not be an adequate remedy. A new cause of action would arise every day for the constantly recurring grievance, which would lead to a multiplicity of suits; and the necessity of preventing these is an exception which warrants the exercise of the equitable jurisdiction of the court. Besides, the lessor has a right to insist upon his property being used in the manner fixed by agreement in the lease; and the testimony tends to show that the carrying on of the real-estate business in the office of the hotel will deteriorate its value, and seriously injure the hotel; and in such cases equity will interfere to restrain the continuance of the injury. 2 High, Inj. § 1142; *Steward v. Winters*, 4 Sandf. Ch. 587; *Macher v. Hospital*, 1 Ves. & B. 188; *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241.

Under the pleadings and the proofs, the temporary injunction was properly allowed, and the order granting the same will be affirmed.

All the justices concurring.

APPEAL OF McCLURG.

(58 Pa. 51.)

Supreme Court of Pennsylvania. Jan. 20, 1868.

Appeal from court of common pleas, Chester county. In equity.

Dr. Benjamin Thompson filed a bill against Dr. John R. McClurg, averring as follows: That the defendant, being a practicing physician at Ohandlerville, Chester county, agreed, on the 22d of January, 1859, with the plaintiff, to sell him his office fixtures and furniture, etc., with his good will in his profession, for \$125, and bound himself to remove not less than twelve miles from the place, and never thereafter to establish himself as a physician within twelve miles without the plaintiff's consent, to use his influence to throw his practice to the benefit of the plaintiff, and give countenance to no other in that direction, averring further that the defendant had established himself as a physician within five miles of his former location without the plaintiff's consent. The bill prayed that he might be restrained from practice in his present location, and from establishing himself elsewhere within the prescribed limits.

The answer alleged that the fixtures, etc., were worth at least \$300; that the agreement as written did not contain the whole agreement of the parties; that the restraint was to have application only so long as the plaintiff should remain on the property then occupied by the defendant; that the plaintiff had ceased to occupy that property, and the defendant had not interfered and did not intend to interfere with the plaintiff's practice.

The case was referred to Joseph Hemphill, Esq., as examiner and master.

The agreement given in evidence is dated January 22, 1859, and, besides the agreement to sell to the plaintiff the defendant's fixtures, etc., "with the good will of his profession," for \$125, contains this covenant:

"The said J. R. McClurg hereby binds and pledges himself to remove not less than twelve miles from his present location, and for ever hereafter not to establish himself in the practice of his profession, within twelve miles, without the free consent of the said Dr. Thompson; also to use all his influence to throw all his practice to the benefit of the said Thompson, and to give countenance to no other in that direction."

The evidence of plaintiff was that defendant moved away in the spring of 1859, and the plaintiff left his residence, gave up his practice at another place, and went into the property, where he remained till the summer of 1864, when he moved to a house about three-quarters of a mile from it, and shortly afterwards removed about a quarter of a mile further: he continued to practice as a physician; defendant moved to Prestonville, five or six miles from his former place, with the declared intention of practicing as a phy-

sician; that there was nothing in the article to which the defendant had not assented.

The defendant gave evidence that \$125 was the price only of the articles sold, and the scrivener added "good will"; also that the restraint was applicable only whilst the plaintiff occupied defendant's former place.

The master reported that the evidence sustained the allegations of the bill, and that there was no evidence offered of fraud or mistake in drawing the agreement, and reported in conclusion:

"Upon the whole, neither fraud or mistake having been established, the subscriber is of opinion that the plaintiff having proven his bill, and the defendant failed to establish any effective answer thereto, the law and equity of the case gives to the plaintiff the right to the injunction prayed for and costs of suit."

Exceptions were filed by the defendant to the report, which was confirmed, and the court (Butler, P. J.) decreed that "an injunction be issued restraining the defendant from establishing himself in the practice of his profession of medicine within the limits of twelve miles from the location on the 22d day of January, 1859, or remaining, as at present established, within said limits, and from practicing his said profession within the circle of his practice at the date aforesaid.

The defendant appealed, and assigned the decree for error.

W. Darlington, for appellant. W. MacVeagh and J. S. Futhey, for appellee.

SHARSWOOD, J. That contracts restraining the exercise of a trade or profession in particular localities are valid, when there is a fair and reasonable ground for the restriction, as in the case of the sale of the good will of a trade or business when the vendor covenants not to pursue the same business within certain prescribed limits, is beyond question. The leading case is *Mitchel v. Reynolds*, 1 P. Wms. 181, in which C. J. Parker delivered a long and elaborate opinion. The doctrine has been at rest ever since, as Lord Kenyon declared in *Davis v. Mason*, 5 T. R. 118, in which a bond by a surgeon not to practice within ten miles of the place where the obligee lived was held good, and a similar undertaking by an apothecary, not to set up his business within twenty miles, was sustained in *Hayward v. Young*, 2 Chit. 407. The appellee had therefore a clear legal right under his contract. Ought a court of equity to enforce it by injunction?

When Mr. Eden wrote his valuable treatise on the law of injunction, he stated that he had not been able to find any reported cases in which the court had interfered by that process to restrain the breach of such a covenant. He admits, however, that it may be inferred from Lord Eldon's observations in *Crutwell v. Lye*, 17 Ves. 335, that there is no reasonable objection to the exercise of such a juris-

diction. *Eden, Inj. 223, 224.* In that case, however, there was no contract, but merely the sale of a trade with the good will, which, without express covenant or fraud, was held not to prevent the vendor from setting up the same business. Lord Eldon said, "A man might stand by and give encouragement generating a confidence that he would not engage in such a trade, inducing other persons to involve themselves, on the ground of which conduct this court might interpose." If equity would enforce an implied contract within reasonable limits, a fortiori they ought to interfere in the case of an express one. Accordingly several subsequent decisions both in England and America have acted on this principle. *Harrison v. Gardner, 2 Madd. 198,* was the case of a retiring partner, who, according to the statement of the bill, had given an assurance verbally that he would not set up in the same line of business in the street in which it had been carried on before, or its immediate vicinity. The vice chancellor, Sir Thomas Plumer, said, "Suppose there was no dispute as to the facts stated in the bill, but that they were admitted, it is clear the court would relieve." In *Williams v. Williams, 2 Swanst. 253,* Lord Eldon granted an injunction in a similar case of a retiring partner where, however, there was an express agreement in writing. *Butler v. Burleson, 16 Vt. 176,* was like this, a contract between two practicing physicians, and it was enforced by injunction. "When there is an express covenant," said C. J. Williams, "and an unconverted mischief arising from the breach of it, equity will grant an injunction to restrain the breach. In this case there is an express contract. The mischief arising from the breach of it cannot be repaired, nor can it well be estimated. A suit at law would afford no adequate remedy, and the damages will be continuing and accruing from day to day, and, furthermore, the object of the contract can only be obtained by the parties conforming expressly and exactly to its terms. It seems, therefore, to be a very proper case for a court of chancery to enforce the contract by granting an injunction to prevent the breach of it, according to the acknowledged principle on which courts of equity act in similar cases." The same doctrine was maintained in *Beard v. Dennis, 6 Ind. 200.* Judge King also recognized it as established in *Palmer v. Graham, 1 Pars. Eq. Cas. 476,* and awarded an injunction on the ground of the inadequacy of an action at law to give the party aggrieved a full and perfect remedy for such a breach of good faith.

We see nothing to distinguish this from the cases cited. It has been objected that the consideration was inadequate. Upon that subject C. J. Tindal, delivering the opinion of the court of exchequer chamber, in *Hitchcock v.*

Coker, 6 Adol. & E. 438, said: "If there is no consideration, or a consideration of no real value, the contract in restraint of trade, which in itself is never favored in law, must either be a fraud upon the rights of the party restrained, or a mere voluntary contract, *nudum pactum*, and therefore void. But if, by adequacy of consideration, more is intended, and that the court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, we feel ourselves bound to differ from that doctrine. A duty would thereby be imposed upon the court, in every particular case, which it has no means whatever to execute. It is impossible for the court, looking at the record, to say whether in any particular case the party restrained has made an improvident bargain or not." This is not like a bill for the specific performance of an unexecuted contract, where, if the bargain is a hard one or founded on an inadequate consideration, a chancellor will refuse to interfere, but leave the party to his legal remedy. This agreement was fully executed. The appellant removed, and the appellee, on the faith of it, gave up his practice at the place where he was before established, and settled in the new neighborhood. He cannot be put in statu quo. We cannot, by our decree, restore to him the practice he has given up, nor could any damages a jury would give be an adequate compensation. Even if it should be a sum which would purchase a life annuity equal to his former income, that would not provide for that increase from year to year which enlarged experience and widening reputation would, in all probability, have insured to him had he remained where he was. The appellant has returned and established himself within the prescribed limits in violation of his agreement. It was said that he did not mean to interfere with the appellee's practice; but how can he well avoid it if he is called upon by his old patients and others? It was with a view to this that the contract stipulated that he should not establish himself in the practice of his profession within twelve miles. This distance was doubtless named because it was considered sufficient to render the practice in the appellant's old circle, reaching a distance of five or six miles on either side, secure to the appellee. We agree with the court below that such a restraint is not unreasonable, nor greater than the appellee's protection may require.

Decree affirmed at the costs of the appellant.

THOMPSON, C. J., dissenting, not on the ground of want of power in the court, but because not a case in which specific performance should be decreed, but the party left to his action at law.

GRAND RAPIDS SCHOOL FURNITURE
CO v. HANEY SCHOOL FURNI-
TURE CO. et al.

(52 N. W. 1009, 92 Mich. 558.)

Supreme Court of Michigan. July 28, 1892.

Appeal from circuit court, Kent county, in chancery; William E. Grove, Judge.

Bill by the Grand Rapids School Furniture Company against the Haney School Furniture Company, Elijah Haney, and George A. Bullard for an injunction. There was a demurrer to the bill, which was sustained, and complainant brings error. Reversed.

Taggart, Wolcott & Ganson, for appellant. Taggart & Denison, for appellees.

LONG, J. The bill of complaint in this case alleges that the complainant is a manufacturing corporation, having its office and manufactory at Grand Rapids; that ever since its organization, in 1887, the defendants have been engaged in circulating thousands of circulars, containing the statement that the goods of complainant infringed a certain patent issued to the defendant Haney, who was and is the president of the corporation, and threatening to bring suit against any and all persons purchasing or using goods of the complainant's manufacture; that these claims and threats were made in bad faith, and with full knowledge that the patent was invalid, and that the complainant was in possession of facts and proofs sufficient to defeat any suit that might be brought for its infringement; that said threats were made for the purpose of intimidating parties who were likely to be customers of the complainant, and had to a considerable extent accomplished their object; but no suits having been brought for infringement of said patent, the threats had lost their force, and hence a fraudulent and collusive suit had been instituted for the purpose of obtaining a decree which could be used to deceive and intimidate the public; that such decree had been obtained, and the defendants had begun to use it for the purpose aforesaid, and were intending so to use it continuously, and on a very large scale, to the great injury of the complainant's business, though the amount of such injury was very difficult to prove or determine by any accurate measure. The prayer of the bill is that the defendants may be perpetually enjoined and restrained from stating, publishing, or claiming, in any manner, that the said decree is anything other or different from a decree obtained by collusion, and from claiming that it is an adjudication upon the merits as to the validity of the said Haney patent, and from using such decree in any way or form to influence or threaten any person or party against purchasing the school furniture manufactured and sold by the complainant. To this bill the Haney School Furniture Company, one of the said defendants, filed a general demurrer; and,

the case having come on to be heard thereon, the court held that the bill of complaint did not set up any facts giving a court of equity jurisdiction to grant relief, and entered a decree sustaining the demurrer, and dismissing the complainant's bill. From this decree the complainant appeals to this court.

The English courts, by recent decisions, have exercised the injunctive jurisdiction to restrain injurious publications concerning property which operate as a slander of the owner's title, and libelous publications which are injurious to the plaintiff's business, trade, or profession, and the wrongful use of a name by which the public would be misled, and the plaintiff injured in his business. Thus far, however, most of the American courts seem unwilling to follow the example of the recent English decisions, and decline to extend the jurisdiction, so as to restrain such torts as libels on business, slanders of title, and the like. In *Massachusetts the English decisions are expressly repudiated. Boston Diatite Co. v. Florence Manuf'g Co.*, 114 Mass. 69; *Whitehead v. Kitson*, 119 Mass. 484. Injunctions to restrain libelous publications concerning plaintiff's business were also refused in *Association v. Boogher*, 3 Mo. App. 173; *Mauger v. Dick*, 55 How. Prac. 132; and *Singer Manuf'g Co. v. Domestic Sew. Mach. Co.*, 49 Ga. 70. In the case of *Emack v. Kane*, 34 Fed. 46, Judge Blodgett allowed the injunction. It appears that Kane issued and widely distributed circulars in which he claimed that Emack's goods infringed his patent. He stated that he should not sue Emack, but should bring suits against all customers of Emack, and collect royalty and damages from all of them. Judge Blodgett said: "The gravamen of this case is an attempted intimidation by the defendant of complainant's customers by threatening them with suits which defendant did not intend to prosecute. * * * If a court of equity cannot restrain an attack like this upon a man's business, then the party is certainly remediless, because an action at law in most cases would do not good, and his ruin would be accomplished before an adjudication could be reached." In the recent case of *Casey v. Typographical Union*, 45 Fed. 135, the case of *Emack v. Kane*, supra, was cited and approved by Judge Sage. It appeared in the *Casey* Case that parties had conspired together to injure the complainant in his business. Circulars were gotten out and widely distributed, containing threats of pecuniary loss and injury to those who should do business with the complainant. The claim was made in that case, as in this, that equity had no jurisdiction, because the injurious publication was merely a libel on complainant's business, and, for any loss which the union inflicted, he had a plain and adequate remedy at law. Judge Sage remarked, however, that it is idle to say that such publications are nothing more than libels, and that the only remedy for the in-

jury inflicted is an action at law; that, while they have certain characteristics of libels, they are more than libels, and there is no plain and adequate remedy at law for such injuries.

We think the bill in this case states a case materially different from the Massachusetts cases and the other cases holding that equity has no jurisdiction to restrain a libel. Here it is claimed and alleged in the bill that Elijah Haney and the Haney School Furniture Company entered into a conspiracy with defendant Bullard to obtain a decree in favor of Haney and against Bullard, which might and should be used by the conspirators to injure the complainant. The fact is recited that, in pursuance of such conspiracy, a bill was filed in the United States court for the eastern district of Michigan, and a decree obtained by fraud and collusion, for the purpose of benefiting the trade of the Haney School Furniture Company at the expense of complainant; that the defendants well knew the patent was invalid; and that the complainant was in possession of facts and proofs sufficient to defeat any suit that might be brought for the infringement of said patent. The prayer of the bill is, not that defendants be enjoined from making whatever claims they see fit concerning their patent, nor from threatening to bring suits, even though such threats be made in bad faith; but that the defendants be restrained from using a decree fraudulently and collusively obtained to the injury of complainant, and from claiming that such decree is an adjudication upon the merits as to the validity of such patent; or from using it in any way or form to influence or threaten any person or party against purchasing the school furniture manufactured and sold by complainant. The case, as stated in the bill, is certainly more than a mere claim for an injunction arising out of a libel

of complainant's business. A conspiracy is claimed to have been entered into between the defendants for the very purpose of injuring the complainant, and that by such conspiracy a false and fraudulent decree was obtained, settling the rights of the Haney School Furniture Company to the patent, under which the complainant was and is operating; that the defendants are publishing to the world, and especially to the customers of the complainant, that such decree was valid, the defendants well knowing it to be false and fraudulent; and that, in any court where the complainant had the right to appear and be heard, it could establish the fact that such patent was absolutely void, and that Mr. Haney and the Haney School Furniture Company had no rights under it, and that complainant was legally entitled to its use. Admitting that the weight of authority in this country is against the proposition that a court of equity has jurisdiction by injunction to restrain the publication of a libel upon one's business, it is no answer to the questions here raised. The complainant has no adequate remedy at law, under the circumstances here stated. It cannot be said that it should lie by and wait the slow and uncertain processes of a suit for damages for its redress. Under the charge in the bill, which we must take as true, the complainant is rightfully operating under such patent, and it has no remedy adequate for the fraud and wrong perpetrated upon it, except as aided by a court of equity. The facts stated make a much stronger case than those in *Casey v. Typographical Union*, supra, calling for the aid of the injunctive power of a court of equity. The decree of the court below must be reversed, with costs, and the demurrer overruled. The defendants will have 20 days to answer the bill. The other justices concurred.

O. & W. THUM CO. v. TLOCZYNSKI.

(72 N. W. 140, 114 Mich. 149.)

Supreme Court of Michigan. Sept. 14, 1897.

Appeal from circuit court, Kent county, in chancery; Allen C. Adsit, Judge.

Bill by the O. & W. Thum Company against Appollonious A. Tloczynski. From a decree for complainant, defendant appeals. Affirmed.

Certain of the secrets sought to be protected by this bill were protected by patent, while others were not.

C. L. Fitch (Frederick W. Stevens, of counsel), for appellant. Earle & Hyde and Butterfield & Keeney, for appellee.

MOORE, J. The complainant is the successor of the firm of O. & W. Thum, who were manufacturers of sticky fly paper. It filed a bill of complaint to restrain defendant communicating to others the secret processes and methods, and the knowledge of secret machinery, which were learned by him while in the employ of O. & W. Thum. The court below granted an injunction, as prayed in the bill of complaint. Defendant appeals.

The testimony is voluminous, and very conflicting. We are satisfied, however, that it establishes, by a very clear preponderance, as follows: The defendant entered the employ of O. & W. Thum in 1887. They at that time were manufacturing sticky fly paper by machinery, and from formulæ known only to themselves. They at that time had but one man and one boy in their employ. The business was carried on in the attic of the house, and in a small building in the back yard. The processes and machinery that were regarded as secret, and of great value to the firm, were used only by the members of the firm. As the business grew, it became necessary to employ more persons, and among others employed was the defendant. Because of the increase in the business and the employment of more persons, other precautions were taken, as the necessity grew for taking them. The public were excluded from the premises. The employes at one machine were not allowed to inspect other machines used in the manufacture, and were not allowed to visit all portions of the premises. Very rigid and careful requirements were made and enforced to guard the formulæ, the processes of manufacture, and knowledge of the machinery used, so that no one could learn them, or either of them, to the detriment of the firm. The business of the firm steadily grew in magnitude, so that when defendant left its employ, in 1892, about \$100,000 was invested in the business, and a large number of persons were given employment. Shortly before this bill was filed, complainant received the following letter: "Grand Rapids, Mich., Jan. 7, 1893. The O. & W. Thum Co., City. Mr. Wm. Thum—Dear Sir: It is about fifteen months since I left your shops, and during that time have been more or less troubled by outside people in regards

to fly paper and its manipulations at your works; not so much so until lately, when there were representatives from two large firms, one from Ohio, which was represented by the president and their attorney, which I looked up in G. R. Dun's, who quote them at \$500,000, who were here for one week, and were directed by some people here in the city to me. They told me that they had sufficient artillery to put the paper on the market, but were a little short on cavalry in its workings; also told me that they were ready at any time to make arrangements,—that is, as soon as I say yes. I can show letters from the above firm and others. I have not said a single word of its manufacture since I left you, but do not think it's my place to keep mum unless you desire it. Awaiting your early reply, I remain, yours, truly, A. A. Tloczynski." It very soon became evident that defendant was negotiating with others to engage in the manufacture of the same product the complainants were making, and this bill was filed.

The terms of employment were not reduced to writing, and there is a sharp conflict of testimony between the defendant and O. & W. Thum as to the terms of his employment, so that it becomes necessary to consider carefully all the testimony in the case to arrive at the truth. One cannot read all the testimony, in the light of the facts and circumstances surrounding the condition of the business at the commencement of the defendant's employment, and its subsequent development and growth, without coming to the conclusion that the defendant and his employer regarded his relation to them as a confidential one, and that he should not disclose or make improper use of the secrets of the business. The conclusion is irresistible that defendant would not have been employed, and information which was imparted to him would not have been conveyed, if it had been understood that he might sever his relations with his employers at any time, and sell the valuable information which had been imparted to him whenever he could find a market. The inception, growth, and development of the business; the manner in which it was conducted; the care taken to exclude the public from means of obtaining knowledge of the processes; the fact that, when new machinery was to be constructed, part of it was got at one place, and part at another, so that no person outside of the members of the firm and their immediate employes, should see a completed machine in operation; the fact that employes in one department of the manufactory were not allowed in other departments; and the care which was taken to prevent employes from obtaining knowledge of any branch of the business, except that in which the employé was immediately engaged, of all of which the defendant had knowledge,—all indicate conclusively that the business and processes were secret, and that no one knew that fact better than the defendant. We think it clearly established by the testimony that the employ-

ment was upon the agreement that defendant would not use the information imparted to him to the harm of his employer.

In our view, the only important question involved in the case is whether an employé, when his employment terminates, may make use of secrets confided to him by his employer, necessary to be confided to him in the conduct of the business, when it is understood and agreed that he shall not make use of the secret knowledge so imparted to the detriment of the employer, and, if he attempts so to do, may he be restrained by writ of injunction?

It is said by counsel that the remedy by injunction will not be granted in such a case as this, where, from the nature of the subject, there could be no decree for a specific performance; citing *Newbery v. James*, 2 Mer. 446; *Williams v. Williams*, 3 Mer. 157; *Kimberley v. Jennings*, 6 Sim. 340.

It is also said that a decree for a specific performance will not be granted where the court has not the means of seeing that its decree shall be carried out; citing *Voorhies v. Frisbie*, 25 Mich. 482; *Blanchard v. Railway Co.*, 31 Mich. 43; *Bumpus v. Bumpus*, 53 Mich. 346, 19 N. W. 29. An examination of the Michigan cases cited shows that in those cases the court was asked to decree the performance of an affirmative act, where the agreement was of an indefinite and uncertain character, instead of being asked to enforce a definite agreement not to do an act. As to the other cases, if they tend to sustain the contention of the defendant, they are contrary to the great weight of authority. Is it not true that, if one discovers a process of manufacture or an invention which is of use to individuals and the community, he has a property right in it, and that an agreement which must be respected may be made in relation to keeping the process of manufacture or the invention a secret between the discoverer or owner and an employé, which agreement is made one of the conditions of the employment? It has been said by a very able justice: "If one invents or discovers and keeps secret a process of manufacture, whether a proper subject for a patent or not, he has not, indeed, an exclusive right to it as against the public, or against those who, in good faith, acquire knowledge of it; but he has a property in it which a court of chancery will protect against one who, in violation of contract and breach of confidence, undertakes to apply it to his own use, or to disclose it to third persons. *Peabody v. Norfolk*, 98 Mass. 452." And, again, Mr. Justice Gray, who delivers the opinion, says: "In this court it is settled that a secret art is a legal subject of property, and that a bond for the conveyance of the exclusive right to it is not open to the objection of being in restraint of trade, but may be enforced by action at law, and requires the obligor not to divulge the secret to any other person. *Vickery v. Welch*, 19 Pick. 523; *Taylor v. Blanchard*, 13 Allen, 373, 374. In *Jarvis v. Peck*, 10 Paige, 118, such a bond was held valid in eq-

uity." In *Salomon v. Hertz*, 40 N. J. Eq. 400, 2 Atl. 379, the court adopts the language of Justice Gray, and holds that there is a property in a secret process of manufacture. *Hardware Co. v. Walbel* (S. D.) 47 N. W. 814.

A recent and instructive case is that of *Eastman Co. v. Reichenbach* (Sup.) 20 N. Y. Supp. 110. "To briefly summarize, then, the established facts of this case, it appears that the plaintiff is the owner of valuable trade secrets, which were either discovered by one or more of the defendants, or necessarily disclosed to them, while occupying a confidential relation towards the plaintiff; that as to such trade secrets as were discovered by either *Reichenbach* or *Passavant*, they have undertaken and agreed to give plaintiff the exclusive property in and control over the same; and that, in violation of this agreement, they are now proposing to make use of them, or some of them, in such a manner as to materially injure the plaintiff's business. With these facts established, the application of the legal principles which must govern the disposition of the case does not appear to be a very formidable undertaking. It may be safely assumed at the outset, I think, that whatever remedy plaintiff may have does not reside in a court of law. The very nature of the case, the peculiar character of the injury liable to be inflicted, and the incalculable damages which may possibly result, all show most conclusively that legal relief is totally inadequate for plaintiff's protection, and that its only resort must be to a court of equity. The learned counsel for defendants has contended, with all the adroitness and skill at his command, which is but another way of saying that such contention has been put forth with all possible adroitness and skill, that this case is not one of which a court of equity can take jurisdiction; and several authorities of both English and American courts are cited in support of this claim. I am constrained, however, to hold that the weight of authority is opposed to his view of the law. The question presented is an interesting one, and would justify a somewhat analytical review of the cases which bear upon either aspect of it did time permit; but, for the purposes of this adjudication, it will be necessary to advert to such only as are deemed conclusive upon this court. In *Morison v. Moat*, 9 Hare, 241, which is an English case, it was held that an injunction would issue to restrain the use of a secret in the compounding of a medicine not being the subject of a patent, and to restrain the sale of such medicine by a party who acquired knowledge of the secret in violation of the contract of the party by whom it was communicated, and in breach of trust and confidence. An appeal was taken from the decision of the vice chancellor, and in 1852 the case was affirmed by the court of chancery, and it was there held that 'there is no doubt whatever that where a party who has a secret in trade employs persons under contract, either express or implied, or under duty, express or implied,

those persons cannot gain knowledge of that secret, and then set it up against their employers.' *Morison v. Moat*, 21 Law J. Ch. 248. In 1868 the supreme court of Massachusetts recognized and followed the authority of *Morison v. Moat*, and in the opinion of Gray, J., the law is thus stated: 'If a party 'invents or discovers and keeps secret a process of manufacture, whether a proper subject for a patent or not, he has not indeed an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it, but he has property in it which a court of chancery will protect against one who, in violation of contract and breach of confidence, undertakes to apply it to his own use, or to disclose it to a third person. The jurisdiction in equity to interfere by injunction to prevent such a breach of trust when the injury would be irreparable, and the remedy at law inadequate, is well established by authority.' *Peabody v. Norfolk*, 98 Mass. 452. The language above quoted was cited with approval in *Salomon v. Hertz*, 40 N. J. Eq. 400, 2 Atl. 379, and it is almost identical with that employed by elementary writers of recognized standing in discussing the same question. Judge Story says: 'Courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment, and it matters not in such cases whether the secrets are secrets of trade or secrets of title, or any other secrets of the party important to its interest.' 2 Story, Eq. Jur. 952. See, also, 1 High, Inj. (2d Ed.) p. 15. The same doctrine has obtained in this state for at least half a century, and has been enunciated by a line of decisions which, with a single exception, is unbroken. *Jarvis v. Peck*, 10 Paige, 118; *Hammer v. Barnes*, 26 How. Prac. 174; *Champlin v. Stoddart*, 30 Hun, 300; *Tabor v. Hoffman*, 118 N. Y. 30, 23 N. E. 12. The *Champlin* Case was decided by the general term of this department, Smith, P. J., writing the opinion, in the course of which he takes occasion to say that 'a secret in trade is fully recognized as property in equity, the disclosure of which will be restrained by injunction.' By a careful reading of the various decisions upon this subject, it will be seen that some are made to depend upon a breach of an express contract between the parties, while others proceed upon the theory that where a confidential relation exists between two or more parties engaged in a business venture, the law raises an implied contract between them that the employé shall not divulge any trade secret imparted to him or discovered by him in the course of his employment, and that a disclosure of such secrets, thus acquired, is a breach of trust, and a violation of good morals, to prevent which a court of equity should intervene. It should also be observed in this connection that the word 'property,' as applied to trade secrets and trade inventions, has its limitations; for it is undoubtedly true that when an article manufactured by some secret process, which is not

the subject of a patent, is thrown upon the market, the whole world is at liberty to discover, if it can by any fair means, what the process is, and, when the discovery is thus made, to employ it in the manufacture of similar articles. In such a case the manufacturer's or inventor's property in his process is gone, but the authorities all hold that, while knowledge obtained in this manner is perfectly legitimate, that which is obtained by any breach of confidence cannot be sanctioned; and this distinction is quite forcibly presented in a recent decision of the court of appeals, to which the attention of this court has been directed by the supplemental brief of defendant's counsel. Judge Landon, in his opinion, speaking of the plaintiff's claim, says: 'His case is unlike those in which the injunctive process of the court is sought to restrain the disclosure of a secret or the publication of a letter which may prove injurious to business or character.' *Bristol v. Society*, 132 N. Y. 264-267, 30 N. E. 506. But without multiplying citations or prolonging consideration of the legal aspect of this case, it may be said, by way of conclusion, that the principle contended for by the plaintiff is not only abundantly supported by authority, but is likewise founded in good common sense, and is peculiarly applicable to the case in hand. Here is a party, which, by the expenditure of large sums of money, and the exercise of much skill and ingenuity, has built up a large and prosperous business, the capital of which consists largely in certain inventions and discoveries made by its officers, servants, and agents. The world at large knows nothing of these inventions and discoveries, because they are locked within the brains of those who conceived them. The defendants, who have been largely instrumental in perfecting them, while under both an express and implied contract to give plaintiff the benefit of their inventive genius, propose now to disregard their legal and moral obligations by creating a new establishment, where these inventions and discoveries may be employed to plaintiff's serious injury. This is not legitimate competition, which it is always the policy of the law to foster and encourage, but it is *contra bonos mores*, and constitutes a breach of trust, which a court of law, and much less a court of equity, should not tolerate." *Fralich v. Despar* (Pa. Sup.) 30 Atl. 521.

It is argued in this case that there is no express contract shown, and that an implied contract is not such a one as will be enforced. We think the testimony discloses very clearly an express agreement between the employer and the employed, but, if it may be stated that the only agreement is an implied one, growing out of oral statements taken in connection with the facts and circumstances surrounding the business, the parties, and their acts, still, if it is clearly established by all that was said and done that the secrets confided to the defendant were not to be disclosed by him to others, and were not to be used by

him except when he was in the employment of those who imparted to him the secret, or their legal representatives, and that was one of the conditions of his employment, we do not think it would make any difference in the principle involved. The knowledge came to him in the course of a confidential employment, relying upon his using the knowledge only for the benefit of the employer. It is said by an eminent writer: "On the whole, the doctrine may be generally stated that wherever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage." Story, Eq. Jur. § 323. The same authority, when discussing the subject of what cases injunction will be issued in, says: "Upon similar grounds of irreparable mischief, courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment; and it matters not, in such cases, whether the secrets be secrets of trade, or secrets of title, or any other secrets of the party important to his interests. Thus a party has been restrained from using the secret of compounding a medicine not protected by patent, when it appeared that the secret was imparted to him, to his own knowledge, in breach of faith or contract on the part of the persons communicating it." Story, Eq. Jur. § 952, and many cases there cited. 10 Am. & Eng. Enc. Law, 949; High, Inj. § 19; Davies v. Clough, 8 Sim. 262; Williams v. Assurance Co., 23 Beav. 338; Morrison v. Moat, 9 Hare, 241; Yovatt v. Winyard, 1 Jac. & W. 394; Tipping v. Clarke, 2 Hare, 393; Peabody v. Norfolk, 98 Mass. 452; Champlin v. Stoddart, 30 Hun, 300; Salomon v. Hertz, 40 N. J. Eq. 400, 2 Atl. 379.

The case of *Little v. Gallus* (Sup.) 38 N. Y. Supp. 487, is against the contention of the defendant. In that case the plaintiff was a maker of typewriter ribbons by secret processes and formulæ. The defendants entered his employ when they were minors. The court says: "It seems, therefore, too plain for controversy that the plaintiff was the owner of a process or invention which possessed great value, and which he had secured at the cost of much time, trouble, and expense; that the defendants, Gallus and Bostwick, occupying a confidential relation towards the plaintiff, gained a knowledge of the process and formulæ employed by him in conducting his business; that they well understood the nature of his business, their relations to it, and the care which was used to keep the same secret; and that, notwithstanding the knowledge thus obtained, and in violation of the faith and confidence reposed in them, they surreptitiously made memoranda of these formulæ, and are now using the same, as well as all the other knowledge obtained while in the plaintiff's service, to start and operate a rival establishment. The only question therefore, to be determined upon this state of facts, is whether or

not they shall be permitted to carry out their intentions. It is contended by the plaintiff that his case is brought directly within the rule laid down in that of *Kodak Co. v. Reichenbach*, 79 Hun, 183, 29 N. Y. Supp. 1143, recently decided by the general term in the Fifth department; and the defendants, while conceding that the law of the case is there correctly stated, insist that the facts do not warrant its application here. We find ourselves unable to concur in the view thus taken, and which was carefully elaborated upon the argument by the learned counsel for the defendants. The facts of this case differ somewhat from those of the *Reichenbach Case*, in that there was no written agreement entered into between these parties by which the employes undertook to give to their employers exclusive right in, or control over, any inventions discovered by, or disclosed to, the former; but we are unable to see how this strengthens the defendants' contention. In the case cited there happens to be an express contract, but, nevertheless, it is asserted, in the opinion of the court, and such is unquestionably the correct rule, that the law raises an implied contract that an employé who occupies a confidential relation towards his employer will not divulge any trade secrets imparted to him or discovered by him in the course of his employment; and we do not see why the defendants, Gallus and Bostwick, are not under just as strong an obligation to observe and keep sacred the trust reposed in them as they would be had they reduced the contract which the law implies to writing. Nor does the fact that they entered the plaintiff's service while minors, and at first performed duties comparatively unimportant in their character, relieve them from a faithful observance of their obligation. Gallus, at least, was ultimately advanced to a position of great responsibility, and both of them had attained their majority before attempting to take improper advantage of the knowledge imparted to them while in the plaintiff's employ, and their present experiments are not in the direction of legitimate competition, but involve a breach of trust which we think the court should prevent." *Tabor v. Hoffman*, 118 N. Y. 31, 23 N. E. 12; *Tuck v. Priester*, 19 Q. B. Div. 629; *Pollard v. Photographic Co.*, 40 Ch. Div. 345.

It is the contention of the defendant that the contract sought to be enforced is void as against public policy because it is in restraint of trade; citing *Richardson v. Buhl*, 77 Mich. 632, 43 N. W. 1102; *Association v. Starkey*, 84 Mich. 76, 47 N. W. 604. These cases are not in point. They are cases where the purpose of the contract was to create a monopoly, by providing by contract that established industries should cease to do business, which, of course, is unlawful; but that is not the purpose of the contract under consideration. Here processes and machinery have been invented which the owners believe would be of great value to them if they could

be used upon a large scale. To use them upon a large scale required the employment of a number of persons, to some of whom some of the secrets of the business and the machinery must be disclosed. If these secrets were disclosed to others, who might use them to establish a business of like character, they would cease to be valuable to the owner. Is there anything unreasonable in enforcing an agreement that such secrets shall not be disclosed by the employé? It has been repeatedly held that contracts for the exclusive use of a secret art are not in restraint of trade, for the public has no right to the secret. See *Taylor v. Blanchard*, 13 Allen, 372, and cases cited; *Cloth Co. v. Lorisont*, L. R. 9 Eq. 345. We cannot see how it can be against public interest to allow an employer to make such conditions of employment with his employés as will give him the fullest protection to his property right in his process or invention, and at the same time enable him to employ a great many employés in its production. To enable

one to do this would be a benefit to the public in many ways. It would secure employment to more persons than would otherwise be employed, and a larger output would be made of a useful article. The evidence discloses that it does not require a man of special skill to do the work done by defendant when in the employ of the predecessors in business of the complainants. To restrain him from making use of what he has not discovered is not an injustice to him, and does not abridge his right to work along those lines which would not be harmful to those to whom he has sustained a position of confidence. It is to the advantage of both parties that such a contract should be allowed. By means of it the defendant secured employment which he could not have secured without it, and at the same time his employers were secured against competition which might be ruinous. *Beal v. Chase*, 31 Mich. 531.

The decree of the court below is affirmed, with costs. The other justices concurred.

DUNCOMBE v. FELT.

(45 N. W. 1004, 81 Mich. 332.)

Supreme Court of Michigan. June 6, 1890.

Appeal from circuit court, Van Buren county, in chancery; GEORGE M. BUCK, Judge.

F. J. Atwell, for appellant. *Spafford Tryon* and *A. J. Mills*, for complainant.

LONG, J. The bill was filed in this cause for an injunction to restrain the defendant from cutting and removing any of the timber or trees standing or growing upon the premises described in the bill, and from committing or permitting any waste of said premises. The bill alleges that complainant is the owner in fee of the premises, containing about 160 acres subject to a life-estate in the defendant. That the complainant derived his title through a sheriff's deed, upon an execution sale to satisfy a judgment against Seth H. Felt. That said Seth H. Felt derived his title through a deed made and executed to him by the defendant, Horatio O. Felt, and his wife. That at about the time of conveyance of said premises to Seth H. Felt he made, executed, and delivered a lease in writing to Horatio O. Felt and wife. This lease is set out in full in the record. The bill also alleges that said Horatio O. Felt is in actual possession and occupancy of the premises under and by virtue of said lease, and that his wife is now deceased. That upon about nine acres of said premises is growing and standing a large amount of valuable oak and other timber, fit for sawing and lumbering purposes, and that said timber constitutes a large portion of the value of said premises. The bill then states: "Your orator further shows that the said Horatio O. Felt has caused to be cut, and is causing to be cut, and is cutting, lumbering, and removing from said premises, a large portion of said timber and trees growing thereon, and threatens to continue so to do, and has already cut about five acres of said timber. Your orator further shows that thereby the said Horatio O. Felt is committing waste upon said premises and irreparable injury thereto, and materially lessening the value thereof. Your orator further shows that if the said Horatio O. Felt is permitted to continue to cut down said timber and lumber, and commit waste upon said premises, as aforesaid, and is not restrained from so doing by an order and injunction of this honorable court, the value thereof will be depreciated to the amount of at least five hundred dollars. And your orator further shows that said cutting and removing of said timber and said lumber upon said premises by said Felt has been and is being done without the authority or consent of your orator, and against his wishes and direction thereon, and without any authority or right in said Felt so to do. All of which actings and doings of the said Horatio O. Felt, who is made defendant herein, are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator." The lease set out in the bill of complaint was executed

before the complainant derived his title under the sheriff's deed, and contains the following clause. "To have and to hold the said demised premises, with the appurtenances, unto the said parties of the second part, their executors, administrators, and assigns, for and during and until the full end and term of their natural lives, so long as either of them shall live, yielding and paying therefor, during the continuance of the lease, unto the said party of the first part, nothing; this lease being given in consideration of the second parties having conveyed the premises herein described to the first party, and under no consideration whatever are the second parties to be removed from the possession of the said premises except as they shall voluntarily surrender their rights under this lease. And it is expressly understood that the second parties are to have as full and complete control of said premises, while they or either of them shall live, as though such conveyance had not been made." A general demurrer was filed, and on the hearing in the court below was overruled, and decree entered for complainant making the injunction perpetual. Defendant appeals.

The claim of counsel for the complainant is that on the premises there are only about nine acres of growing timber; that this timber is needed for the use of the farm, and its destruction makes a case of actionable waste, to be restrained by injunction. The rights of the parties must be determined by the construction given to these clauses in the lease above quoted. The title to the premises was in defendant, Horatio O. Felt. When he and his wife deeded the same, they took back this lease, by the terms of which they were to have and to hold the premises "for and during and until the full end and term of their natural lives, so long as either of them shall live, yielding and paying * * * nothing." The consideration was the conveyance of the premises to Seth H. Felt. It is further provided in the lease that the lessees are not to be removed from the premises on any consideration whatever, except as they might voluntarily surrender their rights under the lease. Then follows the clause which it is claimed gives the defendant the right to take the timber in question. "And it is expressly understood that the second parties are to have as full and complete control of said premises, while they or either of them shall live, as though such conveyance had not been made." The complainant acquired all the rights in the premises under his purchase at the execution sale that Seth H. Felt had, but with notice of all the conditions in this lease. It is therefore contended by counsel that the lease gave defendant the same interest or property in the estate as he had before he and his wife conveyed the lands to Seth H. Felt, and that he can deal with it in all respects as though he was the owner, the only limitation being that of duration of the estate, and that the clauses in the lease above set out in effect are equivalent in meaning with the old clause in leases without impeachment for waste.

Counsel for defendant insists that the doctrine laid down in *Stevens v. Rose*, 69

Mich. 260, 37 N. W. Rep. 205, fully sustains his claim that the defendant has the right to remove this timber, and do all other acts that he could have done as owner in fee, and that the defendant's estate is not impeachable for waste. His claim is not sustained by that case. It was there held that the words "to have and to hold, and to use and control as the lessee thinks proper for his benefit during his natural life," clearly import a lease without impeachment for waste, and that the defendant had the right to do all those acts which such a tenant may exercise, but that the words were not to be treated as importing a license to destroy or injure the estate, but to do all reasonable acts consistent with the preservation of the estate which otherwise might in law be waste. In the present case it is conceded that there are only 9 acres of timber on the whole 160-acre tract, that the defendant has already cut about 5 acres, and threatens to cut and carry away the remainder. I have never understood the rule of the common law to be so broad as contended for by counsel for defendant. The clause "without impeachment for waste" never was extended to allow the very destruction of the estate itself, but only to excuse permissive waste. 10 Bac. Abr. p. 468, tit. "Waste." In *Packington v. Packington*, decided in 1744, and cited by Bacon, (reported 3 Atk. 215,) the plaintiff alleged that the defendant, Sir H. Packington, had cut down a great number of trees, and had threatened to cut down and destroy them all. Lord HARDWICKE granted an injunction to restrain the waste. The lease in the case was made without impeachment of waste. Mr. Greenleaf in his *Cruise on Real Property*, (volume 1, p. 129,) lays down the rule thus: "The clause without impeachment of waste, is, however, so far restrained in equity that it does not enable a tenant for life to commit malicious waste so as to destroy the estate, which is called 'equitable waste,' for in that case the court of chancery will not only stop him by injunction, but will also order him to repair if possible the damage he has done." In 10 Bac. Abr. tit. "Waste," p. 469, it is said: "So, where a lease was made by a bishop for twenty-one years without impeachment of waste, of land that had many trees upon it, and the tenant cut down none of the trees till about half a year before the expiration of his term, and then began to fell the trees, the court granted an injunction; for, though he might have felled trees every year from the beginning of his term, and then they would have been growing up again gradually, yet it is unreasonable that he should let them grow till towards the end of his term, and then sweep them all away; for, though he had power to commit waste, yet this court will model the exercise of that power;"

citing *Abraham v. Buhl*, Freem. Ch. 53. At the common law no prohibition against waste lay against the lessee for life or years deriving his interest from the act of the party. The remedy was confined to those tenants who derived their interest from the act of the law, but the timber cut was, at common law, the property of the owner of the inheritance, and the words in the lease "without impeachment of waste" had the effect of transferring to the lessee the property of the timber. *Bowles' Case*, 11 Coke, 79; Co. Litt. 220a. The modern remedy in chancery by injunction is broader than at law, and equity will interpose in many cases, and stay waste where there is no remedy at law. Chancery will interpose when the tenant affects the inheritance in an unreasonable and unconscientious manner, even though the lease be granted without impeachment of waste. 4 Kent, Comm. (13th. Ed.) 78; *Perrot v. Perrot*, 3 Atk. 94; *Aston v. Aston*, 1 Ves. Sr. 264; *Vane v. Barnard*, 2 Vern. 738; *Kane v. Vanderburgh*, 1 Johns. Ch. 11. In the case of *Kane v. Vanderburgh*, supra, it was said: "Chancery goes greater lengths than the courts of law in staying waste. It is a wholesome jurisdiction, to be liberally exercised in the prevention of irreparable injury, and depends on much latitude of discretion in the court." In this state an action on the case for waste is authorized by chapter 271, How. St. This has superseded the common-law remedy, and relieves the tenant from the penal consequences of waste under the statute of Gloucester, as the owner now recovers no more than the actual damages which the premises have sustained, while that statute gave by way of penalty the forfeiture of the place wasted, and treble damages; and this harsh rule was adopted by many of the American states by the early statutes. This statute giving a right of action in courts of law for waste does not, however, deprive the court of chancery of jurisdiction in proceedings to restrain threatened waste.

There can be no doubt that the defendant in the present case has much of the character of a tenant in fee, but he cannot destroy the inheritance. He may taken the timber for his own use, and do all those acts which a prudent tenant in fee would do. He cannot pull down the buildings or destroy them, or cut and destroy fruit trees, or those planted for ornament and shelter; neither can he be permitted to entirely strip the land of all timber, and convert it into lumber, and sell it away from the inheritance. It is not claimed that the timber is being used for betterments on the premises, but it is admitted that the life-tenant is selling it for his own gain and profit. The demurrer was properly overruled. The decree of the court below will be affirmed, with costs. The other justices concurred.

GRIFFITH v. HILLIARD.

(25 Atl. 427, 64 Vt. 643.)

Supreme Court of Vermont, General Term.
Nov. 5, 1892.

Appeal from chancery court, Rutland county; TART, Chancellor.

Action by Silas L. Griffith against John H. Hilliard. From a decree sustaining a demurrer to plaintiff's bill for an injunction and dismissing the bill *pro forma*, orator appeals. Reversed and modified.

J. C. Baker, for orator. H. A. Harman, for defendant.

START, J. The defendant, John H. Hilliard, by the demurrer contained in his answer, claims that a court of equity has no jurisdiction of the matters alleged in the bill. The bill alleges, among other things, that the orator is the owner of the land in question; that its substantial value is made up of the wood and timber growing thereon; that some of the defendants, under a license from the defendant, Hilliard, have entered upon the land, are engaged in cutting and drawing timber therefrom, and threaten to continue to do so. For the purpose of determining the question now before the court, these allegations must be taken as true. To permit this wood and timber to be cut in the manner the defendants are doing, and threatening to do, under a license from defendant, Hilliard, is to permit a destruction of the orator's estate as it has been held and enjoyed. The power of a court of equity to interpose by injunction to prevent irreparable injury and the destruction of estates is well established, and this power has been construed to embrace trespasses of the character complained of in the orator's bill. Where trespass to property consists of a single act, and it is temporary in its nature and effect, so that the legal remedy of an action at law for damages is adequate, equity will not interfere; but if, as in this case, repeated acts are done or threatened, although each of such acts, taken by itself, may not be destructive to the estate, or inflict irreparable injury, and the legal remedy may, therefore, be adequate for each single act if it stood alone, the entire wrong may be prevented or stopped by injunction. *Smith v. Rock*, 59 Vt. 232, 9 Atl. Rep. 551; *Langdon v. Templeton*, 61 Vt. 119, 17 Atl. Rep. 839; *Erhardt v. Boaro*, 113 U. S. 539, 5 Sup. Ct. Rep. 555; *Iron Co. v. Reymert*, 45 N. Y. 703; *Power Co. v. Tibbetts*, 31 Conn. 165; *Irwin v. Dixon*, 9 How. 28; *Livingston v. Livingston*, 6 Johns. Ch. (Law Ed.) 496; *High*, Inj. 724-727; *Shipley v. Ritter*, 7 Md. 408; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694; 1 Pom. Eq. Jur. § 245; 3 Pom. Eq. Jur. § 1357; *Murphy v. Lincoln*, 63 Vt. 278, 22 Atl. Rep. 418.

In the case of *Murphy v. Lincoln*, *supra*, the bill charged the committing of several trespasses by the defendants by drawing wood and logs across the orator's land. The defendants claimed a right of way. The court found the issue of fact in favor of the orator, and held that a court of equity had jurisdiction to enjoin the commission of a series of trespasses, although

the legal remedy be adequate for each single act if it stood alone. It is said by Judge Story in his work on Equity Jurisprudence, (volume 2, §§ 928, 929:) "If the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly, indeed, courts of equity were extremely reluctant to interpose at all, even in regard to cases of repeated trespasses; but now there is not the slightest hesitation if the acts done or threatened to be done to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in the future. In short, it is now granted in all cases of timber, coals, ores, and quarries, where the party is a mere trespasser, or where he exceeds the limited right with which he is clothed, upon the ground that the acts are, or may be, an irreparable damage to the particular species of property." In *Iron Co. v. Reymert*, *supra*, it is said that mines, quarries, and timber are protected by injunction, upon the ground that injuries to and depredations upon them are, or may cause, an irreparable damage, and also with a view to prevent a multiplicity of actions for damages, which might accrue from continuous violations of the rights of the owners; and that it is not necessary that the right should be first established in an action at law. In *Erhardt v. Boaro*, *supra*, Mr. Justice FIELD says: "It is now a common practice in cases where irreparable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title."

When it appears that the title is in dispute, the court may, in its discretion, issue a temporary injunction, and continue it in force for such time as may be necessary to enable the orator to establish his title in a court of law, and may make the injunction perpetual when the orator has thus established his title; or the court may proceed and determine which party has the better title; or it may dismiss the bill, and leave the orator to his legal remedy. *Bacon v. Jones*, 4 Myne & C. 433; *Duke of Beaufort v. Morris*, 6 Hare, 340; *Campbell v. Scott*, 11 Sim. 31; *Kerr*, Inj. 209; *Ingraham v. Dunnell*, 5 Metc. (Mass.) 118; *Rooney v. Soule*, 45 Vt. 303; *Wing v. Hall*, 44 Vt. 118; *Lyon v. McLaughlin*, 32 Vt. 423; *Hastings v. Perry*, 20 Vt. 278; *Barnes v. Dow*, 59 Vt. 530, 10 Atl. Rep. 258; *Barry v. Harris*, 49 Vt. 392. In *Bacon v. Jones*, *supra*, Lord COTTENHAM says: "The jurisdiction of this court is founded upon legal right. The plaintiff coming into court on the assumption that he has the legal right, and the court granting its assistance on that ground. When a party applies for the aid of a court, the application for an injunction is made either during the progress of the suit or at the hear-

ing; and in both cases, I apprehend, great latitude and discretion are allowed to the court in dealing with the application. When the application is for an interlocutory injunction, several courses are open. The court may at once grant the injunction *simpliciter*, without more,—a course which, though perfectly competent to the court, is not very likely to be taken where the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual, and, as I apprehend, more wholesome, practice in such a case, of either granting an injunction, and at the same time directing the plaintiff to proceed to establish his title at law, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant, in the mean time, keeping an account. Which of these several courses ought to be taken must depend entirely upon the discretion of the court, according to the case. When the cause comes to a hearing, the court has also a large latitude left to it; and I am far from saying that a case may not arise in which, even at that stage, the court will be of opinion that the injunction may properly be granted without having recourse to a trial at law. The conduct and dealings of the parties, the frame of the pleadings, the nature of the patent right and of the evidence by which it is established, these and other circumstances may combine to produce such a result, although this is certainly not very likely to happen, and I am not aware of any case in which it has happened. Nevertheless it is a course unquestionably competent to the court, provided a case be presented which satisfies the mind of the judge that such a course, if adopted, will do justice between the parties. Again, the court may at the hearing do that which is the more ordinary course,—it may retain the bill giving the plaintiff the opportunity of first establishing his right at law. There still remains a third course, the propriety of which must also depend upon the circumstances of the case,—that of dismissing the bill at once." Although *Bacou v. Jones* was a case relative to a patent right, the remarks of the lord chancellor are applicable to any case in which the orator's title is in dispute. The case of the Duke of Beaufort v. Morris, *supra*, was a bill for an injunction to protect the orator's coal mines from injury from the water flowing into them from the defendant's colliery; and it was ordered that the bill be retained for 12 months, with liberty to the orator to bring such actions as he might be advised were necessary, and that the injunction issued in the cause be continued for such time.

We think the granting of the temporary injunction in this case was a proper exer-

cise of the discretionary power which the court possesses. The orator, by his bill, makes out a strong case for equitable consideration. The sole value of the premises in question is in the wood and timber growing thereon. The orator has heretofore held and occupied them for the purpose of manufacturing lumber and charcoal from such timber and wood. He has expended large sums of money in the erection of mills and coal kilns, in building roads, and in procuring teams and workmen for the prosecution of said business, and has made contracts for the sale of said manufactured products. The defendants are engaged in cutting and removing that which constitutes the chief value of the estate, and threaten to continue to do so. These acts, if continued, will work a destruction of the estate, and render it of no value for the purpose for which it has been held and enjoyed. The case is one peculiarly within the province of a court of equity, through its preventive writ, to interpose and stop the mischief complained of, and preserve the property from destruction. The defendant, John H. Hilliard, having, before any evidence has been taken or hearing had, put in issue the orator's title, insisted that this issue be tried in a court of law, the case is one in which the court may properly, in its discretion, require the orator to establish his title in such court before proceeding further with the cause, and such will be the order of this court. The *pro forma* decree of the court of chancery is reversed; the demurrer contained in the answer of the defendant, John H. Hilliard, is overruled; the orator's bill is adjudged sufficient, and defendant's (Hilliard's) answer is ordered brought forward, from which it appears that the orator's title to the premises is in controversy; therefore the cause is remanded to the court of chancery, with direction to that court to retain the cause, and continue in force the injunction for such time as, in the opinion of said court, may be necessary to enable the orator to bring and prosecute to final judgment such action or actions as may be necessary to establish his title in a court of law; and, in default of the orator so establishing his title within the time aforesaid, the orator's bill to be dismissed, as against the defendant, John H. Hilliard, with costs. But if the orator shall, within the time aforesaid, by a final judgment in his favor in a court of law, establish his title to the premises as against the defendant, John H. Hilliard, then the court will enter a decree making perpetual the temporary injunction, and make such order in relation to costs as to the court shall seem meet.

TAFT, J., did not sit.

WHEELOCK v. NOONAN.

(15 N. E. 67, 108 N. Y. 179.)

Court of Appeals of New York. January 17, 1888.

Appeal from general term, superior court, city of New York.

Suit for mandatory injunction, by William A. Wheelock, respondent, against Michael Noonan, appellant.

E. Laffin Kellogg, for appellant. Martin & Smith and Geo. A. Strong, for respondent.

FINCH, J. The findings of the trial court establish that the defendant, who was a total stranger to the plaintiff, obtained from the latter a license to place upon his unoccupied lots, in the upper part of the city of New York, a few rocks for a short time, the indefiniteness of the period having been rendered definite by the defendant's assurance that he would remove them in the spring. Nothing was paid or asked for this permission, and it was not a contract in any just sense of the term, but merely a license which by its terms expired in the next spring. During the winter, and in the absence and without the knowledge of plaintiff, the defendant covered six of the lots of plaintiff with "huge quantities of rock," some of them 10 or 15 feet long, and piled to the height of 14 to 18 feet. This conduct was a clear abuse of the license, and in excess of its terms, and so much so that if permission had been sought upon a truthful statement of the intention it would undoubtedly have been refused. In the spring the plaintiff, discovering the abuse of his permission, complained bitterly of defendant's conduct, and ordered him to remove the rocks to some other locality. The defendant promised to do so, but did not, and in the face of repeated demands has neglected and omitted to remove the rocks from the land. The court found as matter of law from these facts that the original permission given did not justify what was done either, as it respected the quantity of rock or the time allowed; that after the withdrawal of the permission in the spring, and the demand for the removal of the rock, the defendant was a trespasser, and the trespass was a continuing one which entitled plaintiff to equitable relief; and awarded judgment requiring defendant to remove the rocks before March 15, 1886, unless for good cause shown the time for such removal should be extended by the court.

The sole question upon this appeal is whether the relief granted was within the power of the court, and the contention of the defendant is mainly based upon the proposition that the equitable relief was improper since there was an adequate remedy at law. The plaintiff objects that no such defense was pleaded. If it arises upon the facts stated in the complaint, it can scarcely be said to be new matter required to be stated

in the answer, and I doubt whether, under the present system of pleading, the technical objection is good. It is better, therefore, to consider the defense which is interposed. One who would justify under a license or permission must bring his acts within the terms of the license. He exceeds them at his peril. There is no equity in allowing him to strain them beyond their fair and reasonable interpretation. The finding shows permission asked for "a few stone," described as "a portion" of what defendant was getting from the boulevard. The plaintiff was justified in inferring that for the bulk of his stone the defendant had a place of deposit and only wanted additional room for a small excess,—for a few stone. Under this permission defendant was not justified in covering six lots with heavy boulders to a height of 14 to 18 feet. The thing done was gravely and substantially in excess of the thing granted, and the license averred does not cover or excuse the act. Beyond that the permission extended only to the spring of 1880, and expired at that date. The immediate removal of the stone was then demanded, and from that moment its presence upon plaintiff's lands became a trespass, for which there was no longer license or permission. Such parol license, founded upon no consideration, is revocable at pleasure, even though the licensee may have expended money on the faith of it. *Murdock v. Railroad Co.*, 73 N. Y. 579. And this was a continuing trespass. So long as it lasted it incumbered the lots, prevented their use and occupation by the owner, and interfered with the possibility of a sale. It is now said that the remedy was at law, that the owner could have removed the stone and then recovered of the defendant for the expense incurred. But to what locality could the owner remove them? He could not put them in the street; the defendant presumably had no vacant lands of his own on which to throw the burden; and it would follow that the owner would be obliged to hire some vacant lot or place of deposit, become responsible for the rent, and advance the cost of men and machinery to effect the removal. If any adjudication can be found throwing such burden upon the owner, compelling him to do in advance for the trespasser what the latter is bound to do, I should very much doubt its authority. On the contrary, the law is the other way. *Beach v. Crain*, 2 N. Y. 97. And all the cases which give to the injured party successive actions for the continuance of the wrong are inconsistent with the idea that the injured party must once for all remove it. Such is neither an adequate remedy nor one which the plaintiff was bound to adopt.

But it is further said that he could sue at law for the trespass. That is undoubtedly true. The case of *Uline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. 536, demonstrates upon abundant authority that in such action only

the damages to its date could be recovered, and for the subsequent continuance of the trespass new actions following on in succession would have to be maintained. But in a case like the present, would that be an adequate remedy? In each action the damages could not easily be anything more than the fair rental of the lot. It is difficult to see what other damages could be allowed, not because they would not exist, but because they would be quite uncertain in amount and possibly somewhat speculative in their character. The defendant, therefore, might pay those damages, and continue his occupation, and if there were no other adequate remedy, defiantly continue such occupation, and in spite of his wrong make of himself in effect a tenant who could not be dispossessed. The wrong in every such case is a continued unlawful occupation, and any remedy which does not or may not end it is not adequate to redress the injury or restore the injured party to his rights. On the other hand, such remedy in a case like the present might result to the wrong-doer in something nearly akin to persecution. He is liable to be sued every day, *die de diem*, for the renewed damages following from the continuance of the trespass; and while, ordinarily, there is no sympathy to be wasted on a trespasser, yet such multiplicity of suits should be avoided, and especially under circumstances like those before us. The rocks could not be immediately removed. The courts have observed that peculiarity of the case, and shaped their judgment to give time. It may take a long time, and during the whole of it the defendant would be liable to daily actions. For reasons of this character it has very often been held that while, ordinarily, courts of equity will not wield their power merely to redress a trespass, yet they will interfere under peculiar circumstances, and have often done so where the trespass was a continuing one, and a multiplicity of suits at law was involved in the legal remedy. The doctrine was recognized and the authorities cited in the *Murdock Case*, *supra*, and the rule deemed perfectly settled. That case, and those referred to, it is true, were cases of intrusion where no consent had been given for the entry of the intruder, but whether the trespass

was such from the beginning, or became one after a revocation of the license, can make no difference, as it respects the adequacy of the legal remedy. That is the same in either event. Two cases of the former character were cited in the *Uline Case*. *Bowyer v. Cook*, 4 Man. G. & S. 236; *Holmes v. Wilson*, 10 Adol. & E. 503. In one stumps and stakes had been left on plaintiff's land and in the other buttresses to support a road; in each an action of trespass had been brought, and damages recovered and paid; and in each, after a new notice to remove the obstruction, a further action of trespass was brought and sustained,—so that, as I have said, the legal remedy is identical, however the trespass originated.

It is a general rule that a court of equity will act in such cases only after the plaintiff's right has been established at law; but that rule has its exceptions. *Troy & B. R. Co. v. Boston, H. T. & W. Ry. Co.*, 86 N. Y. 128. Where the facts are in doubt, and the right not clear, such, undoubtedly, would be a just basis of decision, though the modern system of trying equity cases makes the rule less important. Where, as in an intrusion by railroad companies whose occupation threatens to be continuous, the injury partakes of that character, an action at law to establish the right has not been required. Indeed, I am inclined to deem it more a rule of discretion than of jurisdiction. In *Avery v. Railroad Co.*, 106 N. Y. 142, 12 N. E. 619, to which we have been referred since the argument, we were disposed to sustain a mandatory injunction requiring defendant to remove so much of a fence as obstructed plaintiff's right of way, although the obstruction was not a nuisance, but an invasion of a private right. In that case the equitable remedy was not challenged by either counsel or the court, and evidently stood upon the grounds here invoked; those of a continuing trespass, the remedy for which at law would be inadequate, and involve repeated actions by the injured party for damages daily occurring.

These views of the case enable us to support the judgment rendered. It should be affirmed, with costs.

All concur, except RUGER, C. J., not voting.

**WILSON v. CITY OF MINERAL
POINT et al.**

(39 Wis. 160.)

Supreme Court of Wisconsin. Aug. Term, 1875.

Bill for an injunction. A demurrer to the bill was overruled, and the defendants appealed.

M. M. Cothren, for appellants. Wilson & Jones, for respondent.

LYON, J. It is sufficiently averred in the complaint that the defendant Weidenfeller, acting under the authority and orders of the regularly constituted authorities of the defendant city, is about to destroy fences, fruit and ornamental trees and shrubbery standing and growing upon premises owned by the plaintiff and occupied by him as his residence and homestead; that the pretense for so doing is that such fences, trees and shrubbery are within the limits of public streets; but that such pretense is unfounded in fact, and the defendants have no lawful authority to do the threatened acts.

On the facts averred it is clear that the plaintiff is entitled to an injunction as prayed in the complaint. It is quite true that the courts will not interfere by injunction to restrain the committing of a mere trespass, for which, if committed, the recovery of damages in an action at law would be an adequate remedy. It is also true that the courts will interfere by injunction and prevent a threatened injury, which, if inflicted, will be irreparable.

An injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated therefor in damages, or when the damages which may result

therefrom cannot be measured by any certain pecuniary standard. High, Inj. § 460, and cases cited. It is said by Judge Story that: "If the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly, indeed, courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses. But now there is not the slightest hesitation, if the acts done or threatened to be done to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future." 2 Story, Eq. Jur. § 928.

That the threatened injuries which this action was brought to prevent, would, if inflicted, be irreparable, in the legal acceptance of that term, and would greatly impair the just enjoyment of the plaintiff's property, is perfectly well settled. No one will seriously contend that a money compensation is an adequate remedy for the loss of the trees and shrubbery which the complaint avers the defendants threaten to destroy; and it would be a denial of justice were the courts to refuse the plaintiff the protection he asks, and thus permit his home to be permanently despoiled. See High, Inj. § 467, and cases cited.

We think the complaint states a cause of action against both defendants, and that there is no misjoinder of causes of action, and no defect of parties. We do not decide whether or not the complaint states facts sufficient to entitle the plaintiff to recover damages, but only, that if the averments therein contained are true, he is entitled to the injunction prayed.

Order affirmed.

GARDNER v. TRUSTEES OF VILLAGE OF NEWBURGH et al.

(2 Johns. Ch. 162.)

Chancery. Aug. 22, 1816.

The bill, which was for an injunction, stated, that the plaintiff is owner of a farm, in the village of Newburgh, through which a stream of water has, from time immemorial, run, having its source from a spring in the adjoining farm of the defendant, Hasbrouck, and after entering the plaintiff's land, continues its whole course through his farm until it empties into the Hudson river. That this stream greatly fertilizes his fields, and, running near his house, serves for watering his cattle, and for various domestic and economical purposes. That it supplies water to a brick-yard on the farm of the plaintiff, where most of the bricks used in Newburgh are made; it also supplies a large distillery erected by him at great expense, and a churning mill, and water for a mill-seat, where the plaintiff is about to erect a mill for grinding plaster of paris. That the trustees of the village of Newburgh, the defendants, by false representations, obtained an act of the legislature, passed the 27th of March, 1809 (Sess. 32, ch. 119, vol. 5, Webst. Ed. 489), to enable the said trustees to supply the inhabitants of the village with pure and wholesome water. That the trustees applied to the plaintiff for leave to divert the stream, offering him a trifling and very inadequate compensation, which he refused. That the said trustees having obtained leave from the defendant, Hasbrouck, the owner of the spring, to use and divert the water, or a part thereof, that is, a stream one inch and a quarter in diameter, taken from a great elevation, have commenced a conduit, and threaten to divert the stream, or a great part thereof, from the plaintiff's farm. That the plaintiff is apprehensive that if this is done, there will not, in a dry season, be water sufficient even for his cattle, &c. The plaintiff, therefore, prayed an injunction to prevent the defendants from diverting the water, &c. The bill was sworn to, and the plaintiff produced several affidavits, which stated that the stream was not more than sufficient for the distillery, brick-yard, &c., of the plaintiff, and if diverted through a pipe, or tube, of the proposed diameter, would greatly injure, if not render the works useless. One of the affidavits stated, that the whole stream would pass through a tube of one inch diameter, with a head of five feet.

Mr. Burr and J. V. N. Yates, for plaintiff.

THE CHANCELLOR. The statute under which the trustees of the village of Newburgh are proceeding (Sess. 32, c. 119), makes adequate provision for the party injured by the laying of the conduits through his land, and also affords security to the owner of the spring, or springs, from whence the water is to be taken. But there is no provision for

making compensation to the plaintiff, through whose land the water issuing from the spring has been accustomed to flow. The bill charges, that the trustees are preparing to divert from the plaintiff's land, the whole, or the most part of the stream, for the purpose of supplying the village. The plaintiff's right to the use of the water is as valid in law, and as useful to him as the rights of others who are indemnified or protected by the statute; and he ought not to be deprived of it, and we cannot suppose it was intended he should be deprived of it, without his consent, or without making him a just compensation. The act is, unintentionally, defective, in not providing for his case, and it ought not to be enforced, and it was not intended to be enforced, until such provision should be made.

It is a clear principle in law, that the owner of land is entitled to the use of a stream of water which has been accustomed, from time immemorial, to flow through it, and the law gives him ample remedy for the violation of this right. To divert or obstruct a water course is a private nuisance; and the books are full of cases and decisions asserting the right and affording the remedy. Fitzh. Nat. Brev. 184; Moore v. Browne, Dyer, 319, b; Lutterel's Case, 4 Coke, 86; Glynn v. Nichols, Comb. 48, 2 Show. 507; Prickman v. Trip, Comb. 231.

The court of chancery has also a concurrent jurisdiction, by injunction, equally clear and well established in these cases of private nuisance. Without noticing nuisances arising from other causes, we have many cases of the application of equity powers on this very subject of diverting streams. In Finch v. Resbridge, 2 Vern. 390, the Lord Keeper held, that after a long enjoyment of a water course running to a house and garden, through the ground of another, a right was to be presumed, unless disproved by the other side, and the plaintiff was quieted in his enjoyment, by injunction. So, again, in Bush v. Western Prec. Ch. 530, a plaintiff who had been in possession, for a long time, of a water course, was quieted by injunction, against the interruption of the defendant, who had diverted it, though the plaintiff had not established his right at law, and the court said such bills were usual. These cases show the ancient and established jurisdiction of this court; and the foundation of that jurisdiction is the necessity of a preventive remedy when great and immediate mischief, or material injury would arise to the comfort and useful enjoyment of property. The interference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which, upon just and equitable grounds, ought to be prevented. Anon., 1 Vern. 120; East India Co. v. Sandys, Id. 127; Hills v. University of Oxford, Id. 275; Anon., 1 Ves. 476; Anon., 2 Ves. 414; Whitchurch v. Hide, 2 Atk. 391, 2 Ves. 453; Attorney General v. Nichol, 16 Ves. 338.

In the application of the general doctrines

of the court to this case, it appears to me to be proper and necessary that the preventive remedy be applied. There is no need, from what at present appears, of sending the plaintiff to law to have his title first established. His right to the use of the stream is one which has been immemorially enjoyed, and of which he is now in the actual possession. The trustees set up no other right to the stream (assuming, for the present, the charges in the bill,) than what is derived from the authority of the statute; and if they are suffered to proceed and divert the stream, or the most essential part of it, the plaintiff would receive immediate and great injury, by the suspension of all those works on his land which are set in operation by the water. In addition to this, he will lose the comfort and use of the stream for farming and domestic purposes; and, besides, it must be painful to any one to be deprived, at once, of the enjoyment of a stream which he has been accustomed always to see flowing by the door of his dwelling. A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be dispossessed "but by lawful judgment of his peers, or by due process of law." This is an ancient and fundamental maxim of common right to be found in magna charta, and which the legislature has incorporated into an act declaratory of the rights of the citizens of this state. Laws, Sess. 10, c. 1.

I have intimated that the statute does not deprive the plaintiff of the use of the stream, until recompense be made. He would be entitled to his action at law for the interruption of his right, and all his remedies at law, and in this court, remain equally in force. But I am not to be understood as denying a competent power in the legislature to take private property for necessary or useful public purposes; and, perhaps, even for the purposes specified in the act on which this case arises. But to render the exercise of the power valid, a fair compensation must, in all cases, be previously made to the individuals affected, under some equitable assessment to be provided by law. This is a necessary qualification accompanying the exercise of legislative power, in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice.

Grotius (*De Jur. B. & P.*, bk. 8, c. 14, § 7), Puffendorf (*De Jur. Nat. et Gent.* bk. 8, c. 5, § 7), and Bynkershoek (*Quæst. Jur. Pub.* bk. 2, c. 15), when speaking of the eminent domain of the sovereign, admit that private property may be taken for public uses, when public necessity or utility require it; but they all lay it down as a clear principle of natural equity, that the individual whose property is thus sacrificed, must be indemni-

fied. The last of those jurists insists, that private property cannot be taken, on any terms, without consent of the owner, for purposes of public ornament or pleasure; and, he mentions an instance in which the Roman senate refused to allow the prætors to carry an aqueduct through the farm of an individual, against his consent, when intended merely for ornament. The sense and practice of the English government are equally explicit on this point. Private property cannot be violated in any case, or by any set of men, or for any public purpose, without the interposition of the legislature. And how does the legislature interpose and compel? "Not," says Blackstone (1 Bl. Comm. p. 139) "by absolutely stripping the subject of his property, in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price, and even this is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform."

I may go further, and show that this inviolability of private property, even as it respects the acts and the wants of the state, unless a just indemnity be afforded, has excited so much interest, and been deemed of such importance, that it has frequently been made the subject of an express and fundamental article of right in the constitution of government. Such an article is to be seen in the bill of rights annexed to the constitutions of the states of Pennsylvania, Delaware, and Ohio; and it has been incorporated in some of the written constitutions adopted in Europe, (*Constitutional charter of Lewis XVIII. and the ephemeral, but very elaborately drawn, constitution de la Republique Francaise of 1795.*) But what is of higher authority, and is absolutely decisive of the sense of the people of this country, it is made a part of the constitution of the United States, "that private property shall not be taken for public use, without just compensation." I feel myself, therefore, not only authorized, but bound to conclude, that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property; and I am persuaded that the legislature never intended, by the act in question, to violate or interfere with this great and sacred principle of private right. This is evident from the care which this act bestows on the rights of the owners of the spring, and of the lands through which the conduits are to pass. These are the only cases in which the legislature contemplated or intended that the act could or should interfere with private right, and in these cases due provision is made for its protection, or for compensation. There is

no reason why the rights of the plaintiff should not have the same protection as the rights of his neighbours, and the necessity of a provision for his case could not have occurred, or it, doubtless, would have been inserted. Until, then, some provision be made for affording him compensation, it would be unjust, and contrary to the first principles of government, and equally contrary to the intention of this statute, to take from the plaintiff his undoubted and prescriptive right to the use and enjoyment of the stream of water.

In the case of *Agar v. Canal Co.*, Cooper,

77, an injunction was granted, on filing a bill supported by affidavit, restraining defendants acting under a private act of parliament, from cutting a canal through the land of the plaintiff, in a line and mode not supposed to be within the authority of the statute.

I shall, accordingly, upon the facts charged in the bill, and supported by affidavits, as a measure immediately necessary to prevent impending injury, allow the injunction, and wait for the answer, to see whether the merits of the case will be varied.

Injunction granted.

SHERRY v. PERKINS et al.

(17 N. E. 307, 147 Mass. 212.)

Supreme Judicial Court of Massachusetts.
Essex. June 19, 1888.

Report from supreme judicial court, Essex county; C. Allen, Judge.

Bill in equity, by Patrick P. Sherry against Charles E. Perkins and Charles H. Leach, for an injunction to restrain the defendants, respectively president and secretary of the Lasters' Protective Union, from causing to be carried in front of the plaintiff's shoe factory a banner on which was the following inscription: "Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U.," and also a banner on which was the following: "Lasters on a strike; all lasters are requested to keep away from P. P. Sherry's until the present trouble is settled. Per order L. P. U." The court, at the trial, found as facts that members of the Lasters' Protective Union entered into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiff, as lasters, from continuing in such employment, and in like manner to prevent other persons from entering into such employment as lasters; that the defendants participated in the scheme; that the use of the banner was a part of the scheme, and its use an injury to the plaintiff in his business and property. The court, after finding the facts, reported the case to the full court.

H. F. Hurlburt, R. Lund, and T. M. Osborne, for plaintiff.

The principal question in this case is whether this court, as a court of equity, has jurisdiction to enjoin the acts complained of, upon the findings of facts reported by the justice who heard the case. The carrying of a banner or placard before a person's place of business, which injures such person in his business and property, is a private nuisance. An authority directly in point is *Gilbert v. Mickle*, 4 Sandf. Ch. 357, in which it was held that a placard paraded or posted in a public street, before the door of an auctioneer, cautioning strangers to beware of mock auctions, constituted a private nuisance remediable by injunction. The injunction in that case was refused upon grounds not affecting the jurisdiction of the court. If the highway is obstructed by crowds of people in consequence of the banner's being carried as described in the bill, such carrying of the banner is a public nuisance. *Rex v. Cross*, 3 Camp. 224; *Rex v. Carlile*, 6 Car. & P. 636; *Reg. v. Grey*, 4 Fost. & F. 73. But as the damage to the business and property of the plaintiffs, found in the report, is special to the plaintiffs, they are entitled to an injunction. *Walker v. Brewster*, L. R. 5 Eq. 25; *Stetson v. Faxon*, 19 Pick. 147; *Soltau v. De Held*, 2 Sim. (N. S.) 133. The entire scheme, "by threats and intimidation, to prevent persons in the employment of the

plaintiffs, as lasters, from continuing in such employment, and in like manner to prevent other persons from entering into such employment as lasters," is a private nuisance to the plaintiffs. *Wood, Nuis.* § 141, and cases cited. Among the things which have been held to be private nuisances are a market illegally conducted within the limits of an established market. (*Yard v. Ford*, 2 Saund. 172;) a ferry carried on, without right, near a duly-licensed ferry, (*Stark v. McGowen*, 1 Nott. & McC. 387;) the use of a toll-bridge inside the limits of a lawfully established toll-bridge, (*Bridge Co. v. Lewis*, 63 Barb. 111.) See 1 Com. Dig. "Action on the Case for Nuisance," C. The scheme in which the defendants are found to have participated, has the same elements of injury as these cases of nuisance. It is illegal, injurious to property, and continuous in character. See *Railroad Co. v. Church*, 108 U. S. 317, 2 Sup. Ct. Rep. 719. This court has full power to restrain a private nuisance by injunction, both under the special provision of the statute, (Pub. St. c. 151, § 2, cl. 9,) and by virtue of its general equity powers conferred by the statute of 1877, c. 178, which is embodied in Pub. St. c. 151, § 4. The jurisdiction in equity now possessed by this court is not limited by any restriction contained in the last clause of Gen. St. c. 113, § 2, but is in all respects as full as that of the English court of chancery. 1 Pom. Eq. Jur. §§ 311, 312. In respect to private nuisances, the English court of chancery has from early times exercised the right to restrain by injunction. This is not limited to cases in which there is no redress at law. Indeed, the ability to recover substantial damages at law has been declared to give the right to ask for an injunction against the continuance of the nuisance. Lord Romilly, M. R., in *Crump v. Lambert*, L. R. 3 Eq. 409, 412; 2 Story, Eq. Jur. § 925 et seq.; 1 Pom. Eq. Jur. § 252; 3 Pom. Eq. Jur. § 1350; *Emperor v. Day*, 3 De Gex, F. & J. 240, 241, (Lord Campbell.) The scheme in which the defendants participated was plainly illegal and criminal, both under the statute and by common law. Pub. St. c. 74, § 2; *Reg. v. Druitt*, 10 Cox, Crim. Cas. 592; *Com. v. Hunt*, 4 Metc. 111; *Com. v. Dyer*, 128 Mass. 70. But the illegality of the nuisance, or its criminal character, does not prevent the court from enjoining it. *Gilbert v. Mickle*, 4 Sandf. Ch. 358, Lord Cairns in *Assurance Co. v. Knott*, L. R. 10 Ch. 144. The jurisdiction of courts of chancery over private nuisances is concurrent with that of courts of law. *Fisk v. Wilber*, 7 Barb. 395. This court has repeatedly exercised its jurisdiction to restrain private nuisances. *Cadigan v. Brown*, 120 Mass. 493; *Mills v. Mason*, Id. 244; *Woodward v. Worcester*, 121 Mass. 245; *Tucker v. Howard*, 122 Mass. 529; *Davis v. Sawyer*, 133 Mass. 289. But, whatever the injury complained of may be called, there is abundant authority for the intervention of a court of equity to prevent injury to property by unlawful or forcible acts, when the injury

is continuous. *Macaulay v. Shackell*, 1 Bligh, (N. S.) 96, 127; *Lord Eldon in Gee v. Pritchard*, 2 Swanst. 402, 413; *Emperor v. Day*, 3 De Gex, F. & J. 217, 240, 241, 253; *Spinning Co. v. Riley*, L. R. 6 Eq. 551, 37 L. J. Ch. 889, and 19 Law T. (N. S.) 64. The various cases in which the unauthorized use of the plaintiff's name has been restrained, go upon the principle of the injury to property involved. *Routh v. Webster*, 10 Beav. 561; *James v. James*, L. R. 13 Eq. 421; *Hookham v. Pottage*, L. R. 8 Ch. 91; 3 Pom. Eq. Jur. § 1358. The case of *Spinning Co. v. Riley*, supra, is almost precisely parallel to the present case, except that in the present case the placards are paraded in a manner which makes them more distinctly a nuisance than if they were merely posted up. See, also, *Dixon v. Holden*, L. R. 7 Eq. 488; *Assurance Co. v. Knott*, L. R. 10 Ch. 142; *Mulkern v. Ward*, L. R. 13 Eq. 619; *Food Co. v. Massam*, 6 Ch. Div. 582. In November, 1874, the judicature act went into effect, and in a decision under the act, in the case of *Saxby v. Easterbrook*, 3 C. P. Div. 339, it was held that, after the jury had found the fact of libel, an injunction would issue against the continuance of the libel. *Thomas v. Williams*, 14 Ch. Div. 864, (1880.) *Fry, J.*; *Loog v. Bean*, 26 Ch. Div. 306. In this court the case of *Spinning Co. v. Riley*, was referred to in the case of *Diatite Co. v. Manufacturing Co.*, 114 Mass. 69, and the dissent there expressed to the views of *Malins, V. C.*, must be understood as applicable only so far as the language of the former case applies to the question of libel, since the question of libel did not arise in that case. The same is true of the reference to the same case in *Partridge v. Hood*, 120 Mass. 403, 406. See 3 Pom. Eq. Jur. § 1358. As to private nuisance, *Bridge v. Bridge*, 6 Pick. 376; 2 Story, Eq. Jur. §§ 925-928. As to the criminal character of the acts complained of: The fact that the nuisance is indictable as a nuisance does not prevent the court from enjoining its continuance. 1 High, Inj. §§ 745, 752, and cases cited; *Attorney General v. Hunter*, 1 Dev. Eq. 12; *People v. St. Louis*, 5 Gilman, 351. The English judicature act did not enlarge the jurisdiction of courts of equity. *Day v. Brownrigg*, 10 Ch. Div. 294; *Gaskin v. Balls*, 13 Ch. Div. 324. As to differences between this court, as a court of equity, and the English chancery court before 1874, see remarks of *Wells, J.*, in *Milkman v. Ordway*, 106 Mass. 232, 255. The acts are not libelous, but calculated to injure trade by direct interference. See *Bridge v. Bridge*, 6 Pick. 398; *Carew v. Rutherford*, 106 Mass. 1, 15. As to the parties against whom the injunction should issue, inasmuch as the *Lasters' Protective Union* is a voluntary association, and all its members cannot be ascertained by the plaintiff, the same rule applies which makes it proper for a few individuals to sue in behalf of such an organization represented by and associated with the defendants named in the bill. See *Birmingham v. Gallagher*, 112 Mass. 190; *Snow v. Wheeler*,

113 Mass. 179; 1 *Daniell*, Ch. Pr. (4th Ed.) 272, note 5.

John R. Baldwin, for defendants.

The carrying of the banner named in the report, in the manner stated in the bill of complaint, is not a nuisance. If the words printed on the banner are libelous, the complainants have an adequate remedy at law. Equity will not restrain a libel. The manner of the publication of the words on the banner cannot be restrained. The case of *Spinning Co. v. Riley*, L. R. 6 Eq. 551, is not a precedent that establishes the injunctive jurisdiction. That case has been expressly overruled by *Assurance Co. v. Knott*, L. R. 10 Ch. 145, and unfavorably noticed in *Diatite Co. v. Manufacturing Co.*, 114 Mass. 69. The prayer of the bill is so broad that no decree comporting with the terms thereof would be equitable.

ALLEN, J. The case finds that the defendants entered, with others, into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiff from continuing in such employment, and to prevent others from entering into such employment; that the banners, with their inscriptions, were used by the defendants as part of the scheme, and that the plaintiff was thereby injured in his business and property. The act of displaying banners with devices, as a means of threats and intimidation, to prevent persons from entering into or continuing in the employment of the plaintiff, was injurious to the plaintiff, and illegal at common law and by statute. Pub. St. c. 74, § 2; *Walker v. Cronin*, 107 Mass. 555. We think that the plaintiff is not restricted to his remedy by action at law, but is entitled to relief by injunction. The acts and the injury were continuous. The banners were used more than three months before the filing of the plaintiff's bill, and continued to be used at the time of the hearing. The injury was to the plaintiff's business, and adequate remedy could not be given by damages in a suit at law. The wrong is not as argued by the defendants' counsel, a libel upon the plaintiff's business. It is not found that the inscriptions upon the banners were false, nor do they appear to have been in disparagement of the plaintiff's business. The scheme, in pursuance of which the banners were displayed and maintained, was to injure the plaintiff's business, not by defaming it to the public, but by intimidating workmen, so as to deter them from keeping or making engagements with the plaintiff. The banner was a standing menace to all who were or wished to be in the employment of the plaintiff, to deter them from entering the plaintiff's premises. Maintaining it was a continuous, unlawful act, injurious to the plaintiff's business and property, and was a nuisance, such as a court of equity will grant relief against. *Gilbert v. Mickle*, 4 Sandf. Ch. 357; *Spinning Co. v. Riley*, L. R. 6 Eq. 551. *Diatite Co. v. Manufacturing Co.*, 114 Mass. 69, was a case of defam-

ation only. Some of the language in *Spinning Co. v. Riley* has been criticised, but the decision has not been overruled. See *Diatite Co. v. Manufacturing Co.*, *ubi supra*; *Assurance Co. v. Knott*, L. R. 10 Ch. 142; *Saxby v. Easterbrook*, 3 C. P. Div. 339; *Loog v. Bean*, 26

Ch. Div. 306; *Food Co. v. Massam*, 14 Ch. Div. 763; *Thomas v. Williams*, Id. 864; *Hill v. Davies*, 21 Ch. Div. 778; *Day v. Brownrigg*, 10 Ch. Div. 294; *Gaskin v. Balls*, 13 Ch. Div. 324.

Decree for plaintiff.

VEGELAHN v. GUNTNER et al.

(44 N. E. 1077, 167 Mass. 92.)

Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 27, 1896.

Report from supreme judicial court, Suffolk county; Oliver Wendell Holmes, Judge.

Bill by Frederick O. Vegelahn against George M. Guntner and others for an injunction. An injunction issued pendente lite restraining the respondents from interfering with the plaintiff's business by patrolling the sidewalk in front of or in the vicinity of the premises occupied by him, for the purpose of preventing any person in his employment, or desirous of entering the same, from entering it or continuing in it; or by obstructing or interfering with any persons in entering or leaving the plaintiff's said premises; or by intimidating any person in the employment of the plaintiff, or desirous of entering the same; or by any scheme or conspiracy for the purpose of annoying, hindering, interfering with, or preventing any person in the employment of the plaintiff, or desirous of entering the same, from entering it, or from continuing therein. This injunction was approved.

Hale & Dickerman, for plaintiff. Thomas H. Russell and Arthur H. Russell, for respondents.

ALLEN, J. The principal question in this case is whether the defendants should be enjoined against maintaining the patrol. The report shows that, following upon a strike of the plaintiff's workmen, the defendants conspired to prevent him from getting workmen, and thereby to prevent him from carrying on his business, unless and until he should adopt a certain schedule of prices. The means adopted were persuasion and social pressure, threats of personal injury or unlawful harm conveyed to persons employed or seeking employment, and a patrol of two men in front of the plaintiff's factory, maintained from half past 6 in the morning till half past 5 in the afternoon, on one of the busiest streets of Boston. The number of men was greater at times, and at times showed some little disposition to stop the plaintiff's door. The patrol proper at times went further than simple advice, not obtruded beyond the point where the other person was willing to listen; and it was found that the patrol would probably be continued if not enjoined. There was also some evidence of persuasion to break existing contracts. The patrol was maintained as one of the means of carrying out the defendants' plan, and it was used in combination with social pressure, threats of personal injury or unlawful harm, and persuasion to break existing contracts. It was thus one means of intimidation, indirectly to the plaintiff, and directly to persons actually employed, or seeking to be employed, by the plaintiff, and of rendering such employment unpleasant or intolerable to such persons. Such an act is an unlawful interference with the rights both of employer and of employed. An employer has

a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon, and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the constitution itself. *Conn. v. Perry*, 155 Mass. 117, 28 N. E. 1126; *People v. Gillson*, 109 N. Y. 3-9, 17 N. E. 343; *Braceville Coal Co. v. People*, 147 Ill. 71, 35 N. E. 62; *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454; *Low v. Printing Co.* (Neb.) 59 N. W. 362. No one can lawfully interfere by force or intimidation to prevent employers or persons employed or wishing to be employed from the exercise of these rights. It is in Massachusetts, as in some other states, even made a criminal offense for one, by intimidation or force, to prevent, or seek to prevent, a person from entering into or continuing in the employment of a person or corporation. *Pub. St. c. 74, § 2*. Intimidation is not limited to threats of violence or of physical injury to person or property. It has a broader significance, and there also may be a moral intimidation which is illegal. Patrolling or picketing, under the circumstances stated in the report, has elements of intimidation like those which were found to exist in *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307. It was declared to be unlawful in *Reg. v. Druitt*, 10 Cox, Cr. Cas. 592; *Reg. v. Hibbert*, 13 Cox, Cr. Cas. 82; *Reg. v. Bauld*, *Id.* 282. It was assumed to be unlawful in *Trollope v. Trader's Fed.* (1875) 11 L. T. 228, though in that case the pickets were withdrawn before the bringing of the bill. The patrol was an unlawful interference both with the plaintiff and with the workmen, within the principle of many cases; and, when instituted for the purpose of interfering with his business, it became a private nuisance. See *Carew v. Rutherford*, 106 Mass. 1; *Walker v. Cronin*, 107 Mass. 555; *Barr v. Trades Council* (N. J. Ch.) 30 Atl. 881; *Murdock v. Walker*, 152 Pa. St. 595, 25 Atl. 492; *China Co. v. Brown*, 164 Pa. St. 449, 30 Atl. 261; *Coeur D'Alene Consol. & Min. Co. v. Miners' Union of Wardner*, 51 Fed. 260; *Temperton v. Russell* [1893] 1 Q. B. 715; *Floyd v. Jackson*, [1895] 11 L. T. 276; *Wright v. Hennessey*, 52 Alb. Law J. 104 (a case before Baron Pollock); *Judge v. Bennett*, 36 Wkly. Rep. 103; *Lyons v. Wilkins* [1896] 1 Ch. 811.

The defendants contend that these acts were justifiable, because they were only seeking to secure better wages for themselves, by compelling the plaintiff to accept their schedule of wages. This motive or purpose does not justify maintaining a patrol in front of the plaintiff's premises, as a means of carrying out their conspiracy. A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby. But a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allow-

able competition, and is unlawful. Various decided cases fall within the former class; for example: *Worthington v. Waring*, 157 Mass. 421, 32 N. E. 744; *Snow v. Wheeler*, 113 Mass. 179; *Bowen v. Matheson*, 14 Allen, 499; *Com. v. Hunt*, 4 Metc. (Mass.) 111; *Heywood v. Tillson*, 75 Me. 225; *Cote v. Murphy*, 159 Pa. St. 420, 28 Atl. 190; *Bohn Manuf'g Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119; *Steamship Co. v. McGregor* [1892] App. Cas. 25; *Curran v. Treleaven* [1891] 2 Q. B. 545, 561. The present case falls within the latter class.

Nor does the fact that the defendants' acts might subject them to an indictment prevent a court of equity from issuing an injunction. It is true that, ordinarily, a court of equity will decline to issue an injunction to restrain the commission of a crime; but a continuing injury to property or business may be enjoined, although it may also be punishable as a nuisance or other crime. *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307; *In re Debs*, 158 U. S. 564, 593, 599, 15 Sup. Ct. 900; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 329, 2 Sup. Ct. 719; *Cranford v. Tyrrell*, 128 N. Y. 341, 344, 28 N. E. 514; *Gilbert v. Mickle*, 4 Sandf. Ch. 357; *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 126, 4 South. 106; *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310; *Toledo, A., A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 744; *Emperor of Austria v. Day*, 3 De Gex, F. & J. 217, 239, 240, 253; *Hermann Loog v. Bean*, 26 Ch. Div. 306, 314, 316, 317; *Monson v. Tusaud* [1894] 1 Q. B. 671, 689, 690, 698.

A question is also presented whether the court should enjoin such interference with persons in the employment of the plaintiff who are not bound by contract to remain with him, or with persons who are not under any existing contract, but who are seeking or intending to enter into his employment. A conspiracy to interfere with the plaintiff's business by means of threats and intimidation, and by maintaining a patrol in front of his premises, in order to prevent persons from entering his employment, or in order to prevent persons who are in his employment from continuing therein, is unlawful, even though such persons are not bound by contract to enter into or to continue in his employment; and the injunction should not be so limited as to relate only to persons who are bound by existing contracts. *Walker v. Cronin*, 107 Mass. 555, 565; *Carew v. Rutherford*, 106 Mass. 1; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307; *Temperton v. Russell* [1893] 1 Q. B. 715, 728, 731; *Flood v. Jackson* [1895] 11 L. T. 276. We therefore think that the injunction should be in the form as originally issued. So ordered.

FIELD, C. J. (dissenting). The practice of issuing injunctions in cases of this kind is of very recent origin. One of the earliest authorities in the United States for enjoining, in equity, acts somewhat like those alleged against the defendants in the present case, is

Sherry v. Perkins (decided in 1888) 147 Mass. 212, 17 N. E. 307. It was found as a fact in that case that the defendants entered into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiffs as lasters from continuing in such employment, and, in like manner, to prevent other persons from entering into such employment as lasters; that the use of the banners was a part of the scheme; that the first banner was carried from January 8, 1887, to March 22, 1887, and the second banner from March 22, 1887, to the time of the hearing; and that "the plaintiffs have been and are injured in their business and property thereby." The full court say: "The act of displaying banners by devices, as a means of threats and intimidation to prevent persons from entering into or continuing in the employment of the plaintiffs, was injurious to the plaintiffs, and illegal at common law and by statute. Pub. St. c. 74, § 2; *Walker v. Cronin*, 107 Mass. 555." "The banner was a standing menace to all who were or wished to be in the employment of the plaintiffs, to deter them from entering the plaintiffs' premises. Maintaining it was a continuous unlawful act, injurious to the plaintiffs' business and property, and was a nuisance such as a court of equity will grant relief against. *Gilbert v. Mickle*, 4 Sandf. Ch. 357; *Spinning Co. v. Riley*, L. R. 6 Eq. 551." *Gilbert v. Mickle*, one of the authorities cited in *Sherry v. Perkins*, was a suit in equity by an auctioneer against the mayor of the city of New York to restrain him and those acting under him from parading, placing, or keeping before the plaintiff's auction rooms a placard as follows: "Strangers, beware of mock auctions." A temporary injunction was issued, but, on hearing, it was dissolved. Notwithstanding what is said in the opinion of the vice chancellor, his conclusion is as follows: "I am satisfied that it is my duty to leave the party to his remedy by an action at law." *Spinning Co. v. Riley* is a well-known decision of Vice Chancellor Malins. The bill prayed that the defendants might be "restrained from printing or publishing any placards or advertisements similar to those already set forth." The defendants had caused to be posted on the walls and other public places in the neighborhood of the plaintiff's works, and caused to be printed in certain newspapers, a notice as follows: "Wanted all well-wishers to the Operative Cotton Spinning, &c., Association not to trouble or cause any annoyance to the Springhead Spinning Company lees, by knocking at the door of their office, until the dispute between them and the self-actor minders is finally terminated. By special order. Carrodus, 32 Greaves Street, Oldham." The case was heard upon demurrers. The vice chancellor says: "For the reasons I have stated, I overruled these demurrers, because the bill states, and the demurrers admit, acts amounting to the destruction of property." Of this case, the court, in *Sherry v. Perkins*, say: "Some

of the language in *Spinning Co. v. Riley* has been criticised, but the decision has not been overruled." The cases are there cited in which that decision has been doubted or criticised. Of that decision, this court, in *Boston Diatite Co. v. Florence Manuf'g Co.*, 114 Mass. 69, say: "The opinions of Vice Chancellor Malins in *Spinning Co. v. Riley*, L. R. 6 Eq. 551, in *Dixon v. Holden*, L. R. 7 Eq. 488, and in *Rollins v. Hinks*, L. R. 13 Eq. 355, appear to us to be so inconsistent with these authorities [authorities which the court had cited], and with well-settled principles, that it would be superfluous to consider whether, upon the facts before him, his decisions can be supported." Much the same language was used by the justices in *Assurance Co. v. Knott*, 10 Ch. App. 142, a part of the headnote of which is: "*Dixon v. Holden* and *Spinning Co. v. Riley* overruled." In *Temperton v. Russell* [1893] 1 Q. B. 435, 438, Lindley, L. J., says of the case of *Spinning Co. v. Riley* that it was overruled by the court of appeal in *Assurance Co. v. Knott*. Since the judicature act, however, the courts of England have interfered to restrain, by injunction, the publication or continued publication of libelous statements, particularly those injuriously affecting the business or property of another, as well as injunctions similar to that in the present case. St. 36 & 37 Vict. c. 66, § 25, subds. 5, 8; *Monson v. Tus-saud* [1894] 1 Q. B. 671, 672; *Lyons v. Wilkins* [1896] 1 Ch. 811, 827. But, in the absence of any power given by statute, the jurisdiction of a court of equity, having only the powers of the English high court of chancery, does not, I think, extend to enjoining acts like those complained of in the case at bar, unless they amount to a destruction or threatened destruction of property, or an irreparable injury to it. In England the rights of employers and employed with reference to strikes, boycotts, and other similar movements have not, in general, been left to be worked out by the courts from common-law principles, but statutes, from time to time, have been passed defining what may and what may not be permitted. The administration of these statutes largely has been through the criminal courts.

As a means of prevention, the remedy given by Pub. St. c. 74, § 2, would seem to be adequate where the section is applicable, unless the destruction of, or an irreparable injury to, property is threatened; and there is the additional remedy of an indictment for a criminal conspiracy at common law, if the acts of the defendant amount to that. If the acts complained of do not amount to intimidation or force, it is not in all respects clear what are lawful and what are not lawful at common law. It seems to be established in this commonwealth that, intentionally and without justifiable cause, to entice, by persuasion, a workman to break an existing contract with his employer, and to leave his employment, is actionable, whether done with actual malice or not. *Walker v. Cronin*, 107

Mass. 555. What constitutes justifiable cause remains in some respects undetermined. Whether to persuade a person who is free to choose his employment not to enter into the employment of another person gives a cause of action to such other person, by some courts has been said to depend upon the question of actual malice; and, in considering this question of malice, it is said that it is important to determine whether the defendant has any lawful interest of his own in preventing the employment, such as that of competition in business. For myself, I have been unable to see how malice is necessarily decisive. To persuade one man not to enter into the employment of another, by telling the truth to him about such other person and his business, I am not convinced is actionable at common law, whatever the motive may be. Such persuasion, when accompanied by falsehood about such other person or his business, may be actionable, unless the occasion of making the statements is privileged; and then the question of actual malice may be important. This, I think, is the effect of the decision in *Rice v. Albee*, 164 Mass. 88, 41 N. E. 122. When one man orally advises another not to enter into a third person's employment, it would, I think, be a dangerous principle to leave his liability to be determined by a jury upon the question of his malice or want of malice, except in those cases where the words spoken were false. In the present case, if the establishment of a patrol is using intimidation or force, within the meaning of our statute, it is illegal and criminal. If it does not amount to intimidation or force, but is carried to such a degree as to interfere with the use by the plaintiff of his property, it may be illegal and actionable. But something more is necessary to justify issuing an injunction. If it is in violation of any ordinance of the city regulating the use of streets, there may be a prosecution for that, and the police can enforce the ordinance; but if it is merely a peaceful mode of finding out the persons who intend to enter the plaintiff's premises to apply for work, and of informing them of the actual facts of the case, in order to induce them not to enter the plaintiff's employment, in the absence of any statute relating to the subject, I doubt if it is illegal, and I see no ground for issuing an injunction against it.

As no objection is now made by the defendants to the equitable jurisdiction, I am of opinion on the facts reported, as I understand them, that the decree entered by Mr. Justice HOLMES should be affirmed, without modification.

HOLMES, J. (dissenting). In a case like the present, it seems to me that, whatever the true result may be, it will be of advantage to sound thinking to have the less popular view of the law stated, and therefore, although, when I have been unable to bring my brethren to share my convictions, my almost invariable practice is to defer to them in si-

lence, I depart from that practice in this case, notwithstanding my unwillingness to do so, in support of an already rendered judgment of my own.

In the first place, a word or two should be said as to the meaning of the report. I assume that my brethren construe it as I meant it to be construed, and that, if they were not prepared to do so, they would give an opportunity to the defendants to have it amended in accordance with what I state my meaning to have been. There was no proof of any threat or danger of a patrol exceeding two men, and as, of course, an injunction is not granted except with reference to what there is reason to expect in its absence, the question on that point is whether a patrol of two men should be enjoined. Again, the defendants are enjoined by the final decree from intimidating by threats, express or implied, of physical harm to body or property, any person who may be desirous of entering into the employment of the plaintiff, so far as to prevent him from entering the same. In order to test the correctness of the refusal to go further, it must be assumed that the defendants obey the express prohibition of the decree. If they do not, they fall within the injunction as it now stands, and are liable to summary punishment. The important difference between the preliminary and the final injunction is that the former goes further, and forbids the defendants to interfere with the plaintiff's business "by any scheme * * * organized for the purpose of * * * preventing any person or persons who now are or may hereafter be * * * desirous of entering the [plaintiff's employment] from entering it." I quote only a part, and the part which seems to me most objectionable. This includes refusal of social intercourse, and even organized persuasion or argument, although free from any threat of violence, either express or implied. And this is with reference to persons who have a legal right to contract or not to contract with the plaintiff, as they may see fit. Interference with existing contracts is forbidden by the final decree. I wish to insist a little that the only point of difference which involves a difference of principle between the final decree and the preliminary injunction, which it is proposed to restore, is what I have mentioned, in order that it may be seen exactly what we are to discuss. It appears to me that the opinion of the majority turns in part on the assumption that the patrol necessarily carries with it a threat of bodily harm. That assumption I think unwarranted, for the reasons which I have given. Furthermore, it cannot be said, I think, that two men, walking together up and down a sidewalk, and speaking to those who enter a certain shop, do necessarily and always thereby convey a threat of force. I do not think it possible to discriminate, and to say that two workmen, or even two representatives of an organization of workmen, do; especially when they

are, and are known to be, under the injunction of this court not to do so. See *Stimson, Labor Law*, § 60, especially: pages 290, 298-300; *Reg. v. Shepherd*, 11 Cox, Cr. Cas. 325. I may add that I think the more intelligent workingmen believe as fully as I do that they no more can be permitted to usurp the state's prerogative of force than can their opponents in their controversies. But, if I am wrong, then the decree as it stands reaches the patrol, since it applies to all threats of force. With this I pass to the real difference between the interlocutory and the final decree.

I agree, whatever may be the law in the case of a single defendant (*Rice v. Albee*, 164 Mass. 88, 41 N. E. 122), that when a plaintiff proves that several persons have combined and conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose or the defendants prove some ground of excuse or justification; and I take it to be settled, and rightly settled, that doing that damage by combined persuasion is actionable, as well as doing it by falsehood or by force. *Walker v. Cronin*, 107 Mass. 555; *Morasse v. Brochu*, 151 Mass. 567, 25 N. E. 74; *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417.

Nevertheless, in numberless instances the law warrants the intentional infliction of temporal damage, because it regards it as justified. It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable any one even to form an intelligent opinion about them.

In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas, for which a rational defense is ready.

To illustrate what I have said in the last paragraph: It has been the law for centuries that a man may set up a business in a small country town, too small to support more than one, although thereby he expects and intends to ruin some one already there, and succeeds in his intent. In such a case he is not held to act "unlawfully and without justifiable cause," as was alleged in *Walker v. Cronin* and *Rice v. Albee*. The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is

privileged. *Com. v. Hunt*, 4 Metc. (Mass.) 111, 134. Yet even this proposition nowadays is disputed by a considerable body of persons, including many whose intelligence is not to be denied, little as we may agree with them.

I have chosen this illustration partly with reference to what I have to say next. It shows without the need of further authority that the policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business by some means, when the damage is done, not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade. In such a case it cannot matter whether the plaintiff is the only rival of the defendant, and so is aimed at specially, or is one of a class all of whom are hit. The only debatable ground is the nature of the means by which such damage may be inflicted. We all agree that it cannot be done by force or threats of force. We all agree, I presume, that it may be done by persuasion to leave a rival's shop, and come to the defendant's. It may be done by the refusal or withdrawal of various pecuniary advantages, which, apart from this consequence, are within the defendant's lawful control. It may be done by the withdrawal of, or threat to withdraw, such advantages from third persons who have a right to deal or not to deal with the plaintiff, as a means of inducing them not to deal with him either as customers or servants. *Com. v. Hunt*, 4 Metc. (Mass.) 111, 112, 133; *Bowen v. Matheson*, 14 Allen, 499; *Heywood v. Tillson*, 75 Me. 225; *Steamship Co. v. McGregor* [1892] App. Cas. 25. I have seen the suggestion made that the conflict between employers and employed was not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term "free competition," we may substitute "free struggle for life." Certainly, the policy is not limited to struggles between persons of the same class, competing for the same end. It applies to all conflicts of temporal interests.

I pause here to remark that the word "threats" often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, give warning of your intention to do—in that event, and thus allow the other person the chance of avoiding the consequence. So, as to "compulsion," it depends on how you "compel." *Com. v. Hunt*, 4 Metc. (Mass.) 111, 133. So as to "annoyance" or "intimidation." *Connor v. Kent*, *Curran v. Treleven*, 17 Cox, Cr. Cas. 354, 367, 368, 370. In *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307, it was found as a fact that the display of banners which was enjoined was part of a

scheme to prevent workmen from entering or remaining in the plaintiff's employment, "by threats and intimidation." The context showed that the words as there used meant threats of personal violence and intimidation by causing fear of it.

So far, I suppose, we are agreed. But there is a notion, which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But, in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and principle. *Com. v. Hunt*, 4 Metc. (Mass.) 111; *Randall v. Hazelton*, 12 Allen, 412, 414. There was combination of the most flagrant and dominant kind in *Bowen v. Matheson*, and in the *Steamship Co. Case*, and combination was essential to the success achieved. But it is not necessary to cite cases. It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. I am unable to reconcile *Temperton v. Russell* [1893] 1 Q. B. 715, and the cases which follow it, with the *Steamship Co. Case*. But *Temperton v. Russell* is not a binding authority here, and therefore I do not think it necessary to discuss it.

If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control. I can remember when many people thought that, apart from violence or breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion to-

day. I feel pretty confident that they equally will abandon the idea that an organized refusal by workmen of social intercourse with a man who shall enter their antagonist's employ is unlawful, if it is dissociated from any threat of violence, and is made for the sole object of prevailing, if possible, in a contest with their employer about the rate of wages. The fact that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist does not necessarily make it unlawful, any more than when a great house lowers the price of goods for the purpose and with the effect of driving a smaller antagonist from the business. Indeed, the question seems to me to have been decided as long ago as 1842, by the good sense of Chief Justice Shaw, in *Com. v. Hunt*, 4 Metc. (Mass.) 111. I repeat at the end, as I said at the beginning, that

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this is the point of difference in principle, and the only one, between the interlocutory and final decree; and I only desire to add that the distinctions upon which the final decree was framed seem to me to have coincided very accurately with the results finally reached by legislation and judicial decision in England, apart from what I must regard as the anomalous decisions of *Temperton v. Russell* and the cases which have followed it. *Reg. v. Shepherd*, 11 Cox, Cr. Cas. 325; *Connor v. Kent*, *Gibson v. Lawson*, and *Curran v. Treleaven*, 17 Cox, Cr. Cas. 354.

The general question of the propriety of dealing with this kind of case by injunction I say nothing about, because I understand that the defendants have no objection to the final decree if it goes no further, and that both parties wish a decision upon the matters which I have discussed.

HAMILTON-BROWN SHOE CO. v.
SAXEY et al.

(32 S. W. 1106, 131 Mo. 212.)

Supreme Court of Missouri, Division No. 1.
Nov. 26, 1895.

Appeal from St. Louis circuit court.

Bill by the Hamilton-Brown Shoe Company to enjoin A. J. Saxey and others from attempting, by threats and intimidation, to force complainant's employes to quit work. A demurrer to the bill was overruled, and defendants appeal. Affirmed.

John F. McDermott, for appellants. Silas B. Jones, for respondent.

PER CURIAM. This is an appeal from the final judgment of the circuit court of the city of St. Louis on a demurrer to the plaintiff's petition, which is as follows: "Plaintiff states that it is a corporation duly organized under the laws of the state of Missouri, and is engaged in the manufacture of shoes in the city of St. Louis, Missouri, at Twenty-First and Locust streets in said city, at which place its factory for the purpose of its said manufacturing business is located. And plaintiff says that it has in its employ in said manufacturing business, in its factory as aforesaid, between eight and nine hundred persons; that all of these persons are at work as operatives in some department or other of said factory; that of these employes as aforesaid a large number, to wit, about two or three hundred, are women and girls, and a large number, to wit, about two or three hundred, are young persons, many of them not being of age, and the balance of said operatives are adult men; that all of these persons are engaged in earning a livelihood at the business of this plaintiff aforesaid, and, on the other hand, this plaintiff requires the services of these persons to successfully carry on its business of manufacturing shoes as aforesaid. Plaintiff further states that all of these employes now in the employ of this plaintiff are desirous of continuing in the service of the plaintiff in its said business as aforesaid. Plaintiff further states that ten or fifteen days ago some of its employes, including all the defendants herein, except the defendants Thomas Beaty and P. J. McGarry, went out of the employ of this plaintiff on what is commonly called a 'strike,' claiming to have some grievance against this plaintiff, and which this plaintiff says was without any reasonable ground to rest upon, and thereupon attempted to inaugurate among the employes of this plaintiff what is commonly called a 'strike'; that thereupon the said defendants, lately employes of this plaintiff, together with the defendants Beaty and McGarry and divers other persons, unlawfully and wrongfully combined and confederated together to terrorize, and thereby, by in-

timidation and threats, to prevent the other employes of this plaintiff from peaceably or otherwise prosecuting their work in plaintiff's factory; that thereupon all of the defendants hereto, together with their associates and confederates, whose names are at this moment unknown to this plaintiff, began and have constantly pursued in a course of threats of personal violence and intimidation and persuasion, for the purpose, by means of such intimidation and threats and fear, to prevent the other employes of this plaintiff from peaceably or otherwise prosecuting their work in plaintiff's factory; that all of the said defendants hereto, together with divers and sundry other persons, who are their associates and confederates, have constantly hung about the plaintiff's said factory at the place aforesaid, and upon the streets in close proximity, for the purpose of picketing the premises of this plaintiff, and, by putting the employes of this plaintiff in fear of bodily injury, to thereby keep them from continuing their employment with this plaintiff, and also for the purpose of preventing other persons from entering the employ of the plaintiff; and the said defendants and their associates and confederates, as a part of their policy of threats and intimidation, and for the purpose of carrying on their unlawful combination, have gone to the homes of divers of the employes of this plaintiff at nighttime, and then and there undertaken to induce, by persuasion and by intimidation and threats, the employes of this plaintiff from further prosecuting their work in plaintiff's said factory. And the plaintiff charges that the said defendants therein named, and their associates and confederates, for a number of days, by the use of threats and personal violence, intimidation, and other unlawful means, have been and are now, undertaking to prevent the employes of this plaintiff from prosecuting their ordinary work, and are endeavoring to induce them, by the unlawful means aforesaid, to quit the employment of this plaintiff. And plaintiff says that by reason of the fact that a great many of its employes are women and girls and young persons, that the defendants aforesaid and their associates and confederates have succeeded in exciting in the minds of the plaintiff's said employes, or many of them, fear for their bodily safety, to such an extent that they cannot happily, as they have a right to do, prosecute their ordinary work; and plaintiff says, by reason of the premises, it cannot peaceably and successfully prosecute its said business. And plaintiff says it is without remedy at law, and can only be fully protected and relieved in a court of equity. Plaintiff therefore prays that the defendants, their associates and confederates, be enjoined by a temporary order of injunction, to be made final upon the hearing of this cause, issued out of this court, from in any manner interfering with the employes of this plaintiff

now in the employ of the plaintiff, and from in any manner interfering with any person who may desire to enter the employ of this plaintiff, by the use of threats, personal violence, intimidation, or other means calculated to terrorize or alarm the plaintiff's employés, in any manner or form whatever, and that said defendants and their associates and confederates aforesaid be restrained by the order of this court from undertaking, by the use of the means aforesaid, to induce or to cause any of the employés of this plaintiff to quit the employment of this plaintiff, and that the defendants aforesaid and their associates and confederates be enjoined from congregating or loitering about the premises of this plaintiff at the place aforesaid, and that they be required by the injunction of this court to go about their ordinary business, and to abstain from in any way interfering with the business of this plaintiff, and for such other and further and general relief as may to the court appear proper in the premises."

The case was tried before the Hon. L. B. Valliant, one of the judges of that court, who, on overruling the demurrer, delivered the following opinion:

"The amended petition states in substance that the plaintiff conducts a large shoe manufactory in this city, and has in its employ some eight or nine hundred persons, all of whom are earning their living in plaintiff's employment, and are desirous of so continuing; that the defendants, except two of them, were lately in plaintiff's employ, but have gone out of the same, on a strike, and are now, with the other two defendants, engaged in an attempt to force the other employés of plaintiff to quit their work and join in the strike, and that to accomplish this purpose they are intimidating them with threats of personal violence; that among the plaintiff's employés who are thus threatened are about 300 women and girls and two or three hundred other young persons; that the effect of all this on the plaintiff's business, if the defendants are allowed to proceed, would be to inflict incalculable damage. Upon filing this amended petition, and the plaintiff's giving bond as required by law, a temporary injunction issued, restraining the defendants from attempting to force the plaintiff's employés to leave their work by intimidation and threats of violence, or from assembling for that purpose in the vicinity of plaintiff's factory. The defendants have appeared by their counsel, and, by their demurrer filed, admit that all the statements of the amended petition are true; but they take the position that, even if they are doing the unlawful acts that they are charged with doing, still this court has no right to interfere with them, because they say that what they are doing is a crime, by the state law of this state, and that for the commission of a crime they can only be tried by a jury in a court having criminal

jurisdiction. It will be observed that the defendants do not claim to have the right to do what the injunction forbids them doing. Their learned counsel even quotes the statute to show that it is a crime to do so. But he contends that the constitution of the United States and the constitution of the state of Missouri guaranty them the right to commit crime, with only this limitation, to wit, that they shall answer for the crime, when committed, in a criminal court, before a jury, and that to restrain them from committing crime is to rob them of their constitutional right of trial by jury. If that position be correct, then there can be no valid statute to prevent crime. But that position is contrary to all reason. The right of trial by jury does not arise until the party is accused of having already committed the crime. If you see a man advancing upon another with murderous demeanor and a deadly weapon, and you arrest him,—disarm him,—you have perhaps prevented an act which would have brought about a trial by jury, but can you be said to have deprived him of his constitutional right of trial by jury? The train of thought put in motion by the argument of the learned counsel for defendants on this point leads only to this end, to wit, that the constitution guaranties to every man the right to commit crime, so that he may enjoy the inestimable right of trial by jury.

"Passing now to the question relating to the particular jurisdiction of a court of equity, we are brought to face the proposition that a court of equity has no criminal jurisdiction, and will not interfere by injunction to prevent the commission of a crime. These two propositions are firmly established; and as to the first, that a court of equity has no criminal jurisdiction, there is no exception. As to the second, that a court of equity will not interfere by injunction to prevent the commission of a crime, that, too, is perhaps without exception, when properly interpreted, but it is sometimes misinterpreted. When we say that a court of equity will never interfere by injunction to prevent the commission of a crime, we mean that it will not do so simply for the purpose of preventing a violation of a criminal law. But when the act complained of threatens an irreparable injury to the property of an individual a court of equity will interfere to prevent that injury, notwithstanding the act may also be a violation of a criminal law. In such case the court does not interfere to prevent the commission of a crime, although that may incidentally result, but it exerts its force to protect the individual's property from destruction, and ignores entirely the criminal portion of the act. There can be no doubt of the jurisdiction of a court of equity in such a case. On this question counsel have cited cases in which courts of equity have been denied jurisdiction to enjoin the publication of a libel, and in those opinions are to be found the general statement of the

proposition above mentioned. But the law of libel is peculiar, and those cases turn upon that peculiarity. The freedom of the press has been so jealously guarded both in England and in this country that our law of libel is like no other law on the books. Our constitution provides that a man may say, write, and publish 'whatever he will,' being answerable only for the 'abuse of liberty.' Libel is the only act injurious to the rights of another which a man cannot, under proper conditions, be restrained from committing; and that is so because the constitution says he shall be allowed to do it, and answer for it afterwards. Equity will not interfere when there is an adequate remedy at law. But what remedy does the law afford that would be adequate to the plaintiff's injury? How would their damages be estimated? How compensated? The defendants' learned counsel cites us to the criminal statute, but how will that remedy the plaintiff's injury? A criminal prosecution does not propose to remedy a private wrong. And, even if there was a statute giving a legal remedy to plaintiff, it would not oust the equity jurisdiction. The legal remedy that closes the door of a court of equity is a common-law remedy. Where equity had jurisdiction because the common law affords no adequate remedy, that jurisdiction is not affected by a statute providing a legal remedy. What a humiliating thought it would be if these defendants were really attempting to do what the amended petition charges, and what their demurrer confesses,—that is, to destroy the business of these plaintiffs, and to force the eight or nine hundred men, women, boys, and girls who are earning their livings in the plaintiff's employ to quit their work against their will,—and yet there is no law in the land to protect them. The injunction in this case does not hinder the defendants doing anything that they claim they have a right to do. They are free men,

and have a right to quit the employ of plaintiffs whenever they see fit to do so, and no one can prevent them; and whether their act of quitting is wise or unwise, just or unjust, it is nobody's business but their own. And they have a right to use fair persuasion to induce others to join them in their quitting. But when fair persuasion is exhausted they have no right to resort to force or threats of violence. The law will protect their freedom and their rights, but it will not permit them to destroy its freedom and rights of others. The same law which guaranties the defendants in their right to quit the employment of the plaintiffs at their own will and pleasure also guaranties the other employes the right to remain at their will and pleasure. These defendants are their own masters, but they are not the masters of the other employes, and not only are they not the masters of the other employes, but they are not even their guardians. There is a maxim of our law to the effect that one may exercise his own right as he pleases, provided that he does not thereby prevent another exercising his right as he pleases. This maxim or rule of law comes nearer than any other rule in our law to the golden rule of Divine authority: 'That which you would have another do unto you, do you even so unto them.' Whilst the strict enforcement of the golden rule is beyond the mandate of a human tribunal, yet courts of equity, by injunction, do restrain men who are so disposed from so exercising their own rights as to destroy the rights of others. The demurrer to the amended petition is overruled."

The law applicable to the case is so clearly stated in this opinion of the learned judge that to add anything to it would be a work of supererogation. We adopt it as the opinion of this court, and affirm the judgment. All concur.

CRAWFORD et al. v. TYRRELL

(28 N. E. 514, 128 N. Y. 341.)

Court of Appeals of New York. Oct. 6, 1891.

Appeal from supreme court, general term, Second department.

Action by John P. Crawford and others against Martin B. Tyrrell, to restrain defendant from keeping a house of ill fame, and to recover damages for injury sustained. Judgment for plaintiffs. Defendant appeals. Affirmed.

Jas. & Thos. H. Troy, for appellant. Alfred E. Mudge, for respondents.

GRAY, J. In this action, which was brought to restrain the defendant from keeping a house of ill fame and from using his premises as an assignation house, and to recover damages for injuries sustained, the trial court found as facts that the house, as maintained by defendant, was a resort for prostitutes and licentious men, and that the persons occupying rooms acted in a boisterous and noisy manner, and indecently exposed their persons at the windows, "whereby the use and occupation of the plaintiffs' premises have been interfered with and rendered uncomfortable, and whereby the occupants of the plaintiffs' premises have been annoyed and seriously disturbed." Such a finding was amply justified by the evidence, and, indeed, it is not discussed by the appellant; but he argues that the plaintiffs could not maintain a civil action of this nature, inasmuch as the damage they suffered was a damage common to the whole community, and not special to them. If that position had been sustained by the facts, I do not doubt but that it would have been the duty of the trial judge to have denied the relief prayed for. The rule of law requires of him who complains of his neighbor's use of his property, and seeks for redress and to restrain him from such use, that he should show that a substantive injury to property is committed. The mere fact of a business being carried on which may be shown to be immoral, and, therefore, prejudicial to the character of the neighborhood, furnishes of itself no ground for equitable interference at the suit of a private person; and, though the use of property may be unlawful or unreasonable, unless special damage can be shown, a neighboring property owner cannot base thereupon any private right of action. It is for the public authorities, acting in the common interest, to interfere for the suppression of the common nuisance. See *Francis v. Schoellkopf*, 53 N. Y. 152. If the business complained of is a lawful one, the legal

question presented in a civil action for private damage is whether the business is reasonably conducted, and whether, as conducted, it is one which is obnoxious and hurtful to adjoining property. If the business is unlawful, the complainant in a private action must show special damage, by which the legitimate use of his adjoining property has been interfered with, or its occupation rendered unfit or uncomfortable. That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in a similar manner. The principle has been long settled that the objection that the nuisance was a common one is not available if it be shown that special damage was suffered. *Rose v. Miles*, 4 Maule & S. 101; *Rose v. Groves*, 5 Man. & G. 613; *Francis v. Schoellkopf*, supra; *Lausing v. Smith*, 4 Wend. 9. One who uses his property lawfully and reasonably, in a general legal sense, can do injury to nobody. In the full enjoyment of his legal rights in and to his property the law will not suffer a man to be restrained, but his use of the property must be always such as in no manner to invade the legal rights of his neighbor. The rights of each to the enjoyment and use of their several properties should, in legal contemplation, always be equal. If the balance is destroyed by the act of one, the law gives a remedy in damages, or equity will restrain. If the use of a property is one which renders a neighbor's occupation and enjoyment physically uncomfortable, or which may be hurtful to the health, as where trades are conducted which are offensive by reason of odors, noises, or other injurious or annoying features, a private nuisance is deemed to be established, against which the protection of a court of equity power may be invoked. In the present case the indecent conduct of the occupants of the defendant's house, and the noise therefrom, inasmuch as they rendered the plaintiffs' house unfit for comfortable or respectable occupation, and unfit for the purposes it was intended for, were facts which constituted a nuisance, and were sufficient grounds for the maintenance of the action.

If it was a nuisance which affected the general neighborhood, and was the subject of an indictment for its unlawful and immoral features, the plaintiffs were none the less entitled to their action for any injury sustained, and to their equitable right to have its continuance restrained. The judgment appealed from should be affirmed, with costs. All concur, except FINCH, J., absent.

WEINSTOCK, LUBIN & CO. v. MARKS.
(No. 18,375.)

(42 Pac. 142, 109 Cal. 529.)

Supreme Court of California. Oct. 12, 1895.

Department 1. Appeal from superior court, Sacramento county; Matt. F. Johnson, Judge.

Action by Weinstock, Lubin & Co., a corporation, against H. Marks. There was a judgment for plaintiff, and defendant appeals. Reversed in part.

Holl & Dunn, for appellant. Johnson, Johnson & Johnson, for respondent.

GAROUTTE, J. Plaintiff is a corporation carrying on a large clothing and dry-goods business in the city of Sacramento. Defendant is also a dealer in clothing of the same general character, and is carrying on business in a building adjoining plaintiff's place of business. The present action is one of injunction, and by its decree, among other things, the court ordered defendant to refrain from further use of the name "Mechanical Store" as the designation of his place of business, and further decreed that defendant maintain and place in a conspicuous part of his store, and also in a conspicuous place on the outside or front thereof, a sign showing the proprietorship of his said store, in letters sufficiently large to be plainly observable by passers-by and customers entering therein. Defendant appeals from the foregoing portions of the judgment.

The judgment is based upon certain findings of fact made by the trial court upon the evidence offered at the trial, and no complaint is now heard that this evidence does not fully support these findings. It therefore follows that the merit of this appeal presents itself upon a consideration of those findings and the decree based thereon. These findings of fact are full and in detail, and, for present purposes, we deem it sufficient to state the general tenor and effect of some of them. (1) The court finds that on or about the 8th day of October, 1874, H. Weinstock and D. Lubin entered into a copartnership under the firm name and style of Weinstock & Lubin, of the city of Sacramento, and, as such partners, engaged in the business of dealing in wearing apparel for men, women, and children, and that said Weinstock & Lubin selected as the name of their place of business "Mechanics' Store," and designated the same by that appellation, by which name their said store thenceforth was continually known; that, in the management and conduct of their business, they fixed a price upon each and every article carried by them in the stock of said store, and marked the said prices in figures upon each article, and sold such articles at the prices so marked, and never deviated therefrom; and they advertised the said method of doing business extensively throughout the entire Pacific coast by means of newspapers, etc., by means whereof their said method of

doing business became widely known to the trade and public throughout the entire Pacific coast, and by reason whereof it became and was well known to the trade and public in California and the other states and territories of the Pacific coast that at the store of said Weinstock & Lubin only one price was charged for goods sold therein, and that no deviation from said price was permitted. (2) That, by care, attention, skill, and strict adherence to business and the rules as aforesaid, this plaintiff has materially increased the volume and importance and value of said business, and enhanced the good will thereof, and the said plaintiff has established for the said store and business throughout the said states and territories a wide and honorable reputation, and thereby said business has become extensive and valuable and profitable, and the public have become accustomed to plaintiff's said method of doing business, and have been induced to rely, and do rely, upon the good faith of the plaintiff in managing and conducting its business in the manner aforesaid, and by reason thereof have been induced to bestow and do bestow upon the plaintiff their custom, trade, patronage, and business. (3) That on or about 1855 the defendant, who had previously been engaged in business elsewhere, and was without any established reputation of his own, and whose business was unknown to the trade and general public, removed his business from the place he then occupied to the premises on the east of and near the premises of this plaintiff; and the defendant then and there engaged in a similar line of trade as this plaintiff, and ever since then he has maintained and conducted, and still maintains and conducts, the said store at said place, and carries on the said business therein; and he named his store in the year 1887 or thereabouts the "Mechanical Store." (4) That the defendant, well knowing the foregoing facts, and contriving, intending, and designing fraudulently to injure this plaintiff, and to obtain undue advantage of plaintiff, and to deprive the plaintiff of its business, and fraudulently and unlawfully to increase his own business, and to pirate and make use of and appropriate to himself the good will of the plaintiff's business, and the said reputation and honorable esteem and confidence that the plaintiff enjoyed in the minds of the people of the Pacific coast, and in order to create confusion in the public mind, and to take advantage of the standing that the plaintiff by its aforesaid acts had acquired in said territory, and fraudulently designing to deceive the public and people intending to trade with the plaintiff, and to divert the custom of the plaintiff to himself, and to deprive the plaintiff of its customers and of the trade, and to induce the people to trade with the defendant under the belief that they were trading with the plaintiff, and for the purpose of deceiving plaintiff's customers and persons intending to trade with plaintiff into believing that the defendant's store was that of the

plaintiff, and thereby inducing them to enter said store of defendant to trade with said defendant, to his profit, and in order to carry out his fraudulent and corrupt designs as aforesaid,—the defendant has persistently carried out a system of deceit and misrepresentations concerning his store and its ownership, in connection with plaintiff's store and business, as follows: That in 1891 plaintiff, at its place of business, erected a store, the front of which is of peculiar architecture, containing arches and alcoves, of which there was none other similar in the city of Sacramento; that afterwards the defendant, at his said place of business, and adjoining plaintiff's store, erected a building which, so far as the first or lower story is concerned, was and is similar in architecture in every respect to the store of plaintiff, so much so that passers-by were liable to go into the store of defendant thinking that they were entering the store of plaintiff, and that customers of plaintiff in many instances did so enter the store of defendant thinking they were in the store of plaintiff; that defendant had no sign inside of his store or on the outside of his store by which customers could for themselves ascertain the true proprietorship thereof; that the erection of the defendant's building exactly the same as plaintiff's building in every particular, and the adoption of the use of the words "Mechanical Store," and the absence of any name or sign upon or in defendant's store designating the true proprietorship of defendant's store, were all done by the defendant for the purpose of deceiving the public, and more especially plaintiff's customers, and enticing and pirating and securing the patronage of said customers from plaintiff to defendant. (5) That, by the aforesaid means the defendant has diverted from the plaintiff a large part of plaintiff's trade and custom; has induced many persons to trade with the defendant who otherwise would have traded with the plaintiff; has sold large quantities of goods in his said store to persons who, but for said acts of defendant, would have purchased said goods of the plaintiff; has deprived the plaintiff of a large share of its legitimate profits; has injured the business and reputation of the plaintiff; has impaired the confidence of the public in the plaintiff and its method of doing business; and has deprived the plaintiff of a large number of its customers and patrons.

The foregoing chapter of facts makes interesting reading, and we first turn our attention to that portion of the judgment restraining defendant from the further use of the words "Mechanical Store" as a designation of his place of business. We see but little difficulty in arriving at a conclusion upon this branch of the case. Defendant assails the judgment in this particular with but a single weapon. He insists that the words "Mechanics' Store" are not the subject of trade-mark, and that, therefore, plaintiff can have no exclusive right to them.

As we view the picture presented by the findings of fact, the question as to what may or may not be the subject of trade-mark is not the problem to be solved. That these words are of a kind that may be used as a trade-name we have no doubt, and, having established that fact, we are required to pursue the investigation no further. That certain names and designations which may not become technical or specific trade-marks may become the names of articles or of places of business, and thereby the use thereof receive the protection of the law, cannot be doubted, for the cases everywhere recognize that fact. The learned judge said in *Lee v. Haley*, 5 Ch. App. 155: "I quite agree that they [the plaintiffs] have no property right in the name, but the principle upon which the cases on this subject proceed is not that there is property in the word, but that it is a fraud on a person who has established a trade, and carried it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name." A similar doctrine is declared in *Manufacturing Co. v. Hall*, 61 N. Y. 226, and also in the late case of *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966. This court said in *Pierce v. Guittard*, 68 Cal. 71, 8 Pac. 645: "We are of opinion that it is not necessary to decide whether the plaintiff's label, with the accompanying words and devices, constituted a trade-mark, and, as such, the exclusive property of the plaintiff, for the reason that it is a fraud on a person who has established a business for his goods, and carries it on under a given name or with a particular mark, for some other person to assume the same name or mark, or the same with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with a person who has given a reputation to that name or mark." The same general principle is also recognized and approved in *Schmidt v. Brieg*, 100 Cal. 672, 35 Pac. 623. While in these two cases the fact appears that the defendants were selling an inferior article, and thereby deceiving and defrauding the public, it is not apparent that such fact was a necessary element in pointing the judgment. Neither do we consider it so upon principle; and in cases without number, restraining defendants from trespassing upon the good will of plaintiff's business, such fact was an element foreign to the litigation. It may be said that the adjudged cases for relief are based solely upon the ground of loss and damage to the tradesman's business, by unlawful competition. In *Levy v. Walker, Cox, Man. Trade-Mark Cas. No. 639*, the learned judge declared: "The court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of

that business by somebody else. It does not interfere to prevent the world outside from being misled into anything."

While our statutes attempt to deal with trade-marks, and provide for the filing thereof with the secretary of state, with accompanying affidavits, etc., yet trade-names are equally protected upon analogous principles of law. And that the words "Mechanics' Store" may be made a trade-name, and the user thereof become entitled under the law to protection from pirates preying upon the sea of commercial trade, we have no doubt. We think the defendant should be restrained from the use of the words "Mechanical Store." The court has declared the fact to be, and it is not challenged by defendant, that these words were used as a designation of his store for the purpose of deceiving the public, and especially plaintiff's customers, and thereby securing the advantages and benefits of the good will of plaintiff's business. To say that such conduct upon the part of defendant is unfair business competition is to state the fact in the mildest terms. In *Celluloid Manuf'g Co. v. Cellonite Manuf'g Co.*, 32 Fed. 97, Justice Bradley, of the supreme court of the United States, in speaking to the question of similarity in name, said: "It was not identical with the plaintiff's name. That would be too gross an invasion of the complainant's rights. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer, is obnoxious to the law." In this case the trial court determined that there was a sufficient similarity in the names to deceive the public; that the defendant adopted the name for the purpose of deceiving the public and securing plaintiff's business; and that such results had followed. These things being true, the decree must go against him.

The remaining branch of the case presents a novel and original proposition of law. In its facts we apprehend no case like it can be found, either in this country or England. The decree orders the defendant to place, both upon the outside and inside of his store, a sign, plainly legible to customers and passers-by, indicating his proprietorship; and, while the power of the court to issue mandatory injunctions in many cases must be conceded, yet cases where such power has been exercised have generally involved matters of nuisance, or at least cases where courts have ordered the subject-matter of the litigation to be placed in its original condition; as, for instance, the removing of obstructions to ancient lights. But let us for a moment turn our attention to the facts of this case. The store of plaintiff was known as the "Mechanics' Store." By various kinds of advertising,

and attention, honesty, and skill in the conduct of the business, it increased the volume thereof and enhanced its good will, and throughout the Pacific coast established for it a wide and honorable reputation as a fair and reliable house with which to deal. Plaintiff erected a store building of peculiar architecture, there being none like it in the city of Sacramento; and defendant thereupon erected a store building, immediately adjoining that of plaintiff's, in every respect of similar architecture. It further appears that defendant erected this particular kind of building for the purpose of deceiving the public, and securing the patronage of plaintiff's customers; and for the same purpose he refrained from placing any sign in or upon the building indicating the proprietorship of the business, or designating it in any way so that it might be distinguished from the store of plaintiff. And, by reason of these acts of defendant, many of plaintiff's customers were deceived into purchasing goods in defendant's store, believing that they were trading in plaintiff's store; and defendant thus diverted from the plaintiff a large part of its trade and custom, and thereby injured its business and curtailed the value of its good will. Upon this bald statement of facts, it cannot be gainsaid that defendant has done the plaintiff wrong; and it is said that for every wrong there is a remedy. These facts certainly indicate a case of unlawful business competition, and courts of equity have ever been ready to declare such things odious. It is strange if plaintiff may be deprived of the fruits of a long course of honest and fair dealing in business by such wicked contrivances, and, upon appeal to the courts for relief, should be told there was no relief. This cannot be so, for the whole law of trade-marks, trade-names, etc., is recognized, approved, and enforced for the very purpose of protecting the honest tradesman from a like loss and damage to that which threatens this plaintiff; and the fact that the question comes to us in an entirely new guise, and that the schemer has concocted a kind of deception heretofore unheard of in legal jurisprudence, is no reason why equity is either unable or unwilling to deal with him. It has been said by some judge or law writer that "no fixed rules can be established upon which to deal with fraud, for, were courts of equity to once declare rules prescribing the limitations of their power in dealing with it, the jurisdiction would be perpetually cramped and eluded by new schemes which the fertility of man's invention would contrive." By device, defendant is defrauding plaintiff of its business. He is stealing its good will,—a most valuable property,—only secured after years of honest dealing and large expenditures of money; and equity would be impotent, indeed, if it could contrive no remedy for such a wrong.

The fundamental principle underlying this entire branch of the law is that no man has

the right to sell his goods as the goods of a rival trader. Mr. Browne, in his work upon Trade-Marks, declares the wrong to be, "not in imitating a symbol, device, or fancy name, for any such act may not involve the slightest turpitude; the wrong consists in unfair means to obtain from a person the fruits of his own ingenuity or industry,—an injustice that is in direct transgression of the decalogue, 'Thou shalt not covet * * * anything that is thy neighbor's.' The most detestable kind of fraud underlies the filching of another's good name, in connection with trafficking." We think the principle may be broadly stated that when one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman, thereby deceiving the people by causing them to trade with him when they intended to and would have otherwise traded with his rival, a fraud is committed,—a fraud which a court of equity will not allow to thrive. In *Howard v. Henriques*, 3 Sanf. 725, the court, in speaking of the competitor in business, said: "He must not by any deceitful or other practice impose on the public, and he must not by dressing himself in another man's garments, and by assuming another man's name, endeavor to deprive that man of his own individuality and of the gains to which by his industry and skill he is fairly entitled." It may well be said that the defendant, by duplicating plaintiff's building, with its peculiar architecture and immediately adjoining, entering into the same line of business, with no mark of identification upon his store, has dressed himself in plaintiff's garments; and, having so dressed himself with a fraudulent intent, equity will exert itself to reach the fraud in some way. In the leading case of *Lee v. Haley*, supra, the whole question is condensed by the final conclusion of the court into the principle of law "that it is a fraud on the part of a defendant to set up a business under such a designation as is calculated to lead and does lead other people to suppose that his business is the business of another person." If the same evil results are accomplished by the acts practiced by this defendant which would be accomplished by an adoption of plaintiff's name, why should equity smile upon the one practice and frown upon the other? Upon what principle of law can a court of equity say, "If you cheat and defraud your competitor in business by taking his name, the court will give relief against you, but, if you cheat and defraud him by assuming a disguise of a different character, your acts are beyond the law?" Equity will not concern itself about the means by which fraud is done. It is the results arising from the means—it is the fraud itself—with which it deals.

The foregoing principles of law do not apply alone to the protection of parties having trade-marks and trade-names. They reach

away beyond that, and apply to all cases where fraud is practiced by one in securing the trade of a rival dealer; and these ways are as many and as various as the ingenuity of the dishonest schemer can invent. In *Glenny v. Smith*, reported in the *Jurist* of 1865 (page 965), the court held: "Where a tradesman, in addition to his own name upon his shop front, placed upon his sunblind and upon his brass plate the words 'From Thresher & Glenny' (in whose employment he had been), the court, being of opinion that this was done in such a way as to be likely to mislead, and there being evidence that persons had been actually misled, granted an injunction to restrain such a use of the name of the firm Thresher & Glenny." In *Knott v. Morgan*, 2 Keen, 213, the "London Conveyance Company" had its omnibuses painted green, and its servants clothed in the same colors. Another adopted the same name, and likewise its vehicles were so painted and its servants so clothed. It was conceded that plaintiff could have no exclusive property right in any of these things, but the court issued its injunction, declaring that plaintiff had "a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representation that carriages really the defendant's belong to and are under the management of the plaintiffs." The author, by a note, approves the doctrine here declared, saying: "There was an obvious attempt to trade upon the plaintiff's reputation,—a constructive fraud,—coupled with pecuniary loss, which was made the ground for the issuance of a broad injunction." The same principle is reiterated by the same learned judge in *Croft v. Day*, 7 Beav. 84, in the following words: "It has been very correctly said that the principle of these cases is this: That no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person or that he is connected with and selling the manufacture of such other person while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud." In the very recent case of *Coats v. Thread Co.*, 149 U. S. 566, 13 Sup. Ct. 966, the court said: "There can be no question of the soundness of the plaintiff's proposition that, irrespective of the technical question of trade-mark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and induce him to believe he is buying those of the plaintiffs. * * * They have no right by imitative devices to beguile the public into buying their wares under the im-

pression they are buying those of their rivals." To the same point, see *System Co. v. Le Boultillier* (Super. Ct.) 24 N. Y. Supp. 890; *Appolinaris Co. v. Scherer*, 27 Fed. 18; *Burgess v. Burgess*, 3 De Gex, M. & G. 896; *Von Mumm v. Frash*, 56 Fed. 830.

Having decided that defendant's acts constitute a fraud upon plaintiff, and that a court of equity will administer relief, the question then presents itself, what shall be the form of the decree? How may the court reach the wrong? The defendant had the right to erect his building, and erect it in any style of architecture his fancy might dictate. He had the right to erect it in the particular locality where it was erected. He had the right there to conduct a business similar to that of plaintiff. He had a right to do all these things, for, of themselves, they did not offend against equity; but when they were done with a fraudulent intent, when they were done for the purpose of tolling away the customers of plaintiff by a deception, a fraud is practiced, and equity will do what it can to right the wrong. The

decision of the trial court in effect ordered defendant to place signs both inside and outside his building, showing to the world the proprietorship thereof. We think this decree holds defendant to a rule too strict, in that it requires the proprietorship of the store to be shown. In this particular we think the decree should be modified so as to require that the defendant, in the conduct of this business, shall distinguish his place of business from that in which the plaintiff is carrying on its business, in some mode or form that shall be a sufficient indication to the public that it is a different place of business from that of the plaintiff. For the foregoing reason, the judgment in this respect only is reversed, and the cause remanded, with directions to the trial court to modify the same, as heretofore suggested; and thereupon it is ordered that said judgment stand affirmed. Appellant is to pay the costs of this appeal.

We concur: HARRISON, J.; VAN FLEET, J.

PURVINES et al. v. HARRISON.

(37 N. E. 705, 151 Ill. 219.)

Supreme Court of Illinois. June 16, 1894.

Error to circuit court, Sangamon county.

Bill by Frances A. Harrison against Frances Purvines and others. Complainant obtained a decree. Defendants bring error. Affirmed.

Conkling & Grout, for plaintiffs in error. Wm. J. Butler and Connolly & Mather, for defendant in error.

MAGRUDER, J. This is a bill filed on July 18, 1890, by the defendant in error, Frances A. Harrison, the mother of Peyton Asbury Purvines, deceased, by a former husband, against Frances Purvines, the minor daughter and only child of said Peyton Asbury Purvines, deceased; Samuel H. Claspill, the guardian of said minor; Alfred B. Purvines, the administrator of said deceased; and Edward Wyatt, a tenant occupying the premises hereinafter referred to under a lease from the complainant in the bill. The bill is filed for the purpose of reforming a deed of about 60 acres of land, executed by the defendant in error to her son, said Peyton A. Purvines, in his lifetime. The deed sought to be reformed bears date January 31, 1889, was acknowledged August 30, 1889, and recorded on September 2, 1889. It is a warranty deed, and conveys about 60 acres of land in Sangamon county to the grantee. The bill alleges that it was the intention of the complainant and her deceased son to insert words in the deed reserving to her a life estate in the land, so that she could have the use of it, and the rents from it, as long as she lived; but that, by the mutual mistake of the parties to the deed, and by an oversight on the part of the scrivener who drew it, such reservation was unintentionally omitted from the deed. The prayer of the bill is that the deed be reformed by inserting therein a reservation of the life estate to the grantor. A guardian ad litem was appointed for the minor, who answered; and answers denying the allegations of the bill were filed by said guardian and tenant, to which replications were filed. After proofs taken and hearings had, the circuit court rendered a decree finding the allegations of the bill to be true, and directing that the deed be reformed in the respect mentioned, and that such reformation take effect as of the date of the deed, and that the rents and profits of the land after that date should belong to the complainant.

Evidence was introduced showing that an inquisition as to the insanity of the complainant was had in the county court of said county, and a verdict of the jury was returned therein on January 25, 1892, finding her to be an insane person; and thereafter her insanity was suggested in the present suit, and one B. F. Irwin was appointed to prosecute the same as next friend. Application had been

previously made to the court, in March, 1890, for the appointment of a conservator for defendant in error as a distracted person, but upon the trial of the issue whether she was a distracted person verdict had been returned in her favor. Some evidence was introduced tending to show that when she made the deed her mind had begun to fail, and she showed signs of absent-mindedness not theretofore noticeable in her. Her son, Peyton A. Purvines, had been divorced from his wife before he died, and his habits up to the time of his death were those of a very intemperate man. There is no evidence, however, that he practiced any fraud upon his mother in order to obtain the deed. He lived with her at that time upon a farm of 80 acres, owned by her, and the consideration as expressed in the deed is "one dollar, and natural love and affection." He died unmarried and intestate on February 22, 1890, leaving, as his only child and heir at law, the minor plaintiff in error, Frances Purvines. After a careful examination of the evidence, we think that both parties executed the deed under a common or mutual mistake, and did what neither of them intended to do. *Warrick v. Smith*, 137 Ill. 504, 27 N. E. 709. To justify the reformation of a written instrument upon the ground of mistake, it is necessary—First, that the mistake should be one of fact, and not of law (*Sibert v. McAvoy*, 15 Ill. 106); second, that the mistake should be proved by clear and convincing evidence (2 Pom. Eq. Jur. § 862); third, that the mistake should be mutual and common to both parties to the instrument (*Sutherland v. Sutherland*, 69 Ill. 481). A mistake of law is an erroneous conclusion as to the legal effect of known facts. *Hurd v. Hall*, 12 Wis. 113. The construction of words is a matter of law. *Sibert v. McAvoy*, supra. Where parties instructed an officer to prepare a quitclaim deed for their execution, but he drew a deed containing language which amounted in law to a covenant of title in fee, and they signed the deed knowing that such language was in it, they were held to have been mistaken in the law,—that is to say, in the legal effect of the language used,—and in the legal consequences of retaining such language in the deed. *Gordere v. Downing*, 18 Ill. 492. Mistake of fact has been defined to be a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract, or belief in the present existence of a thing material to the contract which does not exist, or in the past existence of a thing which has not existed. 2 Pom. Eq. Jur. § 839. It is manifest that the mistake in the present case was one of fact, and not one of law, because it had reference to the accidental omission from the deed of words which were intended to be inserted therein; that is to say, words reserving to the grantor a life interest. In *Sibert v. McAvoy*, supra, we said: "It is where par-

ties intended to insert words in a contract which were by accident omitted that equity can reform the contract by inserting them. * * * The insertion of words is a matter of fact. It is for mistakes of fact alone that contracts may be reformed." Nor can it be said in this case that the mistake occurred on account of any want of reasonable diligence to ascertain the facts, or on account of any neglect, amounting to a violation of legal duty. 2 Pom. Eq. Jur. § 856. Where the relation of the parties is one of confidence, such as that which existed here between mother and son, and where a party executing the contract has a failing or weak mind arising from suffering or old age, the same degree of vigilance and care is not expected or required as is expected or required in the ordinary dealings of men with one another. *Day v. Day*, 84 N. C. 408. In *Day v. Day*, *supra*, a deaf and aged father made a deed to his son, in whom he reposed confidence, conveying a tract of land in fee, but omitting, either by mistake or contrivance of the son, under whose direction the deed was drawn, to reserve a life estate to the grantor; and it was held that an equity arose in favor of the father to have such instrument reformed in accordance with the original intention of the parties. Counsel for plaintiffs in error claim that the evidence does not show want of mental capacity in the defendant in error, or want of capacity on her part to understand the ordinary affairs of life. This may be true. The proof shows merely a weakening of the mental powers, growing out of domestic trouble, and grief for the recent death of her aged parents.

This proof was not introduced for the purpose of showing such insanity as would avoid the deed; but in a proceeding to reform the deed it tended, in connection with the relations of the parties and other attending circumstances, to excuse any apparent want of care in examining the phraseology of the deed. We think that the proof of a mutual mistake was clear and convincing. The burden of proof was upon the complainant, but the defendants offered no testimony whatever to contradict her witness. Some time after the deed was executed the deceased applied for a loan of money to be secured by mortgage upon his interest in the land. He then discovered for the first time that his mother's life estate had not been reserved in the deed. There is abundant evidence, given by quite a number of witnesses, that he admitted the mistake, and stated that it was the intention and agreement to retain a life estate for her in the deed, and that he intended to correct the mistake. He died, however, without doing so. These declarations, made many times, and challenged by no opposing evidence, were admissions against his own interest. It is well settled that parol proof may be received to show a mistake in a written instrument. *McLennan v. Johnston*, 60 Ill. 306. For the reasons here stated, and deeming it unnecessary to enter into a detailed discussion of the evidence, we think that the decree of the circuit court was correct, and it is accordingly affirmed. Affirmed.

PHILLIPS, J., having heard this case in the circuit court, took no part here.

WELLES v. YATES.

(44 N. Y. 525.)

Commission of Appeals of New York. May, 1871.

Appeal from an order of the general term of the supreme court in the Sixth district, affirming a judgment of the special term in favor of the plaintiff.

The action was brought for the reformation of a deed executed by the plaintiff, he claiming that a reservation of certain timber had been omitted, through mistake on his part; and also for an accounting by the defendant for timber taken from the premises conveyed.

An account was ordered to ascertain the value of the lumber taken since March 10, 1851. The referee found the value at \$2,-041.72.

Upon the coming in of the referee's report, judgment was entered for the plaintiff that the deed be reformed and corrected, and that he have judgment for the value of the timber removed by the defendant. This judgment was affirmed by the general term in the Sixth district, and the defendant appeals to the court of appeals. The facts appear from the opinion of the court.

E. H. Benn, for appellant. Geo. Sidney Camp, for respondent.

HUNT, C. It will not be necessary to consider in detail the fifteen points presented by the appellant, and so ably argued by his counsel. The discussion of a few of them will settle principles that may serve to decide the case.

The complaint, in substance, alleged that on the 28th of May, 1846, the plaintiff was the owner of one hundred and ten acres of land, being lot No. 4; that on that day he sold the same by executory contract, with the timber thereon, to T. & T. Trevor, for \$17 per acre.

That on the 7th day of December, 1846, he was the owner of lot No. 5, containing one hundred and forty-one acres, and then entered into an agreement with the same parties, by which they undertook to cut the timber standing thereon, manufacture the same into boards and planks, and to give the plaintiff one-half of the lumber thus manufactured. Certain other details were provided, which it is not necessary to specify. At the same time, the plaintiff entered into an executory contract with the same persons, for the sale of the one hundred and forty-one acres, at \$4 per acre.

That these two pieces of land were of the same value; that the timber growing on the latter piece was of the value of \$5,000, and that such timber, in the understanding of the parties, was reserved to the plaintiff by the manufacturing contract mentioned, and that the price of \$4 per acre was for the land simply, the timber reserved to the plaintiff. That, after proceeding for some time in the manufacture of the lumber, the purchasers became embarrassed, and the defendant took their place in the contract, and without new

or further negotiations, a calculation was made of their payments, the balance found due paid by the defendant, and an absolute deed of the two pieces of land, without reservation of the timber, made by the plaintiff to the defendant.

That the defendant well knew all of the facts in the complaint recited. The plaintiff then avers "that through and by mistake he failed to insert in the said last-mentioned deed (of the one hundred and forty-one acres) any reservation of the timber mentioned and embraced in the contract secondly above mentioned;" and also avers demand and refusal to amend. The prayer is that the deed may be corrected, so as to be made to contain a reservation of the timber, and that the plaintiff may have an accounting as to the timber taken and removed by the defendant.

The judge found that there was an error and mistake on the part of the plaintiff, as averred by him. He found also that there was no mistake on the part of the defendant, but that he well understood the plaintiff's error. He knew that the timber was not reserved, and he knew that the plaintiff supposed and understood that it was reserved. He received the deed, failing to correct the plaintiff's error, but intending to reap the profits of it. He knew that he received of the plaintiff's estate \$4,000 or \$5,000 more than the plaintiff intended to give him, or than he supposed he had given him. The mistake was unilateral; on the part of the plaintiff only. On the part of the defendant, there was no mistake, but something worse. It was a fraud, as palpable as if he had made affirmative representations to induce the error; as gross as if he had put his hands in the plaintiff's pocket and feloniously abstracted his money. 1 Story, Eq. Jur. §§ 187, 137, 140, 147, 152, 153, 167, 168, 191, 214-217; Waldron v. Stevens, 12 Wend. 100; Wiswall v. Hall, 3 Paige, 313; Hill v. Gray, 1 Starkie, 434; 2 E. C. L. 167.

The point here arises, can there be a judgment to reform the contract, there not being a mutual error, but error on one part and fraud on the other?

It is laid down in many authorities reported and elementary works, that there must be a mutual error, to authorize this interposition of a court of equity. See Story, Eq. Jur. § 155; Story v. Conger, 36 N. Y. 673; Nevius v. Dunlap, 33 N. Y. 676; Lyman v. United States Ins. Co., 17 Johns. 376. The cases where this general statement is made are very numerous, and it is well said that to exercise this power, where one party only has been in error and the other has correctly understood it, would be making a new contract for the parties, and would be doing injustice to the party who made no mistake. On this point two distinctions may be noticed. 1st. Those cases will be found to have in them the element of the honesty on the part of the one correctly understanding the contract. Where two parties enter into a contract, and an error is

claimed by one party to exist on an important point, which is claimed to be correct by the other party, it cannot be amended, as against the party correctly understanding it, he acting in good faith, and supposing the other to have understood the contract as he did. This rule does not apply where there is fraud. Either fraud or mutual mistake will authorize the reformation. See authorities *supra*; *De Peyster v. Hasbrouck*, 11 N. Y. 582; and *Gillespie v. Moon*, 2 Johns. Ch. 585; *Barlow v. Scott*, 24 N. Y. 40; *Rider v. Powell*, 28 N. Y. 310. In his supplementary points the appellant expressly concedes this proposition.

2. This is the consummation of an existing contract, about the terms of which there was no dispute. This contract it was attempted to perform. There has been a failure to perform it, by the misunderstanding, on the part of the plaintiff, of the effect of the instrument by which performance was attempted. A reformation is permitted in such case, although the mistake be not mutual. See the cases before cited, and *Coles v. Bowne*, 10 Paige, 534.

The result of the cases justifies a reformation of a contract, when there is either a mutual mistake, that is, a mistake common to both parties, or when there is fraud. In his complaint, the plaintiff has simply stated the facts on which he claims relief. After setting forth the facts, he adds, that by mistake, he failed to insert in the deed a reservation of the timber. He does not charge that it was a mistake common to both parties. Nor does he charge it to have been a fraud. He gives no name to the conduct of the defendant. The facts, as found by the referee, and the judgment rendered by him, are in conformity to the allegations of the complaint. They establish, not a mutual or common error, but an error on the part of the plaintiff and fraud on the part of the defendant.

The defendant, by the judgment of the court upon the facts, occupied the place of the original contractors and undertook to perform their contract. This was the finding of the judge, and the evidence, with the circumstances, justified this finding. The fraud was in the deceitful performance. If the judgment of the court below is carried out, he will not be made a party to a new contract, which he would never have assumed. He did assume the original contract. He therefore became bound by it. When the court now compel him to abandon his fraudulent contract, he is remitted to the original agreement. He has no ground therefore to say that by being convicted of a fraud, he is compelled to enter into a new contract. Nor is he to be relieved by the rule that a party seeking to be relieved from fraud, must be ready, prompt and eager in his demand for redress. When a party seeks to rescind a contract, on the ground of fraud, he must undoubtedly be prompt and ready in his disaffirmance. He has the election to affirm or disaffirm. If he elects the latter he must do it at once. He is not permitted to hesitate and balance advantages. *Masson v. Bovet*, 1 Denio, 69; *Beers v. Hen-*

drickson, 6 Rob. (N. Y.) 54; *Tomlinson v. Miller*, *42 N. Y. 517.

In the present case the party does not ask to have the contract rescinded. He does not seek to have it declared void. On the contrary he insists that it is valid. He asks that it may read exactly as the parties originally agreed, and that all its parts may be completely performed. In such case the rule is that the party must show himself ready and eager for its performance. 1 Story, Eq. Jur. § 776. The plaintiff has given sufficient evidence of his readiness and eagerness to perform. If there has been an unreasonable delay in seeking relief, the court will refuse it. *Id.*, and 1 Fonbl. Eq. bk. 1, c. 6, § 2, note e. It is a question of discretion in the court whether under all the circumstances of time, repeated applications and refusals, the condition, knowledge, expectations and hopes of the parties, the relief should be granted. There is no positive or rigid rule, like that existing in the case of an attempted rescission. I am satisfied with the decision on this point of the court below, and the judge trying the cause. 1 Story, Eq. Jur. § 529; *Bidwell v. Insurance Co.*, 16 N. Y. 263.

The court having jurisdiction of the cause to amend the contract, thereby acquired the right incidentally to give relief in damages, or in such mode as justice required. *Rathbone v. Warren*, 10 Johns. 587; *Kempshall v. Stone*, 5 Johns. Ch. 193; *Woodcock v. Bennett*, 1 Cow. 711; *Bidwell v. Insurance Co.*, 16 N. Y. 263; *Story*, Eq. § 794; *Rundle v. Allison*, 34 N. Y. 180.

The defendant contends further, that no damages can be recovered by the plaintiff for timber that was cut more than six years before the commencement of the action. The argument of the defendant's counsel is that the reformation of the deed is merely a means by which the plaintiff seeks to recover damages for the timber taken, and that its correction is simply a part of the evidence to authorize him thus to recover; that his claim is therefore a legal one and cannot extend back beyond six years. The authorities cited by the defendant do not sustain this position. The most plausible is that of *Borst v. Corey*, 15 N. Y. 505, which was an action to enforce in equity a lien for the unpaid purchase-money of land. The court held that the action could not be sustained, for the reason that the debt sought to be enforced was barred by the statute of limitations. The debt they held to be the principal, the lien the incident, and the principal being ended the incident could not be enforced. At the same time the court conceded that where a mortgage was given to secure the payment of a simple contract debt, the lapse of six years was no bar to an action to foreclose the mortgage. The authority of *Mayor v. Colgate*, 12 N. Y. 140, was conceded, where an assessment was attempted to be enforced more than six years after the assessment had become due and payable. In the present case the question is not what action can be sustained after the deed is reformed,

But what action could have been sustained before its reformation? The reformation had not occurred when the suit was commenced, and the right of the parties was determined by the unreformed deed. That deed conveyed to the defendant without reservation, the one hundred and forty-one acres in question. It carried with it complete title to the trees. The plaintiff could not have sustained an action for their conversion. He would have been told that defendant had a legal title. The reformation of the deed in the present case is the principal and not the incident. Damages are the incident, not the principal. It is the title which the judgment of reformation gives that warrants the claim for damages; not the claim for damages that creates the legal title. Complete justice and nothing more is done by the judgment in this respect as it stands.

The defendant also insists that in the view that the recovery against the defendant is sustained upon the ground of fraud and not of mutual mistake, the cause of action is barred in six years from the discovery of the fraud. He further says that the judge has expressly found as a fact that the cause of action has not accrued within six years from the commencement of the suit. I have looked through the testimony carefully, and I do not find any evidence that the plaintiff discovered the fraud perpetrated upon him as early as six years before the commencement of the suit. He did undoubtedly discover his own error soon after its occurrence, and applied to the defendant's agents for its correction. He says that "he had confidence in them and expected all would have gone on as though it had been reserved." In other words, he had discovered his own mistake and believed it to be a mutual mistake, which the defendant would willingly rectify. He says further of the defendant's agent: "He seemed willing to do something. They proposed leaving it out. They never told me I could not have the timber. They always gave me to understand that they would settle it in some way. They always gave me to understand that they would do something about it. Neither of them ever told me I should not have so given the deed, if I did not mean to part with the timber." This evidence does not show a knowledge of the fraud. It does not show the plaintiff's knowledge that the defendant knew, when he took it, that the deed conveyed the absolute ownership of the trees, and that the plaintiff was ignorant of that fact, but supposed the trees were reserved, and that the defendant failed to correct his error. It does not even show that he supposed the defendant meant to insist upon retaining the benefits of the error. It shows rather that the plaintiff was constantly deluded with the idea that the mistake would be corrected. The judge has not found that the plaintiff discovered the fraud within more than six years before suit brought, and there was no evidence on which he could have been justified in so finding.

When the cause of action accrued in this case is a question of law. It was either when the transaction occurred or when the fraud was discovered.

The judge has found that the cause of action did not accrue within six years before suit brought. He states, in his opinion, that the action being to reform the contract, and the accounting being incidental, the action falls under the ninety-seventh section of the Code, which requires it to be brought within ten years after action accrued. He fixes the occurrence of the transaction as the time from which by law the statute begins to run. The defendant now asks us to hold this as a conclusive finding of fact, that the fraud was discovered more than six years before suit brought. This we cannot do. Upon the theory that the running of the statute begins with the date of the occurrence more than six years had elapsed, and such was the theory of the judge trying the cause. On the theory that it runs from the discovery of the fraud, there is no such finding, nor is there evidence to prove it. All presumptions are in favor of the judgment, and the contrary must be taken to be the fact.

I have thus considered the most important of the questions raised by the appellant. There are several other objections stated in the points, which I have also examined. They furnish no valid ground for asking a reversal of the judgment.

A majority of the court concur in the opinion that the plaintiff is entitled to relief. A majority of the court do not concur with me on the question of damages, and are of the opinion that the recovery of damages for a period exceeding six years prior to the commencement of the suit was erroneous. The judgment of the court will therefore be, that the judgment of the general term be affirmed, without costs of the court of appeals to either party, provided that the plaintiff shall, within thirty days after the entry of this order, serve on the defendant's attorney a stipulation, deducting from the judgment of April 6, 1863, the sum of \$2,407.45 as of that date. If such stipulation be not served, then the judgment shall be reversed and a new trial ordered, with costs to abide the event. In case the attorneys do not agree as to the details of the judgment, the same can be settled before one of the commissioners.

EARL, C. (dissenting). As I cannot concur with my brethren in this case, I will briefly give the reasons for my dissent.

No mistake is alleged in the contracts, and no reformation of them is claimed. And under no allegations or proof could the contracts be reformed, as a cause of action, for such purpose, would be barred by the statute of limitations.

If, as claimed by the plaintiff in his complaint, and by his counsel on the argument before us, the deed was given in pursuance

and in fulfillment of the contracts, then there can be no reformation of the deed, as it is in precise conformity to the contracts. If the two contracts of December 7, 1846, are construed together, they must be read as if embodied in one; and the timber is not reserved, and the contract does not provide for any reservation in the deed. The vendees were to get out certain lumber upon shares, and were to pay \$4 per acre besides. The contract in reference to the lumber was a binding contract and, if performed as the parties contemplated, it would be fully performed before the deed was required to be given; and such was manifestly the intention of the parties, and hence no provision was made for any reservation in the deed. The deed was given without any mention of the lumber, and hence the only claim the vendor could thereafter have, upon the lumber contract, was to sue for damages on account of its non-performance.

The only contract the defendant ever made or intended to make, as found by the referee, is that which is embodied in the deed. He never intended or was willing to take a deed with any reservation in it. What right then has a court of equity to reform the deed, so as to give him such a deed as he was never bound to take? There was never a time when, by action for specific performance, he could have been compelled to take a deed with a reservation, and the court has no right to compel him to take such a deed by the reformation of the one he did take.

If by fraud or mistake on his part, the plaintiff was induced to give this deed, the only relief he could have was to set aside the deed; and to obtain this relief, it was his duty, on the discovery of the fraud or mistake, to proceed promptly and not ratify the deed by taking the money on the note given for the purchase-price, after he discovered the mistake or fraud.

As I understand the opinion in which my brethren have concurred, it sustains the relief granted to the plaintiff, upon the ground of fraud, and yet the complaint does not in any way intimate even that the defendant was guilty of any fraud, nor does it allege that the defendant used any artifices to procure the deed to be drawn with the reservation omitted, or that he knew it was omitted. The charge of fraud should have been distinctly made in the complaint, so that the defendant could have taken issue upon it.

And it does not appear that any claim was made, at the trial, that the defendant was guilty of fraud, and the case was manifestly not tried upon any such theory. The judge at special term did not put his decision upon the ground of fraud. If he had, he would certainly have decided against the plaintiff, under his finding as to the statute of limitations, as follows: "That within a month after the execution of said deed, the plaintiff discovered said mistake, and shortly thereafter applied to the defendant to cor-

rect the same, which he neglected and refused to do; but proceeded to cut large quantities of said timber and appropriate the same to his own use; that the cause of action for which this suit is brought has not accrued to the plaintiff within six years before the commencement of this suit."

The learned judge evidently proceeded and granted relief upon the ground that the scrivener made a mistake in drawing the deed, and this was the ground upon which the general term placed its decision of affirmance. The cause of action for the mistake was not barred by the statute of limitations, because the action was commenced within ten years from the time the alleged mistake occurred.

A cause of action, for such a fraud as is now alleged in this case, is deemed to accrue, when the aggrieved party discovers the facts constituting the fraud, and it is barred in six years from that time. Code, § 91. All the fraud, if any, that was perpetrated in this case was in procuring and taking the deed without the reservation, and this was discovered, according to the finding of the judge, more than nine years before the suit was commenced, and hence I cannot be mistaken in saying that relief was granted at Special Term upon the ground of mistake alone, and not of fraud.

And still further, the counsel for respondent in his argument before us, did not claim to sustain the judgment below upon the ground of fraud, but upon the ground of mistake alone.

Hence under all the circumstances I cannot consent to uphold this judgment, or any part of it, upon the ground of fraud, against the decisions of both courts below, the claims of plaintiff's counsel, and the explicit finding of the judge at special term, that the cause of action for fraud was barred by the statute of limitations. It was the duty of the plaintiff to show that he discovered the fraud within six years before the commencement of the suit, and there can be no pretense that he gave any evidence to show this.

I concur with my brethren in holding that in any view of the case the plaintiff could recover only for timber cut within six years before the suit was commenced.

For affirmance, as modified: LOTT, C. C., and HUNT and LEONARD, CC.

For reversal: EARL and GRAY, CC., not voting.

Judgment affirmed without costs to either party in the court of appeals, provided the plaintiff within thirty days after the entry of this order, serves on the defendant's attorney a stipulation reducing the judgment \$2,407.45 and interest from the date of the judgment, April 6, 1863. If such stipulation be not served, then the judgment is reversed and a new trial ordered, costs to abide the event.

Judgment affirmed.

TOWN OF VENICE v. WOODRUFF.

(62 N. Y. 462.)

Court of Appeals of New York. 1875.

Appeal from supreme court, general term.

This was an action to secure the cancellation of certain bonds issued by the supervisor and railroad commissioners of the plaintiff town, and to restrain the defendants, who were the holders of those bonds, from transferring them. There was a finding of fact by a referee, the material part of which appears in the opinion.

RAPALLO, J. The referee has found that all of the bonds, which the plaintiff seeks by this action to have delivered up and canceled, were made and issued without the requisite consent of two-thirds of the tax payers of the town. That fact, according to the decisions of this court, rendered the bonds void, even in the hands of bona fide holders. *Starin v. Town of Genoa*, 23 N. Y. 439; *People v. Mead*, 24 N. Y. 114, 36 N. Y. 224.

It was further held in these cases that the burden of proving the requisite consent of the tax payers rested upon the party seeking to enforce payment of the bonds, and that the affidavit directed by the act under which the bonds purported to be issued, to be filed with the consent, was not evidence of the requisite consent. It is therefore settled by the adjudications of this court that no recovery can be had in an action upon these bonds, without affirmative extrinsic proof of the requisite consent. The fact being found that such consent was not given, it is clear that a perfect defense to the bonds exists, should an action be brought upon them in any court of this state, either by the present holders of the bonds, or by any person to whom they may be transferred.

Upon this state of facts the question arises, whether an equitable action can be maintained by the town to restrain the holders of the bonds from suing upon or transferring them, and to compel the surrender and cancellation of the instruments.

The cases in which a court of equity exercises its jurisdiction to decree the surrender and cancellation of written instruments are, in general, where the instrument has been obtained by fraud, where a defense exists which would be cognizable only in a court of equity, where the instrument is negotiable, and by a transfer the transferee may acquire rights which the present holder does not possess, and where the instrument is a cloud upon the title of the plaintiff to real estate. Under the chancery system, where a bill of discovery was necessary to establish a defense, the court having acquired jurisdiction of the case for the purpose of discovery, might proceed and award relief, but this ground of jurisdiction no longer exists. It is true that the jurisdiction of the court of chancery has been asserted to decree the surrender of every instrument which ought not to

be enforced, whether void at law or not, and whether void from matter appearing on its face, or from matter which must be established by extrinsic proof. *Hamilton v. Cummings*, 1 Johns. Ch. 520-522, 523. But Chancellor Kent in the case cited, in asserting this jurisdiction recognizes the necessity of showing strong grounds for the exercise of the power, and endeavors to reconcile the apparently conflicting English authorities by adverting to the general principle that the exercise of the power is to be regulated by sound discretion, as the circumstances of the individual case may dictate, and that a resort to equity, to be sustained, must be expedient either because the instrument is liable to abuse from its negotiable nature; or because the defense not arising on its face may be difficult or uncertain at law; or from some other special circumstances peculiar to the case, and rendering a resort to equity highly proper. And it is now well established that equity will not interpose to decree the cancellation of an instrument, the invalidity of which appears upon its face. *Story, Eq. Jur.*, § 700, a.

There must exist some circumstance establishing the necessity of a resort to equity, to prevent an injury which might be irreparable, and which equity alone is competent to avert. If the mere fact that a defense exists to a written instrument were sufficient to authorize an application to a court of equity to decree its surrender and cancellation, it is obvious that every controversy in which the claim of either party was evidenced by a writing could be drawn to the equity side of the court, and tried in the mode provided for the trial of equitable actions, instead of being disposed of in the ordinary manner by a jury.

Whether therefore the question be regarded as one of jurisdiction or of practice, it is established by the later decisions that some special ground for equitable relief must be shown, and that the mere fact that the instrument ought not to be enforced is insufficient, standing alone, to justify a resort to an equitable action. *Grand Chute v. Winegar*, 15 Wall. 374; *Minturn v. Farmers' Loan & Trust Co.*, 3 N. Y. 498; *Perrine v. Striker*, 7 Paige, 598; *Morse v. Hovey*, 9 Paige, 197; *Field v. Holbrook*, 6 Duer, 597; *Allerton v. Belden*, 49 N. Y. 373; *Reed v. Bank of Newburgh*, 1 Paige, 215, 218.

In the present case in so far as the invalidity of the bonds results from the want of consent of the tax payers, there is no ground whatever shown for resorting to an equitable action. Not only is the want of the consent a perfect defense at law, but the onus of proving the consent is upon the party seeking to enforce the bond; and the court cannot assume that he will be able to establish a fact that does not exist, and of which there is no documentary evidence. If it be said that the town may by delay lose evidence now existing, which would be avail-

able to meet and rebut false testimony, one decisive answer is that the statutes now provide a summary mode of perpetuating testimony in all cases, and an action is not necessary for that purpose. The case is analogous to those of *Field v. Holbrook*, 6 Duer, 597, and *Allerton v. Belden*, 49 N. Y. 373.

It is urged that the action should be sustained for the purpose of preventing a transfer of the bonds to a bona fide holder. This court has held that such a transfer could not prejudice the plaintiff, as the defense would be available even against a bona fide holder. *Starin v. Town of Genoa*, 23 N. Y. 439. But it is said that although such is the rule in this state, a different rule has been adopted in the courts of the United States, and the bonds might be transferred to a bona fide holder, who might sue in those courts. There would be force in this argument provided it were established in the case that the present holders of the bonds were not bona fide holders. In that case it might be proper for a court of equity to prevent their subjecting the town to liability by a transfer of the bonds. But if they are themselves bona fide holders, there is no justification for interfering with the right of transfer. In contemplation of law the transferees would acquire no greater rights than are possessed by the present holders.

The real purpose of the litigation seems to be to prevent a resort to the courts of the United States for the collection of these bonds; and the question is, whether it is the province of a court of equity in a state to interfere for the purpose of preventing a resort to the federal courts for the enforcement of obligations on the ground that they may be held in those courts to be valid, while according to the decisions of the state courts the same obligations are held to be void. I apprehend that the power of a court of equity to decree the surrender and cancellation of instruments has never before been appealed to or exercised for such a purpose. Equity will interfere to control the action of parties and restrain them from transferring negotiable obligations, on the ground that it is against conscience to allow them to create in their transferee a right or equity which they themselves do not possess. But where the effect of a transfer is not to change in any respect the rights or equities of the parties, I am not prepared to hold that the allegation that the transferee might resort to a tribunal in which a rule of decision prevails, or may prevail, differing from that of the court which is asked to enjoin the transfer, is sufficient to justify the interference asked. The wrong sought to be prevented by such a proceeding is not any wrongful act of any party, but a decision of another court. The facts of the case and the abstract rights of the parties are not changed by the transfer. The greatest effect it can have is to enable a transferee to sue in a court to which the present holder could not

resort. This, in general, would not be regarded as any wrong which a court of equity would restrain. If it is a wrong in this case it must be on the assumption that the federal court will render a decision at variance with the decision of this court. I am of opinion that such an apprehension is not a legitimate ground for the action of a court of equity in restraining a transfer or directing the cancellation of the instrument. There is no finding that the present holders are not bona fide holders of the bonds. As the judgment entered upon the report of the referee was in favor of the defendants it could not be disturbed unless facts were found showing that the conclusions of law were erroneous. We have held over and over again that the facts showing error in the legal conclusions must be found, and that the appellate court will not search for them in the evidence. In this case the findings are in favor of the bona fides of the defendants. As to five of the bonds it is found that they were sold and delivered by the supervisor and railroad commissioner to Hutchinson & Murdock, who paid for them par in cash. This finding is not weakened by the further finding that the money was in the first instance advanced on a pledge of the bonds which was subsequently converted into a sale. As to the twenty bonds which were issued direct to the railroad company, the referee finds that the holders purchased them without being informed that they had been delivered directly to the company. No fact is found impeaching the bona fides of the holders of any of the bonds, and therefore it does not appear that any transfer of them can be made which will confer upon the transferees any greater equities than are possessed by the present holders.

The fact that twenty of the bonds were delivered directly to the railroad company instead of being sold by the railroad commissioners, is relied upon as a ground for granting relief as to those bonds. In the case of *People v. Mead*, 24 N. Y. 124, 125, it seems to be considered that this fact would not constitute a defense, even in the state court, as against a bona fide holder of the bonds. But to entitle the town to affirmative equitable relief on that ground, it should have been made to appear that the defendants were not bona fide holders; which, as has already been shown, the plaintiff has failed to do.

Another ground urged in support of the claim to equitable relief is, that it is necessary for the purpose of avoiding a multiplicity of suits; and the case of *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 592, and 34 N. Y. 30, is referred to as an authority in point. But that case was essentially different from the present. There the defendants all claimed shares in the same corporation, which had authority to issue only a limited number; shares had been issued in excess of that limit, and some of them

must be rejected. The spurious shares were held to be a cloud upon the title of the holders of the genuine shares, and the corporation was held to be the proper representative of the genuine stockholders to seek the interposition of the court to remove that cloud. Here was a solid ground upon which the plaintiff could found its application for relief. The plaintiff having this standing in court, it was held that all the alleged spurious shareholders were properly joined as defendants. But jurisdiction was not entertained on the sole ground that the holders of spurious shares were numerous. In the present case there is no question of any cloud upon the title. The plaintiff seeks to have canceled certain written instruments purporting to be obligations for the payment of money, which are held by various independent owners. If it fails to make out a case which would sustain an action for that purpose against any one of them alone, the mere fact that there are several such holders is not of itself sufficient ground for entertaining the suit. If the facts were such as would have sustained the action against one person had he been the holder of all the bonds, then the case of the New Haven Railroad Company would be an authority in favor of the position, that if there were several holders all might be joined as defendants. But it does not support the position, that the mere fact that numerous independent parties hold separate instruments upon which they might bring separate suits is sufficient to justify a court of equity in entertaining an action by the debtor to compel them to litigate their claims in an action in the form which he selects.

Under any circumstances, I am inclined to concur with Judge Talcott, in the opinion that a court of equity would not interfere affirmatively to relieve the plaintiff against these bonds, except upon condition that it surrendered what it had received for them. The relief sought is discretionary with the court; and the plaintiff is not entitled to it as matter of absolute right. Actions of this class are in that respect governed by the same rules which apply to actions for specific performance; and relief will never be granted except upon equitable terms, where the case is such as to call for the imposition of terms. Story, Eq. Jur., §§ 692, 693, 696, and cases cited section 742. But the reasons before given I deem sufficient to sustain the conclusion of the referee dismissing the complaint.

There is great doubt whether the defense of the statute of limitations is available in this case. In respect to the limitation of time it is analogous in principle to an action to remove a cloud upon the title to land; and in such cases I do not understand the rule to be that the statute runs from the time the cloud was first created. See *Miner v. Beekman*, 50 N. Y. 338; *Hubbell v. Medbury*, 53 N. Y. 99; *Arnold v. Hudson R. R. Co.*, 55 N. Y. 661.

On the ground that the facts of the case are insufficient to justify the interposition of a court of equity to decree the surrender and cancellation of the bonds, or to restrain their transfer, so much of the judgment as is appealed from should be affirmed, with costs.

All concur; CHURCH, C. J., not sitting.
Judgment affirmed.

BOOTH v. CLARK.

(17 How. 322.)

Supreme Court of the United States. Dec. Term, 1854.

The case is stated in the opinion of the court.

Mr. Bradley, for appellant. Lawrence & May, contra.

WAYNE, J., delivered the opinion of the court.

We learn from the record of this case that Juan de la Camara recovered a judgment in the supreme court of New York, against Ferdinand Clark, for \$4,688.49, with interest at seven per cent.; that a *feri facias* was issued upon the judgment, and that there was a return upon it of "no goods, chattels, or real estate of the defendant to be levied upon." Upon this return, Camara filed a creditor's bill, before the chancellor of the First circuit in the state of New York, setting out his judgment and the return upon the *feri facias*, in which he seeks, under the laws of that state, to subject the equitable assets and choses in action of Clark to his judgment; and he asks for a discovery of them from Clark, for an injunction, and the appointment of a receiver. Notice of this proceeding, and of the action upon it were served upon the solicitor of Clark, and the bill of complaint was taken as confessed, upon the defendant's default in not answering. Booth, the present complainant, was appointed receiver on the 3d August, 1842. Clark had been previously enjoined under the proceeding from making any disposition of any part of his estate, legal or equitable. Thus matters stood from the time of the receiver's appointment, in 1842, until June, 1851. Then Booth, as receiver, reports that no effects of Clark had come to his knowledge, except a claim upon Mexico, which had been adjudged to Clark by the United States commissioners, under the treaty with Mexico; and that, as receiver, he was contesting it; and he asks from the court authority to proceed for that purpose, which was granted. Such is an outline of the case in New York, containing every substantial part of it.

We will now state the proceedings of this suit at the instance of the receiver, in the circuit court of the United States for the District of Columbia, from the decision of which, dismissing the receiver's bill, it has been brought to this court for revision.

On the 29th May, 1851, Booth, the receiver, filed his bill in the circuit court for the District of Columbia, reciting so much of the proceedings of the New York courts as was deemed necessary to support his suit. He declares that Clark, when the original suit was instituted against him by Camara, and from that time until after he had been appointed receiver, had resided in New York.

That his effects consisted principally, if not wholly, of the claim upon Mexico, and that he claimed that fund as receiver for the purposes of that appointment. Clark answered the bill. He denies that the proceedings against him in the courts of the state of New York created any lien in behalf of Camara, or the receiver, upon the fund in controversy. He admits that no part of his property ever came into receiver's hands, under those proceedings, and that he had the claim upon Mexico whilst the suits were pending against him, and when the receiver was appointed under Camara's creditor's bill; but that all the evidences and papers in support of his Mexican claim were then in the public archives at Washington. He also states, that the board of commissioners under the act of congress of March, 3, 1849 (9 Stat. 393, 992), entitled "An act to carry into effect certain stipulations of the treaty between the United States and the republic of Mexico, of the 2d February, 1848," had made an award in his favor for the sum of \$86,786.29, which sum was then in the hands of the secretary of the treasury of the United States. He then alleges that, being a resident of the state of New Hampshire, he filed in the clerk's office of that district, on the 28th January, 1843, his petition to be declared a bankrupt. That he had been declared a bankrupt on the 22d March following, pursuant to the "Act to establish a uniform system of bankruptcy throughout the United States," passed August 19, 1841 (5 Stat. 440). He then recites that there had been attached to his petition in the bankrupt's court, a schedule of his property, rights, and credits of every kind and description, in which his Mexican claim had been stated; and that it was upon that claim the commissioners had awarded to him the sum before mentioned. He declares that, under the decree of the court in bankruptcy, one John Palmer had been appointed assignee; and that, having given his bond in compliance with the order of the court, he was vested, as assignee, in virtue of the operation of the bankrupt law, of all the defendant's property, for the benefit of his creditors, including the Mexican claim. It is also stated in his answer, that notice of all the proceedings in his matter of bankruptcy had been published in the leading newspapers of New Hampshire, and that the name of Juan de la Camara, and his residence, was placed among the list of his creditors attached to his petition to be declared a bankrupt. And he avers that all of his creditors had had notice of the proceedings in bankruptcy. That neither Camara nor any other creditor had filed or made any objections to those proceedings, or to the action of the assignee, until after the award had been made upon the Mexican claim.

It is not necessary, for the purposes of this opinion, to state the defendant's recital of the sale of his effects by Palmer, the as-

signee; his purchase of them, including the Mexican claim, or the rights claimed by the defendant under his purchase, all relating to the same having been fully acted upon by this court at this term, in the case of *Ferdinand Clark v. Benjamin C. Clark and W. H. Y. Hackett*. We state, however, that Palmer, the original assignee in Clark's bankruptcy, having died, he had been succeeded by the appointment of Hackett as assignee. This suit, then, is substantially between Hackett, as the assignee of Clark in bankruptcy, and Booth, the receiver under Camara's creditor's bill; that it may be determined by this court, which of them has the official right to the Mexican fund, for the distribution of it between the creditors of Clark, or whether Booth, as receiver, shall have from that fund a sufficient sum to pay Camara's entire debt, leaving the residue of it for distribution between Clark's other creditors.

It appears also from the record that Booth, the receiver, took no steps to execute his official trust, from the time of his appointment in 1842, until 1851, after the award of the Mexican claim had been made in Clark's favor. And, also, that the court of chancery, acting upon the creditor's bill brought by Camara, had not been applied to, either by Camara or by the receiver, for any order upon Clark in personam, to coerce his compliance with its injunction and decree.

Upon this statement of the case, we will now consider it. There is no dispute concerning the regularity or binding operation of the judgment obtained by Camara against Clark. None in respect to the proceedings under the creditor's bill. The leading point in the case is the effect of the proceedings under the last, to give a right to the receiver, in virtue of a lien which he claims upon the property of the debtor, to sue for and to recover any part of it, legal or equitable, without the jurisdiction of the state of New York. In other words, as an officer of a court of chancery, for a particular purpose, will he be recognized as such by a foreign judicial tribunal, and be allowed to take from the latter a fund belonging to a debtor, for its application to the payment of a particular creditor within the jurisdiction of the receiver's appointment, there being other creditors in the jurisdiction in which he now sues, contesting his right to do so. Or can he as receiver claim, in virtue of a decree upon a creditor's bill given in one jurisdiction, a right to have the judgment upon which the creditor's bill was brought, paid out of a fund of a bankrupt debtor in a foreign jurisdiction; because his appointment preceded the bankrupt's petition.

It is urged that the receiver in this case, by the decree of the court in New York, was entitled officially to the entire property of Clark, real, personal, or equitable, both within and without the state of New York. That he could, as receiver, maintain any action

for the property and rights of property of the debtor which the latter could have done. That the fund now in controversy was a chose in action, belonging to the debtor when the receiver was appointed, and, though not within the state of New York, that it followed the person of the owner and passed to the receiver, because the owner was domiciled in New York. And it was also said that, having such official rights or liens upon the property of the debtor, the comity of nations would aid him in the assertion of them in a foreign tribunal. The counsel for the receiver cited from the reports of the state of New York several cases in support of the foregoing propositions. We have perused all of them carefully, without having been able to view them altogether as the learned counsel does. Whatever may be the operation of the decree in respect to the receiver's powers over the property of the debtor within the state of New York, and his right to sue for them there, we do not find any thing in the cases in the New York reports showing the receiver's right to represent the creditor or creditors of the debtor in a foreign jurisdiction. It is true that thereceiver in this case is appointed under a statute of the state of New York, but that only makes him an officer of the court for that state. He is a representative of the court, and may, by its direction, take into his possession every kind of property which may be taken in execution, and also that which is equitable, if of a nature to be reduced into possession. But it is not considered in every case that the right to the possession is transferred by his appointment; for, where the property is real, and there are tenants, the court is virtually the landlord, though the tenants may be compelled to attorn to the receiver. *Jeremy, Eq. Jur.* 249. When appointed, very little discretion is allowed to him, for he must apply to the court for liberty to bring or defend actions, to let the estate, and in most cases to lay out money on repairs, and he may without leave distrain only for rent in arrear short of a year. 6 Ves. 802; 15 Ves. 26; 3 Brown, Ch. Cas. 88; 9 Ves. 335; 1 Jac. & W. 178; *Morris v. Elme*, 1 Ves. Jr. 139; *Id.* 165; *Blunt v. Clithero*, 6 Ves. 799; *Hughes v. Hughes*, 3 Brown, Ch. Cas. 87; 5 Madd. 473.

A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. *Wyatt's Prac. Reg.* 355. He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it. *Delany v. Mansfield*, 1 Hogan, 234

It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. *Verplanck v. Insurance Co.*, 2 Paige, Ch. 452. Unless where he is appointed under the statute of New York, directing proceedings against corporations (2 Rev. St. 438), and then he is a standing assignee, vested with nearly all the powers and authority of the assignee of an insolvent debtor. *Attorney General v. Life & Fire Ins. Co.*, 4 Paige, Ch. 224. In the case just cited, Chancellor Walworth says, that the receiver has "no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court." In the statement which has been made of the restraints upon a receiver, we are aware that they have been measurably qualified by rules, and by the practice of the courts in the state of New York, as may be seen in *Hoffman's Practice*; but none of them alter his official relation to the court, and, so far as we have investigated the subject, we have not found another instance of an order in the courts of the state of New York, or in the courts of any other state, empowering a receiver to sue in his own name officially in another jurisdiction for the property or choses in action of a judgment debtor. Indeed, whatever may be the receiver's rights under a creditor's bill, to the possession of the property of the debtor in the state of New York, or the permissions which may be given to him to sue for such property, we understand the decisions of that state as confining his action to the state of New York.

Such an inference may be made from several decisions. It may be inferred from what was said by Chancellor Walworth, in *Mitchell v. Bunch*, 2 Paige, Ch. 615. Speaking of the property which might be put into the possession of a receiver, and of the power of a court of chancery to reach property out of the state, he declares the manner in which it may be done, thus: "The original and primary jurisdiction of that court was in personam merely. The writ of assistance to deliver possession, and even the sequestration of property to compel the performance of a decree, are comparatively of recent origin. The jurisdiction of the court was exercised for several centuries by the simple proceeding of attachment against the bodies of the parties to compel obedience to its orders and decrees. Although the property of a defendant is beyond the reach of the court, so that it can neither be sequestered nor taken in execution, the court does not lose its jurisdiction in relation to that property, provided the person of the defendant is within the jurisdiction. By the ordinary course of proceeding, the defendant may be compelled either to bring the property in dispute, or to which the defendant

claims an equitable title, within the jurisdiction of the court, or to execute such a conveyance or transfer thereof as will be sufficient to vest the legal title, as well as the possession of the property, according to the *lex loci rei sitæ*." It is very obvious, from the foregoing extract, that up to the time when *Mitchell v. Bunch* was decided, in the year 1831, it had not been thought that a court of chancery in the state of New York could act upon the property of a judgment debtor in a creditor's bill which was not within the state of New York, but by the coercion of his person when he was within the jurisdiction of the state; and that it had not been contemplated then to add to the means used by chancery to enforce its sentences, in respect to property out of the state of New York, the power to a receiver to sue in a foreign jurisdiction for the same. It is true that the jurisdiction of a court of chancery in England and the United States, to enforce equitable rights, is not confined to cases where the property is claimed in either country, but the primary movement in the chancery courts of both countries to enforce an injunction, is the attachment of the person of the debtor, where he is amenable to the jurisdiction of the court.

We find in the second volume of Spence on the Jurisdiction of the Court of Chancery in England (pages 6, 7), this language: "When, therefore, a case is made out against a person resident within the jurisdiction of the court, in respect to property out of it, but within the empire, or its dependencies, which would call for the interference of the court of chancery if the property were situate in the country, the court, as it had the power, has assumed the jurisdiction, when such an interference is necessary to the ends of justice, of enforcing the equitable rights of the parties to or over property out of its jurisdiction, by the coercion of the person and sequestration of his property here, in the same manner as it would have done had the property been situate in this country." And Sir John Leach said: "When parties defendants are resident in England, and are brought upon subpoena here, the court has full authority to act upon them personally, with respect to the subject of the suit, as the ends of justice require, and with that view to order them to take or to omit to take any steps or proceedings in any other court of justice, whether in this or in a foreign country. This court does not pretend to any interference with the other courts." It acts upon the defendant by punishment for his contempt, for his disobedience of the court. The court of chancery has no power directly to affect property out of the bounds of its jurisdiction. *Roberdeau v. Rous*, 1 Atk. 544; 2 Spence. We believe such to be the proper course, in chancery, in cases of injunction, and that its jurisdiction, by injunction, rests entirely on

the coercion of the person. Such, however, was not the course pursued in this case, though the debtor was then a resident of the state of New York, and amenable to the jurisdiction of the court. No motion was made to force Clark to comply with the injunction which Camara had obtained under the creditor's bill. The matter was allowed to rest for seven years, Camara being aware that Clark had a pecuniary claim upon the republic of Mexico, at least as early as in the year 1843. The receiver during all that time took no action. His first movement is an application to be permitted to sue for the fund in the hands of the government, which had been awarded to Clark by the commissioners under the treaty with Mexico. Permission was given to sue. He has brought his bill accordingly, and it directly raises the question, whether he can, as an officer of the court of chancery in New York, and in his relation of receiver to Camara, be permitted to sue in another political jurisdiction.

We have already cited Chancellor Walworth's opinion as to the course which is to be pursued in New York upon an injunction in a creditor's bill. Mr. Edwards, in his excellent work on Receivers in Chancery, after citing the language used in *Mitchell v. Bunch*, says: "Still, the difficulty remains as to a recognition of the powers or officers of the court, by persons holding a lease upon the property, especially realty, out of the jurisdiction. Then in *Malcolm v. Montgomery*, 1 Hogan, 93, the master of the rolls observed, that a receiver could not be effectually appointed over estates in Ireland, by the English court of chancery, in any direct proceeding for the purpose; and that attempts had often been made to do so by serving orders made by the English court of chancery, but that they had failed, because the English court of chancery has no direct means of enforcing payment of rent to its receiver, by tenants who reside in Ireland. The attorney-general and another counsellor also said, that to their knowledge such attempts had been frequently made, but had been uniformly given up as impracticable. A conflict might also arise between the receiver out of the jurisdiction and creditors, and also other persons out of the jurisdiction. The comity of nations and different tribunals would hardly help a receiver."

We also infer, from the case of *Storm v. Waddell*, 2 Sandf. 494, that the receiver's right to the possession of the property of a debtor in the state of New York, and his right to sue for property there, is limited to that jurisdiction. The chancellor, in the last case mentioned, after having given an epitome of the cause of proceeding in a creditor's bill, and speaking of equitable interests and things in action belonging to the debtor, without regard to the injunction, says: "The property of the defendant is subjected to the suit, wherever it may be, if

the receiver can lay hold of it, or the complainant can reach it by the decree. The injunction, when served, prevents the debtor from putting it away or squandering it." This language indicates the receiver's locality of action. Taken in connection with that of Chancellor Walworth, in *Mitchell v. Bunch*, it shows that the receiver's right to the possession of the debtor's property is limited to the jurisdiction of his appointment, and that he has no lien upon the property of the debtor, except for that which he may get the possession of without suit, or for that which, after having been permitted to sue for, he may reduce into possession in that way. Our industry has been tasked unsuccessfully to find a case in which a receiver has been permitted to sue in a foreign jurisdiction for the property of the debtor. So far as we can find, it has not been allowed in an English tribunal; orders have been given in the English chancery for receivers to proceed to execute their functions in another jurisdiction, but we are not aware of its ever having been permitted by the tribunals of the last.

We think that a receiver has never been recognized by a foreign tribunal as an actor in a suit. He is not within that comity which nations have permitted, after the manner of such nations as practise it, in respect to the judgments and decrees of foreign tribunals, for all of them do not permit it in the same manner and to the same extent, to make such comity international or a part of the laws of nations. But it was said that receivers in New York are statutory officers, as assignees in bankruptcy are. That being so, he had, as assignees in bankruptcy have upon the property of the bankrupt, a lien upon the property of a judgment debtor, under an appointment in a creditor's bill. But that cannot be so. An assignee in bankruptcy in England, and in this country when it had a bankrupt law, is an officer made by the statute of bankruptcy, with powers, privileges, and duties prescribed by the statute, for the collection of the bankrupt's estate for an equal distribution of it among all of his creditors.

In England, the property of the bankrupt is vested in the assignees in bankruptcy by legislative enactment. Where commissioners have been appointed, it is imperative upon them to convey to the assignees the property of the bankrupt, wherever it may be or whatever it may be, and it is done by deed of bargain and sale, which is afterwards enrolled. It vests the assignees with the title to the property from the date of the conveyance, it having been previously vested in the commissioners for conveyance by them to the assignees. As to the bankrupt's personal estate, the statute looks beyond the debts and effects of a trader within the kingdom, and vests them in the commissioners in every part of the world. The last is done in England, upon the principle

that personal property has no locality, and is subject to the law which governs the person of the owner. As by that law the property of a bankrupt becomes vested in the assignee, for the purposes of the assignment, his title to such property out of England is as good as that which the owner had, except where some positive law of the country, in which the personal property is, forbids it. Cullen, 244.

In claiming such a recognition of assignees in bankruptcy from foreign courts, England does no more than is permitted in her courts, for they give effect to foreign assignments made under laws analogous to the English bankrupt laws. *Solomons v. Ross*, 1 H. Bl. 131, note; *Jollet v. Deponthieu*, Id. 132, note. But such comity between nations has not become international or universal. It was not admitted in England until the middle of the last century in favor of assignees in bankruptcy. Lord Raymond decreed it in 1811, in the case of a commission of bankruptcy from Holland. Sir Joseph Jekyll, in 1715, said, the law of England takes no notice of a commission in Holland, and therefore a creditor here may attach the effects in the city of London, and proceed to condemnation. 3 Burge, 907. Lord Mansfield, in *Warring v. Knight*, (sittings in Guildhall, after Hilary term, Geo. III.) *Cooke, Bankr. Law*, 200, 3 Burge, 907, ruled, that where an English creditor proceeded subsequent to an act of bankruptcy, by attachment in a foreign country, and obtained judgment there and satisfaction by the sale of the debtor's personal property, the assignees in an action in England could not recover from such creditor the amount of the debt which had been remitted to him. Again, his lordship ruled, that the statutes of bankrupts do not extend to the colonies or any of the king's dominions out of England, but the assignments under such commissions are, in the courts abroad, considered as voluntary, and as such take place between the assignee and the bankrupt, but do not affect the rights of any other creditors.

So the law stood in England until the case of *Folliott v. Ogden*, 1 H. Bl. 123, when Chancellor Northington stimulated it into a larger comity, by giving effect to a claim to the creditors of a bankrupt in Amsterdam over an attaching creditor in England, who had proceeded after the bankrupt had been declared to be so, by the proper tribunal in Amsterdam. England had just then become the great creditor nation of Europe, and of her provinces in North America. Her interest prompted a change of the rule, and her courts have ever since led the way in extending a comity which had before been denied by them. The judicial history of the change, until the comity in favor of assignees became in England what it now is, is given in 3 Burge, c. 22; *Bankr. Laws*, 886, 906-912, inclusive, and from 912-929. It may now be said to be the rule of comity

between the nations of Europe; but it has never been sanctioned in the courts of the United States, nor in the judicial tribunals of the states of our nation, so far as we know, and we know that it has been repeatedly refused in the latter. Our courts, when the states were colonies, had been schooled, before the Revolution, in the earlier doctrines of the English courts upon the subject. The change in England took place but a few years before the separation of the two countries.

That comity has not yet reached our courts. We do not know why it should do so, so long as we have no national bankrupt laws. The rule which prevailed whilst these states were colonies still continues to be the rule in the courts of the United States, and it is not otherwise between the courts of the states. It was the rule in Maryland, before the Revolution. It is the rule still, as may be seen in *Birch v. McLean*, 1 Har. & McH. 286; *Wallace v. Patterson*, 2 Har. & McH. 463. An assignment abroad, by act of law, has no legal operation in Pennsylvania. We find from *McNeil v. Colquhoun*, 2 Hayw. (N. C.) 24, that it has been the rule in North Carolina for sixty years. South Carolina has no other. 1 Const. (S. C.) 283; 4 McCord, 519; *Taylor v. Geary*, Kirby, 313. In Massachusetts, the courts will not permit an assignment in one of the states, whether it be voluntary or under an insolvent law, to control an attachment in that state of the property of an insolvent which was laid after the assignment, and before payment to the assignees. The point occurred recently in the circuit court of the United States for that district, in the case of *Betton v. Valentine*, 1 Curt. 168; and it was ruled that the assignee of an insolvent debtor, appointed under the law of Massachusetts, does not so far represent creditors in the state of Rhode Island as to be able to avoid a conveyance of personal property in the latter state, good as against the insolvent, but invalid as against creditors, by the law of Rhode Island.

In New York, the "ubiquity of the operation of the bankrupt law, as respects personal property," was denied in *Abraham v. Ples-toro*, 3 Wend. 538. Chancellor Kent considers it to be a settled part of the jurisprudence of the United States, that a prior assignment under a foreign law will not be permitted to prevail against a subsequent attachment of the bankrupt's effects found in the United States. The courts of the United States will not subject their citizens to the inconvenience of seeking their dividends abroad, when they have the means to satisfy them under their own control. We think that it would prejudice the rights of the citizens of the states to admit a contrary rule. The rule, as it is with us, affords an admitted exception to the universality of the rule that personal property has no locality, and follows the domicile of the owner. This court, in *Ogden v. Saunders*, 12 Wheat. 213, disclaimed the English

doctrine upon this subject; and in *Harrison v. Sterry*, 5 Cranch, 289, 302, this court declared that the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States.

Such being the rule in the American courts, in respect to foreign assignments in bankruptcy, and in respect to such assignments as may be made under the insolvent laws of the states of the United States, there can be no good reason for giving to a receiver, appointed in one of the states under a creditor's bill, a larger comity in the courts of the United States, or in those of the states or territories. On the contrary, strong reasons may be urged against it. A receiver is appointed under a creditor's bill for one or more creditors, as the case may be, for their benefit, to the exclusion of all other creditors of the debtor, if there be any such, as there are in this case. Whether appointed as this receiver was, under the statute of New York, or under the rules and practice of chancery as they may be, his official relations to the court are the same. A statute appointment neither enlarges nor diminishes the limitation upon his action. His responsibilities are unaltered. Under either kind of appointment, he has at most only a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by the direction of the court into ability to act. He has no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek.

In those countries of Europe in which foreign judgments are regarded as a foundation for an action, whether it be allowed by treaty stipulations or by comity, it has not as yet been extended to a receiver in chancery. In the United States, where the same rule prevails between the states as to judgments and decrees, aided as it is by the first section of the fourth article of the constitution, and by the act of congress of 26th May, 1790 (1 Stat. 122), by which full faith and credit are to be given in all of the courts of the United States, to the judicial sentences of the different states, a receiver under a creditor's bill has not as yet been an actor as such in a suit out of the state in which he was appointed. This court considered the effect of that section of the constitution, and of the act just mentioned, in *McElmoyle v. Cohen*, 13 Pet. 324-327. But apart from the absence of any such case, we think that a receiver could not be admitted to the comity extended to judgment creditors, without an entire departure from chancery proceedings, as to the manner of his appointment, the

securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the estate of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court; and that it would be difficult to do, where it may be asked to be done, without the court exercising its province to determine whether the suitor, or another person within its jurisdiction, was the proper person to act as receiver.

Besides, there is much less reason for allowing the complainant in this case to be recognized as receiver for the fund out of the state of New York, and in this jurisdiction, even if the practice in chancery in respect to receivers was different from what we have said it was. The remedies which the judgment creditor in New York had under his creditor's bill against his debtor, were not applied as they might have been in that state, according to the practice in chancery in such cases. When Clark had been enjoined under the creditor's bill, and the receiver had been appointed, both judgment creditor and receiver knew at the time,—certainly, as the record shows, in a short time afterwards,—that Clark had a pecuniary claim upon the republic of Mexico. No attempt was made, according to chancery practice, to coerce Clark by the attachment of his person under the injunction, to make an assignment of that claim for the payment of Camara's judgment. It cannot be said that Clark had not property to assign, and that it was therefore unnecessary to attach him. That would make no difference; for whether with or without property, he might have been compelled to make a formal assignment, even though he had sworn that he had none. It was so ruled in *Chipman v. Sabatton*, 7 Paige, 47, and in *Fitzburgh v. Everingham*, 6 Paige, 29.

There was a want of vigilance in this matter, which does not make any equity which he may have in New York upon Clark's property, superior to that of Clark's creditors, who are pursuing the funds in this district. Nor, according to the rule prescribed in the United States, that personal property has no locality on account of the domicile of the owner, to transfer it under a foreign assignment, can the receiver have in this case any thing in the nature of a lien to bind the property of Clark not within the state of

New York. When we take into consideration also the origin of the fund in controversy, the manner of its ultimate recovery from Mexico, the congressional action upon it, in every particular, to secure it, after the awards were made, to those who might be entitled to receive it; the jurisdiction given to the circuit court of this district, with an appeal from its decision to this court, upon the principles which govern courts of equity to adjudge disputes concerning it, and that such cases were to be conducted and governed in all respects as in other cases in equity, we must conclude that the complainant in this case, as receiver, cannot be brought under the rule prescribed for our decision. We concur with the court below in the dismissal of the bill.

DAVIS v. GRAY.

(16 Wall. 203.)

Supreme Court of the United States. Dec., 1872.

Appeal from the circuit court for the Western district of Texas, the case being thus:

The state of Texas had at the times hereinafter named, certain public lands. A general land office was established at the capital of the state for the registration of titles and surveys, and the lands were divided when surveyed into sections of six hundred and forty acres each. One Kuechler was the chief of this office, under the title of the "commissioner of the general land office." All certificates for the public lands were issued by this commissioner; and all patents were issued under the seals of the state and the general land office, and were required to be signed by the governor and countersigned by the said commissioner. These certificates were evidences of obligation on the part of the state to grant and give a patent to the holder for a certain amount therein mentioned of the vacant and unreserved public lands of the state; when the certificates are located and surveyed, and the surveys returned to the commissioner and approved by him, a patent, conveying the fee, is executed as above mentioned.

In and about the year 1856, and for many years thereafter the state of Texas, though of great extent, was, as it still is, sparsely inhabited, while its public domain was far from markets, and without connection with the more settled parts of the country; and it was greatly to the interest of the state to attract immigration and capital. To produce this result it became the settled policy of the state to make grants and reservations of public lands to corporations, conditioned upon the construction of certain amounts of railroad within certain times. In pursuance of this policy the Memphis, El Paso & Pacific Railroad Company, was incorporated February 4th, 1856, by the state of Texas, to build a railroad across the state from the eastern boundary to El Paso, with a land grant of 16 sections to the mile; certificates for 8 sections per mile to be issued on the grading of successive lengths of road, and 8 more per mile upon the complete construction of the same; and a reservation was granted of the alternate or odd sections of land for eight miles on each side of the road, within which the company should have an exclusive right to locate its certificates, while it also had the privilege to locate said certificates on any other unappropriated public lands.

This reservation, of course, was of the greatest value, as it enabled the company to reap the advantage of the enhancement of price which the construction of the road by them would cause in the lands along the line.

In the same year of 1856 the company

was organized in reliance on the grants, and especially on the reservation, and duly accepted the same.

There were certain conditions precedent to the vesting of the charter, land grant, and reservation; but they were all complied with, and at a cost to the company for surveys of over \$100,000. These and subsequent surveys resulted, for the company, in the official designation of the road line and the center line of the reservation for some 800 miles, and the "sectionizing" and numbering of the odd sections of land in said reservation in a belt of country some 250 miles in length and 16 in width; and for the state in the surveying and mapping of the same belt of country and the "sectionizing" and numbering of the alternate or even sections for the benefit of the state. The company also graded some 65 miles of road westerly from Moore's Landing, in Bowie county, and was interrupted in the work of construction by the rebellion and so-called "secession" of Texas; but resumed work after the war, and graded between 20 and 30 miles further, from Jefferson in Marion county, in the direction of Moore's Landing.

There were certain conditions subsequent annexed to the charter, viz.: That if the company should not have completely graded not less than 50 miles of their road by the 1st of March, 1861, and at least 50 miles additional thereto within two years thereafter, then the charter of said company should be null and void. The first 50 miles were graded within the required time; the second 50 miles have never been graded. Within two years after the performance of the first condition, however, the legislature of Texas, by act "for the relief of railroad companies," approved February 11th, 1862, enacted, that the failure of any chartered railroad company to complete any section, or fraction of a section, of its road as required by existing laws, should not operate as a forfeiture of its charter, or of the lands to which the said company would be entitled under the provisions of an act entitled "An act to encourage the construction of railroads in Texas by donation of land," approved January 30th, 1854; provided that the said company should complete such section, or fraction of a section, as would entitle it to donations of land, under existing laws, within two years after the close of the war between the Confederate States and the United States of America. Within the two years after the close of the war, the provisional legislature, by act of November 13th, 1866, enacted, "that the grant of 16 sections of land to the mile to railroad companies heretofore or hereafter constructing railroads in Texas shall be extended, under the same restrictions and limitations heretofore provided by law, for 10 years after the passage of this act;" and by article 12, section 33, of the present constitution of Texas, while declaring that the legislatures which sat from

March 18th, 1861, to August 6th, 1866, were without constitutional authority, yet enacted that such declaration should not affect, prejudicially, private rights which had grown up under such acts, and that though the legislature of 1866 was only provisional, its acts were to be respected, so far as they were not in violation of the constitution and laws of the United States.

By act of July 27th, 1870, the Southern Transcontinental Railroad Company was incorporated, and it was enacted, in terms, that it might "purchase the rights, franchises, and property of the Memphis, El Paso & Pacific Railroad Company, heretofore incorporated by the state."

The land grant was limited to fifteen years from the 4th of February, 1856, but this time had not yet expired, and by an act of November 13th, 1866, for the benefit of railroad companies, it was enacted, that this grant of 16 sections of land to the mile to railroads theretofore or thereafter constructing railroads in Texas, should be extended under the same restrictions and limitations theretofore provided by law, for ten years after the passage of this act.

The land reservation was conditioned upon certain surveys: (1) It was to be surveyed from the eastern boundary of Texas, as far as the Brazos river, within four years from March 1st, 1856. (2) The centre line of the reserve was to be run and plainly designated from the Brazos to the Colorado within fifteen months from February 10th, 1858. (3) The whole reservation was to be surveyed within ten years from February 10th, 1858. (4) The company was to have a connection with some road leading to the Mississippi river or the Gulf of Mexico, within ten years from February 10th, 1858. The first and second of these conditions were fulfilled within the times limited. The legislature, by act approved January 11th, 1862, enacted that "the time of the continuance of the present war between the Confederate States and the United States of America shall not be computed against any internal improvement company in reckoning the period allowed them in their charters, by any law, general or special, for the completion of any work contracted by them to do."

This act the company considered extended the time for the performance of the third and fourth conditions till the 10th of June, 1873.

In the years 1867 and 1868 the company executed two series of bonds, known as land grant bonds, amounting in the aggregate to the par value of \$10,000,000 in gold, and also executed and delivered to one Forbes and others, trustees as aforesaid, two mortgages to secure said bonds, by one of which they mortgaged all lands actually acquired or thereafter to be acquired by said company by grading, constructing, and equipping the first 150 miles of the road of said company, from Jefferson in Marion county to Paris in Lamar county, and by the other of

which they mortgaged the like property for the second 150 miles, from Paris to Palo Pinto in Palo Pinto county. These bonds were put on the bourse in Paris, France, and sold for value to the extent of \$5,343,700 of their par value, mostly in small lots, and to persons of limited means. The grants, guarantees, and assurances by the state of Texas to said company of the said franchises, and especially of said land grant and land reservation, were recited in said mortgages, and were also announced and repeated to the purchasers personally, and by advertisement and prospectus, and the purchasers took the bonds relying on said grants, and upon the exclusive right of the company to locate certificates within the territory so reserved.

The bonds not being paid the circuit court for the Western district of Texas, on motion of Forbes, trustee under the mortgage, on the 6th of July, 1870, enjoined the railroad company from disposing of any of its effects, and put the road into the hands of one John A. C. Gray, as receiver: "To take possession of the moneys and assets, real and personal; roadbed, road, and all property, whatsoever, of the said Memphis, El Paso & Pacific Railroad Company, wheresoever the same may be found, with power under the special order of the court, from time to time to be made, to manage, control, and exercise all the franchises, whatsoever, of said company, and, if need be, under the direction of the court, to sell, transfer, and convey the road, roadbed, and other property of said company, as an entire thing," &c.

On the 20th of January, 1871, it was further ordered by the court: "That the said John A. C. Gray, receiver, as aforesaid, be, and he is hereby, authorized and empowered to defend and continue all suits brought by or against the said Memphis, El Paso & Pacific Railroad Company, whether before or after the appointment of said receiver, and whether in the name of said company or otherwise; defend all suits brought against him as such receiver or affecting his receivership, and to bring such suits in the name of said company, or in the name of said receiver, as he may be advised by counsel to be necessary and proper in the discharge of the duties of his office, and for acquiring, securing, and protecting the assets, franchises, and rights of the said company and of the said receiver, and for securing and protecting the land grant and land reservation of the said company."

In November, 1869, the present constitution of Texas was adopted, and was approved by congress. The fifth and sixth [seventh] sections of this constitution are as follows:

"Sec. 5. All public lands heretofore reserved for the benefit of railroads or railway companies shall hereafter be subject to location and survey by any genuine land certificates."

"Sec. 7. All lands granted to railway companies which have not been alienated by said companies in conformity with the terms

of their charter respectively and the laws of the state under which the grants were made, are hereby declared forfeited to the state for the benefit of the school fund."

The constitutional convention which framed this constitution passed an ordinance to the effect that all heads of families actually settled on vacant lands lying within the Memphis & El Paso Railroad reserve, shall be entitled to and receive from the state of Texas 80 acres of land, including the place occupied, on payment of all expenses of survey and patent; and that all vacant lands lying within said reserve are declared open and subject to sale to heads of families actually settled on or who may actually settle on said reserve, at the price of one dollar per acre; and that said vacant lands within said reserve shall be open to pre-emption settlers, and subject to the location of all genuine land certificates.

There were in 1869, and were on the 20th of January, 1871, when Gray was ordered by the court to bring such suits in the name of the company as he might be advised by counsel were necessary and proper in the discharge of the duties of his office, a great number of land certificates outstanding and unlocated in Texas. Since the passing of the said ordinance, and the adoption of the said constitution, many hundreds of the holders of certificates other than those issued to the company had located their certificates on the sections reserved to the company, had returned their surveys and locations to the commissioner of the general land office, and had applied for patents on the same. Before the 19th day of September, 1870, Commissioner Kuechler and Governor Davis, professing to act under the said constitutional provisions, issued 2 of such patents. On the 19th of September, 1870, the receiver filed a protest with the commissioner against issuing any further patents for lands reserved to the company, but the commissioner and governor disregarded the protest and issued 32 additional patents within the reserve; the whole of the land thus patented amounting to nearly 20,000 acres.

Hereupon on the same 20th of January, 1871, Gray, who was a citizen of New York, filed a bill in the court below against one Davis, governor of the state of Texas, and Kuechler, already mentioned as commissioner of the land office of the state. The bill—averring that "the Memphis, El Paso & Pacific Railroad Company" is "a corporation created by and existing under certain statutes of Texas," already referred to, and that it had done "all acts and things necessary to the full and complete vesting, securing, and preserving of the franchises, rights, and privileges granted thereby"—set forth a history much as above given. It averred that the company was insolvent, and could not continue the construction of the road, and that the holders of said bonds would necessarily be remitted to the security of the mortgages;

that the said security was worthless unless the receiver, under order of court, should be able to sell the franchises and property of said company to some party or parties who, by constructing the road, should acquire the lands referred to in the mortgages, and hold the same subject to the lien of them. It set forth that the general laws of Texas authorized to the fullest extent the conveyance of the franchises of a railway company by sale under execution or foreclosure; and that by act of July 27th, 1870, the Southern Transcontinental Railroad Company was created, and, as before mentioned, was expressly authorized by its charter to "purchase the rights, franchises, and property of the Memphis, El Paso & Pacific Railroad Company, heretofore incorporated by the state;" that the Southern Transcontinental Company stood ready to do this, and to devote the lands to be acquired by the exercise of said Memphis & El Paso franchises to the settlement of the land grant mortgage debt, provided the receiver could convey the charter, the land grant, and the grant of the land reservation unimpaired and in full force.

It set forth further, that the receiver, on negotiating for a transfer of the franchises of the company, found that the market for them was peculiar, in the following respects: It was limited, as the franchises are only of use or value to those who desired and were able to construct the road; it depended in great measure upon the reputation of and confidence in the enterprise, and a belief among capitalists, outside of the state of Texas, that the state could and would have to abide by the grants contained in the charter; that it depended peculiarly and essentially upon the preservation of the land grant and land reservation, inasmuch as the country through which the road was to be built was sparsely inhabited, without cities or towns to furnish local traffic; that Texas lands at a distance from railroads were of but nominal value compared with lands along the line of the roads, and that the Southern Transcontinental Railroad Company, to whom the receiver chiefly looked as a purchaser, already had the right of way across the state and parallel with the route of the Memphis & El Paso charter, following "as near as might be practicable the old survey of the Memphis & El Paso road;" making the mere right of way of the latter of comparatively little value without the lands and the reservation.

It asserted that the acts of the governor and commissioner of the land office, in executing and causing to issue patents for the reserve, were, and their continuance would be, irretrievable destruction of that portion of the franchise of the company which consisted of the right to have the odd sections of the reservation devoted exclusively to the location and patenting of the company's certificates, would destroy all confidence in the

other grants of the company, as well as in the grant of the reservation, and render the franchise of the company valueless in the hands of the receiver, doing irreparable injury to the interests committed to his charge.

It set forth further that the Southern Transcontinental Company asserted and insisted to the receiver, that unless the said acts were judicially declared unlawful, and perpetually restrained, the said franchises would be valueless to them, and that they would not carry out the purchase of the same.

[It was an admitted fact in the case, that the Memphis, El Paso & Pacific Railroad Company had never sectionized or numbered the land reservation of the same west of Brazos river, or any portion of said reservation west of said river; and that no work had been done on the road of the said company before or since the year 1861, either by grading or otherwise, except those as already affirmatively stated and set forth.]

The bill further asserted that the charter of the company was a contract between the state and the company, which contract was now in the hands of the complainant as receiver, and under direction of a court of equity, to be used for the benefit of the creditors of the company; that the said provisions of the constitution of Texas and the said ordinance of convention impaired the obligation and value of the said contract, and also of the said contracts of mortgage, and were in so far contrary to article 1, § 10, of the constitution of the United States, which declares that "no state shall pass any law impairing the obligation of contracts," and were in so far null and void; and that the acts of the governor of the state and commissioner of the land office, in issuing such patents, were without authority of law, and illegal, and that any repetition of the same should be perpetually restrained. The bill prayed an injunction accordingly.

As a reason for confining the bill to the two defendants named, an amendment to the bill alleged that the complainant had applied at the general land office of Texas, to have the number and names of the parties who had located land certificates other than those issued to the Memphis, El Paso & Pacific Railroad Company, on lands within and forming a part of the land reservation of the said company, and to obtain a list of the same; that he had been informed, on making such application, and by the defendant, Kuechler, the commissioner of the general land office, that the number of the same was very great, to wit, many hundreds, and that a list could not be furnished without great time and labor. The amendment further alleged that parties were constantly making locations and surveys of land certificates as aforesaid on the lands of said reservation; and that parties who had made such locations and surveys had — months allowed them by law, after making the same,

before they were required to make returns thereof to the commissioner of the general land office, and that the complainant was consequently unable, and never would be able, to obtain a correct list of such parties.

To this bill the defendants demurred:

(1) Because it did not appear from it that the defendants, or either of them, had any direct or personal interest in the lands which were the subject-matters of this suit; but on the contrary that they were sued in their official capacities only; and that the lands were a part of the public domain of the state of Texas, which was not and could not be made a party to this suit.

(2) Because it did not appear that while under the amendment 11 to the constitution of the United States [which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of a foreign state"], the court could have no jurisdiction as between the complainant and the state of Texas, jurisdiction existed in a suit against two of the officers of said state in their official capacity alone, to decree portions of the constitution of the state, which had been accepted by the congress of the United States, and which the defendants were sworn to obey, void.

(3) Because it did not appear that the bill was founded on fraud, accident, mistake, trust, specific performance, or any ground of equity jurisdiction; or that the same set out any equity against the defendants whatever; on the contrary, it appeared that the bill was brought to have sections 5 and 7 of article ten of the constitution of the state of Texas decreed void.

(4) Because it did not appear that the complainant, being an officer of the court, had a right to sue the defendants therein, nor that the court could have jurisdiction as between the complainant, though a citizen of the state of New York, and the defendants, as citizens of the state of Texas, in either their respective official or individual capacities.

(5) Because the "act incorporating the Memphis, El Paso & Pacific Railroad Company," and the other acts referred to in the bill, did not amount to a contract between the state of Texas and the company.

(6) Because it did not appear that any designated third person or persons was or were about to have a patent granted him or them by the defendants, and that such third person or persons was or were sought to be made a party or parties, nor that said bill was not too vague and indefinite.

(7) Because it did not appear that the creditors not specified of the company were made parties thereto, nor that the persons not specified applying for patents on locations of certificates, within the limits of the lands that were reserved, were made parties thereto; all

of whom, according to the bill, had equities that ought to be determined in this suit, and hence were necessary and proper parties to this suit.

(8) Because it did not appear that the complainant had any equities that he was not bound to have litigated against such third persons not specified, and also against those not specified who had located certificates within the limits of the lands that were reserved, before he would have a right (which was not conceded) to invoke any action by means of a bill in a court of equity, in case such a court might have jurisdiction.

The demurrer was overruled, and, no answer being filed, a decree pro confesso was taken for the complainant, and on the 16th of February, 1871, a final decree was granted in accordance with the prayer of the bill, to the following effect: "That in July, 1870, and at the time of the appointment of Gray as receiver, and at the date of the decree, the company was duly possessed of the franchise and right of and to the land grant and land reservation of the company; that the said right and the franchise of the company were unimpaired, and in full force and virtue; that the provisions of the constitution of Texas, and of said ordinance of convention, so far as they impaired, or purported to impair the said charter, land grant, or land reservation, were contrary to the provisions of article 1, section 10, of the constitution of the United States, and were in so far, null and void; and that the defendants should be perpetually enjoined from issuing, or causing or permitting to issue, any patent of the lands of the odd sections of said reservation, except on the certificates granted to the company, or its assigns."

From this decree appeal was taken by the defendants to this court.

T. J. Durant and G. F. Moore, for appellants.
B. R. Curtis, J. A. Davenport, and C. Parker, for appellees.

SWAYNE, Justice. This is an appeal in equity from the decree of the circuit court of the United States for the Western district of Texas. The appellee was the complainant in the court below. The defendants demurred to the bill. The demurrer was overruled. The defendants stood by it. A decree as prayed for was thereupon rendered pro confesso for the complainant. The defendants removed the case to this court by appeal, and it is now before us, as it was before the court below, upon the demurrer to the bill. This brings the whole case as made by the bill under review. The facts averred, so far as they are material, are to be taken as admitted and true. We shall refer to them accordingly. The question presented for our determination is, whether the circuit court erred in overruling the demurrer. The appellants having elected not to answer, the decree for the complainant followed as of course.

At the outset of our examination of the

case, we are met by jurisdictional objections as to the parties—both complainant and defendants—which, before proceeding further, must be disposed of. We will consider first, those which relate to the complainant, and then, those with respect to the defendants.

The complainant was appointed to his office of receiver, in the suit in equity of Forbes and others against the Memphis, El Paso & Pacific Railroad Company, a corporation created by the state of Texas. The suit was in the same court whence this appeal was taken. In that case, on the 6th of July, 1870, it was, among other things, ordered and decreed, that the corporation should be enjoined from disposing of any of its effects, and that John A. C. Gray, the complainant in this suit, should be, and he was thereby "appointed receiver; to take possession of the moneys and assets, real and personal; roadbed, road, and all property whatsoever, of the said Memphis, El Paso & Pacific Railroad Company, wheresoever the same may be found, with power under the special order of the court, from time to time to be made, to manage, control, and exercise all the franchises, whatsoever, of said company, and, if need be, under the direction of the court, to sell, transfer, and convey the road, roadbed, and other property of said company, as an entire thing," &c.

On the 20th of January, 1871, it was further ordered by the court "that the said John A. C. Gray, receiver as aforesaid, be, and he is hereby, authorized and empowered to defend and continue all suits brought by or against the said Memphis, El Paso, and Pacific Railroad Company, whether before or after the appointment of said receiver, and whether in the name of said company or otherwise; defend all suits brought against him as such receiver or affecting his receivership, and to bring such suits in the name of said company, or in the name of said receiver, as he may be advised by counsel to be necessary and proper in the discharge of the duties of his office, and for acquiring, securing, and protecting the assets, franchises, and rights of the said company and of the said receiver, and for securing and protecting the land grant and land reservation of the said company."

It is to be presumed the receiver filed this bill, as it is framed in accordance with the advice of counsel. *Bank v. Dandridge*, 12 Wheat. 70.

The authority given by the decree is ample. Still the question arises whether it was competent for him to proceed in his own name instead of the name of the company whose rights he seeks by this bill to assert. A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative of the court, and of all the parties in interest in the litigation wherein he is appointed. Jer-

eny, Eq. 249; *Davis v. Duke of Marlborough*, 2 Swanst. 125; *Shakel v. Duke of Marlborough*, 4 Madd. 463. He is required to take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in the possession of either of the parties in the litigation. *Wyatt*, Prac. Reg. 355. He is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is in custodia legis. In *re Colvin*, 3 Md. Ch. Dec. 278; *Delany v. Mansfield*, 1 Hogan, 234. He has only such power and authority as are given him by the court, and must not exceed the prescribed limits. *Bank v. White*, 6 Barb. 589; *Verplanck v. Insurance Co.*, 2 Paige, 452. The court will not allow him to be sued touching the property in his charge, nor for any malfeasance as to the parties, or others, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person while in the discharge of his official duties. In such cases the court will vindicate its authority, and, if need be, will punish the offender by fine and imprisonment for contempt. *De Groot v. Jay*, 30 Barb. 483; *Angel v. Smith*, 9 Ves. 335; *Russell v. Railroad Co.*, 3 Macn. & G. 104; *Parker v. Browning*, 8 Paige, 388; *Noe v. Gibson*, 7 Paige, 513; 2 Story, Eq. Jur. § 833, A. & B. The same rules are applied to the possession of a sequestrator. 2 Daniell, Ch. Prac. 1433. Where property in the hands of the receiver is claimed by another, the right may be tried by proper issues at law, by a reference to a master, or otherwise, as the court in its discretion may see fit to direct. *Empringham v. Short*, 3 Hare, 470. Where property, in the possession of a third person, is claimed by the receiver, the complainant must make such person a party by amending the bill, or the receiver must proceed against him by suit in the ordinary way. 8 Paige, 388; *Noe v. Gibson*, 7 Paige, 513; 2 Story, Eq. Jur. supra; 2 Jac. & W. 176; 2 Daniell, Ch. Prac. 1433. After tenants have attorned to the receiver, he may distrain for rent in arrear in his own name. 2 Daniell, Ch. Prac. 1437. In a suit between partners he may be required to carry on the business, in order to preserve the goodwill of the establishment, until a sale can be effected. *Marten v. Van Schaick*, 4 Paige, 479.

Here the property in question is not in the possession of the defendants. The possession of the receiver has not been invaded. He has not been in possession, is not seeking possession; and there is no question in the case relating to that subject. But the order of the court expressly requires the receiver to secure and protect "the assets, franchises, and rights," and "the land grant and reservation of said company." He is seeking to perform that duty by enjoining the appellants from doing illegal acts, which the bill alleges, if done, would render the rights and title of the company to the immense property last men-

tioned, of greatly diminished value, if not wholly worthless.

We think it is competent for him to perform this function in the mode he has adopted. The decree, in the case wherein he was appointed, expressly authorizes him to sue for that purpose in his own name. The order was made by a court of adequate authority in the regular exercise of its jurisdiction. No appeal has been taken, and the order stands unreversed.

This bill is auxiliary to the original suit. *Freeman v. Howe*, 24 How. 451; *Jones v. Andrews*, 10 Wall. 327. It is analogous to a petition by a receiver to the court to protect his possession from disturbance, or the property in his charge from threatened injury or destruction. No title in the receiver is necessary to warrant such an application, or the administration by the court of the proper remedy. There can be no valid objection to the receiver here, in analogy to that proceeding, maintaining this suit. In the progress and growth of equity jurisdiction it has become usual to clothe such officers with much larger powers than were formerly conferred. In some of the states they are by statutes charged with the duty of settling the affairs of certain corporations when insolvent, and are authorized expressly to sue in their own names. It is not unusual for courts of equity to put them in charge of the railroads of companies which have fallen into financial embarrassment, and to require them to operate such roads, until the difficulties are removed, or such arrangements are made that the roads can be sold with the least sacrifice of the interests of those concerned. In all such cases the receiver is the right arm of the jurisdiction invoked. As regards the statutes, we see no reason why a court of equity, in the exercise of its undoubted authority, may not accomplish all the best results intended to be secured by such legislation, without its aid.

A few remarks will be sufficient to dispose of the jurisdictional objections as to the appellants.

In *Osborn v. Bank*, 9 Wheat. 738, three things, among others, were decided:

(1) A circuit court of the United States, in a proper case in equity, may enjoin a state officer from executing a state law in conflict with the constitution or a statute of the United States, when such execution will violate the rights of the complainant.

(2) Where the state is concerned, the state should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state in all respects as if the state were a party to the record.

(3) In deciding who are parties to the suit the court will not look beyond the record. Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand

behind him as the real party in interest. A state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case. *Dodge v. Woolsey*, 18 How. 331; *Bank v. Knoop*, 16 How. 369; *Bank v. Skelly*, 1 Black, 436; *Trust Co. v. Debolt*, 16 How. 432; and *Bank v. Debolt*, 18 How. 380,—proceeded upon the same principles, and were controlled by that authority, with respect to the jurisdictional question arising in each of those cases as to the defendant.

In *Woodruff v. Trapnall*, 10 How. 190, a writ of mandamus was issued to the proper representative of the state of Arkansas to compel him to receive the paper of the Bank of the State of Arkansas in payment of a judgment which the state had recovered against the relator. The bank was wholly owned by the state, and the claim was made under a clause in the charter which had been repealed. Judgment was given against the respondent. The question of jurisdiction does not appear to have been raised. In *Curran v. Arkansas*, 15 How. 304, it appeared that the bank had become insolvent. A creditor's bill was filed to reach its assets. The objection was taken that the state could not be sued. This court answered that the objection involved a question of local law, and that as the state permitted herself to be sued in her own tribunals, that was conclusive upon the subject. According to the jurisprudence of Texas, suits like this can be maintained against the public officers who appropriately represent her touching the interests involved in the controversy. *Ward v. Townsend*, 2 Tex. 581; *Cohen v. Smith*, 3 Tex. 51; *Commissioner General Land Office v. Smith*, 5 Tex. 471; *McLeland v. Shaw*, 15 Tex. 319; *Stewart v. Crosby*, 1d. 547. In the application of this principle there is no difference between the governor of a state and officers of a state of lower grades. In this respect they are upon a footing of equality. *Whitman v. The Governor*, 5 Ohio St. 528; *Houston & G. N. R. Co. v. Kuechler*, Sup. Ct. Tex., not yet reported. [36 Tex. 382].

A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the constitution gives him a choice of tribunals. In the former he may hope to escape the local influences which sometimes disturb the even flow of justice. And in the regular course of procedure, if the amount involved be large enough, he may have access to this tribunal as the final arbiter of his rights. *Ex parte McNeil*, 13 Wall. 236. Upon the grounds of the jurisprudence of both the United States and of Texas we hold this bill well brought as regards the defendants.

It is insisted that the corporation, on behalf of which this suit was instituted, has ceased to exist.

The bill avers that "the Memphis, El Paso

& Pacific Railroad Company" * * * is "a corporation created by and existing under certain statutes of the state of Texas hereinafter set forth," and that within the times limited by the charter and extended by other acts the company "did all acts and things necessary to the full and complete vesting, securing, and preserving of the franchises, rights, and privileges granted thereby." The demurrer admits the truth of these averments unless they are inconsistent with the statutes which bear upon the subject. The corporation was created by an act of the legislature of Texas, approved February 4th, 1856. By the first section certain parties are named and created a body politic and corporate, and the general powers inherent in all such bodies are formally given. The second gives the right to construct a railway, commencing on the eastern boundary of the state, between Sulphur Fork and Red River, at the western terminus of the Mississippi. Ouachita & Red River Railroad, or of the Cairo & Fulton Railroad, and running thence westerly to the Rio Grande, opposite to or near the town of El Paso. The twentieth section declares that no rights shall vest under the charter until a certain amount of stock therein named shall have been subscribed, and the percentage prescribed shall have been paid upon it. This requirement is covered by the averment in the bill that the company had done everything necessary to secure the vesting of all the franchises given to it. We do not understand that there is any controversy on this subject. All the other conditions prescribed, involving the existence of the corporation, are clearly subsequent. They are found in the fourteenth section of the charter, in the first section of the act of February 5th, 1856, and in the third section of the act of February 10th, 1858. To any argument drawn from these provisions there are two conclusive answers:

(1) There has been no judgment of ouster and dissolution. Without this they are inoperative. To make them effectual they must be grasped and wielded by the proper judicial action. See *Ang. & A. Corp.* § 777, and the authorities there cited.

(2) The offences and punishment denounced have been condoned and waived by the subsequent action of the legislature. The act of March 20th, 1861: the act for the relief of railroad companies, approved January 11th, 1862; the act for the relief of companies incorporated for purposes of internal improvement, approved February 18th, 1862; and the third section of the "Act to incorporate the Transcontinental Railroad Company," of the 27th July, 1870, each and all have that effect. The section last mentioned authorizes the company therein named to "purchase the rights, franchises, and property of the Memphis, El Paso & Pacific Railroad Company, heretofore incorporated by this state." This is a clear affirmation, by implication, of the existence of the cor-

poration, and of the possession of the rights, franchises, and property conferred by its charter. What is implied is as effectual as what is expressed. *U. S. v. Babbitt*, 1 Black, 57. These considerations are so clearly conclusive, that it is needless to advert more particularly in this connection to the legislation in question, or to pursue the subject further. There is no warrant for the proposition that the corporation had ceased to exist.

The heart of this litigation lies in the immense land grant which is in controversy between the parties. The objections we have considered are only outworks thrown up to prevent the conflict from reaching that point. It is insisted that the rights of the company touching the entire reservation have become forfeited.

The fifteenth section of the charter provides as follows: "All the vacant lands within eight miles on each side of the extension line of said road, shall be exempt from location or entry, from and after the time when such line shall be designated by survey, recognition, or otherwise. The lands hereby reserved shall be surveyed by said company at their expense, and the alternate or even sections reserved for the use of the state. And it shall be the duty of said company to furnish the district surveyor of each district through which said roadway runs, with a map of the track of said road, together with such field-notes as may be necessary to the proper understanding and designation of the same."

There are other provisions prescribing various details not necessary to be particularly stated or considered.

A proviso in the seventeenth section declares that no title shall be permanently vested in the company or their assigns for land granted for the grading as contemplated by the act, until twenty-five miles of the road shall have been completed and put in running order. The proviso in the twentieth section of the charter, that no rights shall vest under it until the condition therein prescribed is complied with, has already been considered. Conditions of forfeiture of the lands granted are prescribed in this and subsequent acts. They are found in the fourteenth section of this act; in the first and fourth sections of the supplemental act of the same date; and in the third and fourth sections of the act of February 10th, 1858. These conditions will be considered hereafter.

The act for the relief of internal improvement companies of February 18th, 1862, declared that the time of the continuance of the war between the Confederate States and the United States should not be computed against any internal improvement company in reckoning the period allowed them for the completion of any work they had contracted to do.

The act of January 11th, 1862, for the relief

of railroad companies enacted that the failure of any chartered railroad company of the state to complete any part of its road, as required by existing laws, should not operate as a forfeiture of its charter or of the lands to which the company would be entitled, under the provisions of the act entitled "An act to encourage the construction of railroads in Texas by donations of land," approved January 30th, 1854, and the several acts supplementary thereto, provided the company should complete such portion of its road as would entitle it to donations of land under existing laws within two years from the close of the war.

The act for the benefit of railroad companies of November 13th, 1866, declared that the grant of sixteen sections of land to the mile to railroad companies theretofore, or thereafter, constructing railroads in Texas, should be extended under the same restrictions and limitations theretofore provided by law, for ten years after the passage of the act. These several acts are valid. See the 33d section of the constitution of Texas of 1869, and *Texas v. White*, 7 Wall. 700.

By an act approved July 27th, 1870, the Southern Transcontinental Railroad Company was incorporated.

It was declared that the object of the company thus created was to construct and establish a railway line and telegraphic communication from the eastern boundary of the state of Texas, "and thence as near as practicable to the route of the Memphis, El Paso & Pacific Railroad Company, to, or near, the town of El Paso." It was enacted that "the main line of said road shall follow, as near as may be practicable, the old survey of the Memphis & El Paso road." It was further enacted that "the said company, hereby incorporated, may purchase the rights, franchises, and property of the Memphis, El Paso & Pacific Railroad Company, heretofore incorporated by this state," as before mentioned.

The first section of the ordinance of 1869 declared that all heads of families settled on vacant lands ly. g within the Memphis & El Paso railroad reserve, should be entitled to receive from the state of Texas eighty acres of land, including the place occupied, upon payment of the expenses of survey and patent.

By the second section it was declared that all the vacant land within the reserve was open to sale to settlers and pre-emption settlers, and subject to the location of land certificates. The third section declared that the company had forfeited its right to the land, and that certain certificates having been issued to the company and patents issued thereon, it was made the duty of the attorney-general to institute legal proceedings to have such certificates and patents cancelled.

In November, 1869, the present constitution of Texas was adopted. It was subsequently approved by congress.

Sections 5 and 7 of this constitution are as follows:

"Sec. 5. All public lands heretofore reserved for the benefit of railroads or railway companies shall hereafter be subject to location and survey by any genuine land certificates."

"Sec. 7. All lands granted to railway companies which have not been alienated by said companies in conformity with the terms of their charter respectively, and the laws of the state under which the grants were made, are hereby declared forfeited to the state for the benefit of the school fund."

This summary gives a view of the statutory and constitutional provisions necessary to be considered in disposing of the question before us.

On the 20th of June, 1857, the company filed in the land office at Austin surveys showing the line of the road from the eastern boundary of the state to El Paso, which line was officially recognized by the commissioner of the general land office of Texas. By the 1st of March, 1860, the company had surveyed, sectionized, and numbered all the sections and fractional sections of the vacant lands within the reservation, from the eastern boundary of the state to the crossing of the Brazos, of which due returns were made to the commissioner, and by him accepted. By the 10th of May, 1859, the company had marked and designated the central line of the road from the Brazos to the Colorado, and made proper returns to the office of the commissioner, by whom they were accepted. The lands granted to the company thereby became defined and officially recognized as such along the whole extent of their line.

In doing this work the company surveyed, numbered, and mapped each alternate or even section of public lands for two hundred and fifty miles in length, and sixteen miles in width, in behalf of the state of Texas. It was of great benefit to her, and is reported to the receiver to have cost the company more than \$100,000.

By consent of parties the bill was amended *nunc pro tunc* in three particulars. The complainant admitted that no land within the reserve had been surveyed, sectionized, or numbered west of the Brazos river, and that no work had been done on the road before or since 1861, except as averred in the bill. He averred that he applied to the general land office for the number and names of those who had located certificates other than such as were issued to the company upon lands within the reservation, and that Kuechler, the defendant, answered that the number was very great, amounting to hundreds, and that a list could not be furnished without great time and labor. He averred further that parties were constantly locating certificates and making surveys within the reservation, and that they were allowed a specified time to make their

returns, so that it was impossible for him to obtain a full list of such parties.

The company commenced work within one year from the 1st of March, 1856, and before the 1st of March, 1861, had completely graded more than fifty miles of its roadway, beginning at the eastern boundary line of the state and extending west in the direction of El Paso. See section 3 of the act of February 10th, 1858.

We do not understand that up to that time there was a breach of any condition touching the existence of the corporation or its right to the lands within the reservation. Before that time the tracts east of the Brazos covered by the grant were definitely fixed by the surveys which the company had made. The title of the company to those west of the Brazos, though the sections were not designated, was equally valid. The good will of a lease which the landlord is in the habit of renewing is property, and rights growing out of it, whether by contract or otherwise, will be protected and enforced by a court of equity. *Phyfe v. Wardell*, 5 Paige, 268. See, also, *Amour v. Alexander*, 10 Paige, 571.

The rights of the company west of the Brazos were of a much more substantial character than those which were the subjects of judicial action in the cases cited.

The real estate of a corporation is a distinct thing from its franchises. But the right to acquire and sell real estate is a franchise, and the right to acquire the particular real estate designated in the charter of this company, and here in question, is within that category. It might, therefore, well be doubted whether this right could be taken from the company without an appropriate proceeding instituted for that purpose, and prosecuted to judgment by the state. But the view which we take of the case renders it unnecessary to pursue the subject.

We will recur to the conditions of forfeiture touching the land grant, and consider them irrespective of that point. The provisions to that effect, in the fourteenth section of the charter, are expressly superseded by those in the first section of the supplemental act of February 5th, 1856. The fourth section of that act prescribes a further condition. These provisions again are superseded by the third and fourth sections of the amendatory act of February 10th, 1858. The conditions prescribed by the last-named act are:

(1) To survey the reserve as far as the Brazos river, within four years from the 1st of March, 1856.

(2) To run and designate the centre line of the reservation from the Brazos to the Colorado, within fifteen months from the 10th of February, 1858.

(3) To survey the whole reserve within ten years from February 10th, 1858.

(4) To have a connection with some road leading to the Mississippi or Gulf of Mexico within ten years from February 10th, 1858.

(5) That the company shall have finished and in running order at least twenty-five miles of their road within one year after it is connected with certain other roads mentioned in the act, and at least fifty miles every two years thereafter until the road is completed.

(6) That the right to acquire lands from the state by donation shall cease at the expiration of fifteen years from February 10th, 1858.

The two first conditions were performed within the time prescribed. These points are covered by the averments of the bill. The time limited for the performance of the third and fourth is extended from February 10th, 1868, to June 10th, 1873, by adding the time of the continuance of the war, according to the act of February 18th, 1862, before referred to. When the bill was filed there were no such roads as those mentioned in the fifth condition with which a connection could be formed. The fifteen years limited by the sixth condition expired February 10th, 1873. The period that elapsed during the war is to be added. That extends the time so much further.

The title of the company is therefore unaffected by the breach of any condition annexed to the grant.

But suppose there had been such breaches, as is insisted by the counsel for the appellants, the result must still be the same.

Except as to a small portion of the land in question the legal title is yet in the state. Whatever may be the right of the company it is wholly equitable in its character. With a few exceptions, which have no applicability in this case, the same rules apply in equity to equitable estates as are applied at law to legal estates. They are alike descendible, devisable, alienable, and barrable. *Jickling, Estates*, 17; *Croxall v. Shererd*, 5 Wall. 281.

There is wide distinction between a condition precedent, where no title has vested and none is to vest until the condition is performed, and a condition subsequent, operating by way of defeasance. In the former case equity can give no relief. The failure to perform is an inevitable bar. No right can ever vest. The result is very different where the condition is subsequent. There equity will interpose and relieve against the forfeiture upon the principle of compensation, where that principle can be applied, giving damages, if damages should be given, and the proper amount can be ascertained. *Wells v. Smith*, 2 Edw. Ch. 78; see, also, as to the principle of compensation, *Beaty v. Harkey*, 2 Smedes & M. 563. By the common law a freehold estate could not be created without livery of seizin, and it could not be determined without some act in pais of equal notoriety. Conditions subsequent are not favored in the law (4 Kent, Comm. 129), and when they are sought to be enforced in an action at law, there must have been a re-entry, or something equivalent to it, or the suit must fail. The right to sue at law for the breach is not alienable. The action must be brought by the grantor or some one in priv-

ity of blood with him. *Nicoll v. Railroad Co.*, 12 N. Y. 121; *Ludlow v. Railroad Co.*, 12 Barb. 440; *Webster v. Cooper*, 14 How. 488. In *Dumpro's Case*, 4 Reports, 119, it was decided that a condition not to alien without license is finally determined by the first license given.

Here the controlling consideration is, that the performance of all the conditions not performed was prevented by the state herself. By plunging into the war, and prosecuting it, she confessedly rendered it impossible for the company to fulfil during its continuance. This is alleged in the bill, and admitted by the demurrer.

The rule at law is, that if a condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, by the act of God, or the law, or the grantor, the estate having once vested, is not thereby divested, but becomes absolute. *Co. Litt.* 206a, 208b; 2 Bl. Comm. 156; 4 Kent, Comm. *130. The analogy of that rule applied here would blot out these conditions. But this would be harsh and work injustice. Equity will, therefore, not apply the principle to that extent. It will regard the conditions as if no particular time for performance were specified. In such cases the rule is that the performance must be within a reasonable time. *Hayden v. Stoughton*, 5 Pick. 528; 4 Kent, Comm. *125, 126; *Com. Dig.* tit. "Condition G, 5." We are clear in our conviction that, under the circumstances, a reasonable time for performance had not elapsed when this bill was filed. As the state, by the act of July 27th, 1870, created the Southern Transcontinental Railroad Company, and authorized that company to "purchase the rights, franchises, and property of the Memphis, El Paso & Pacific Railroad Company," it will be but right to allow a reasonable time for that purchase to be made, if such an arrangement can be effected, and for the vendee thereafter to perform all that was incumbent upon the Memphis, El Paso & Pacific Railroad Company by its charter and the supplementary and amendatory acts. If that arrangement cannot be made, the latter company will have the right to provide otherwise for the fulfilment of its obligations to the state within such time, and thus consummate its inchoate title to the lands within the reservation. Either will be in accordance with the principles of reason and justice, and within the spirit of well-considered adjudications. *Walker v. Wheeler*, 2 Conn. 299; *Beaty v. Harkey*, 2 Smedes & M. 563; *Moss v. Matthews*, 3 Ves. Jr. 279; 2 Vern. 366; 1 Vern. 83; 3 Brown, Ch. 256; *Taylor v. Popham*, 1 Brown, Ch. 168; 1 Bac. Abr. 642; 1 Madd. Ch. Prac. 41, 42; *Bank v. Smith*, 3 Gill & J. 265.

Both parties will thus be put in the same situation, as near as may be, as if the breaches had not occurred. Neither will be subjected to any serious hardship. The state, by her own acts, has lost the benefits of an

earlier completion of the work. The company has lost the income which it might have enjoyed, and has doubtless been thrown into embarrassments it would have escaped. The circumstances do not call for a severe application of the rules of law upon either side.

Breaches of such conditions may be waived by the grantor expressly or in pais. *Dumpro's Case*, 1 Smith, Lead. Cas. Eq. 85, Am. note. Such waiver is expressed in the statutes relating to the subject, to which we have referred, except the act creating the Transcontinental Company, and there it exists by the clearest implication.

That the act of incorporation and the land grant here in question, were contracts, is too well settled in this court to require discussion. *Fletcher v. Peck*, 6 Cranch, 137; *New Jersey v. Wilson*, 7 Cranch, 166; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Bank v. Knoop*, 16 How. 369. As such, they were within the protection of that clause of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts. The ordinance of 1869, and the constitution adopted in that year, in so far as they concern the question under consideration, are nullities, and may be laid out of view. *Von Hoffman v. City of Quincy*, 4 Wall. 535. When a state becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty. *Curran v. Arkansas*, 15 How. 308.

A case more imperatively demanding the exercise of jurisdiction in equity could hardly be imagined than that presented in this bill. Should the interposition invoked be refused, doubtless the reservation would speedily be thatched over with adverse claims. A cloud would not only be thrown upon the title of the company, but the time, litigation, labor, and expense involved in the vindication of its rights, would very greatly lessen the value of the grant and materially

delay the progress of the work it was intended to aid. The injury would be irreparable. It is the peculiar function of a court of equity in a case like this to avert such results.

It has been insisted that those holding adverse claims should have been brought into the case as parties. They are too numerous for that to be done. An application was made to one of the defendants for a list of their names, and it was not given. The important questions which have arisen between the appellants and the company can all be properly determined without the presence of other parties than those before us.

The parties referred to are sufficiently represented for the purposes of this litigation by the governor and the commissioner of the general land office. We feel no difficulty in disposing of the case as it is presented in the record.

There are other points, ably maintained by the learned counsel for the appellants, to which we have not adverted. They are sufficiently answered by what has been said. It would extend this opinion unnecessarily, and could serve no useful purpose, specifically to consider them.

The circuit court decided correctly. The decree appealed from is affirmed.

Mr. Justice HUNT did not hear the argument in this case and did not participate in its decision.

Mr. Justice DAVIS, with whom concurred the CHIEF JUSTICE, dissenting, said: I am constrained to enter my dissent to the opinion and judgment of the court in this case, for the reason that this suit, although in form otherwise, is in effect against the state of Texas. The object which it seeks to obtain shows this to be so, which is to deprive the state of the power to dispose, in its own way, of its public lands, and this object, by the decision just rendered, is accomplished. In my judgment the bill should have been dismissed, because the state is exempt from suit at the instance of private persons, and on the face of the bill it is apparent that the state is arraigned as a defendant.

In re FLOWERS et al.

(1 Q. B. Div. 14.)

Court of Appeal. Oct. 30, 1896.

Appeal from an order of a registrar in bankruptcy dismissing a petition for a receiving order presented against the debtors.

The debtors were a firm consisting of five members, some of whom, being desirous of dissolving partnership, commenced an action in the chancery division, and in that action a receiver and manager was appointed. The members of the firm thereupon ceased to attend at the place of business, and the business was carried on by the manager. The petitioning creditors, who had previously brought an action against the firm, obtained judgment and issued a bankruptcy notice, which was served on four out of the five partners. The fifth partner could not be found, and the notice was thereupon served on the receiver and manager at the place of business. On objection that no proper service of the notice had been effected, the registrar dismissed the petition.

The petitioning creditors appealed.

F. Cooper Willis, for petitioning creditors.
Muir Mackenzie, for debtors.

LORD ESHER, M. R. I am of opinion that this appeal should be dismissed, and I come to that conclusion upon what I consider to be the true construction of rule 260. As to the position of the receiver appointed by the court, he is the officer and servant of the court, and not of the partners. As I pointed out in the case of *Burt v. Bull* (1895) 1 Q. B. 276, only the court can dismiss him, or give him directions as to the mode of carrying on the business, or interfere with him if he is

not carrying on the business properly, and he is in no sense the servant of the partnership. On the true construction of rule 260, I think there is a necessary implication that the person described in the rule as having the control or management of the business must be a person having authority from the partners, and acting as their agent, and that consequently the rule does not apply to a receiver and manager appointed by the court, and deriving his authority from that appointment, and not from the partners. The service was therefore ineffectual, and the registrar was right in dismissing the petition.

LOPES, L. J. I am of the same opinion. The material words of rule 260 of the Bankruptcy Rules, 1890, are, "any person having at the time of service the control or management of the partnership business there." I agree with the master of the rolls that these words imply a person having the control or management of the business for and on account of the partners, and indicate some one in the position of an agent or servant. Having regard to the fact that the person served in this case did not stand in any such relationship to the partners, but was a receiver appointed by and responsible to the court, I think the decision of the registrar was right.

RIGBY, L. J. A receiver and manager appointed by the court is certainly not the agent of the parties; but, admitting that to the fullest extent, I do not know that, if I had to decide this case sitting alone, I should have arrived at the same conclusion as the other members of the court, from which, however, I do not dissent.

Appeal dismissed.

SEMPLE v. FLYNN et al.

(10 Atl. 177.)

Court of Chancery of New Jersey. June 30, 1887.

Bill for relief.

On December 5, 1885, Semple and James D. Flynn entered into an agreement for the purpose of carrying on the saloon and restaurant business at Mount Holly, New Jersey. Semple was to furnish the money to buy the necessary fixtures and chattels with which to run the business, while Flynn was to take charge of and conduct the business; it being run in his (Flynn's) name. Out of the proceeds arising from the earnings an equal division was to be made between the two. Semple bought the fixtures for \$1,200, paying \$850 in cash, and giving a chattel mortgage of \$350 for the balance. Flynn agreed to pay \$250 to Semple, and take up the \$350 mortgage in the spring of 1886. Flynn paid Semple the \$250, and took up the \$350 mortgage, giving a \$300 one in place of it, and, according to the charge of the complainant, has refused to cancel or pay off the \$300 mortgage. In November last, Flynn refused to further divide the profits. The complainant also charges that the defendant fraudulently, and without any consideration, in February, 1887, gave a second chattel mortgage on the fixtures to his brother John J. Flynn for the alleged securing of the payment of \$500. The bill asks for an accounting since last November, the appointment of a receiver to continue the business until the complainant is paid the money he advanced, and the restraining of the selling or transferring of the second mortgage. The defendant denies part of the agreement respecting the payment of the chattel mortgage, and also claims that the \$850 advanced by Semple was loaned to him, and that he has since paid Semple the amount in full; that the mortgage was given to his brother to secure moneys advanced by the said brother. The cause was heard on bill, answer, and proofs, on motion for receiver and preliminary injunction.

Alfred Hugg, for complainant. C. E. Hendrickson, for defendant.

BIRD, V. C. In this case I am asked to appoint a receiver to take possession of goods and of a business which the complainant claims are held and used in partnership. I cannot advise such appointment.

1. It is not at all established by the proofs, by way of affidavits, that there is or ever was a copartnership. There are many circumstances tending to show that a partnership was never intended.

2. If there ever was a copartnership, the presumption, from several circumstances, is that it was broken and abandoned according to its original terms, and such settlement had as to preclude the complainant from any further claim on the goods or interest in the business as a partner.

3. These things being so, no sufficient cause appears to justify the court in taking the goods, and the business, too, out of the hands of the defendant, to whom it was originally committed, when so to do would totally destroy the business, and that necessarily, because such business is carried on under a license, which, of course, is personal to the defendant, and cannot be delegated nor assigned nor committed to the care of a receiver by any court. Before the court will take a step which will work such results, it must be reasonably certain that the allegations upon which relief depends are true.

4. But I will advise an injunction restraining the defendant from selling, assigning, or incumbering any of the goods, chattels, or fixtures now in use in said business, or the said business itself, or the good will thereof, —not, however, to restrain him from managing and carrying on said business in the ordinary way in which he has heretofore been carrying it on during the continuance of the alleged copartnership. I feel justified, under the proofs, in going thus far in the interests of the complainant, but no further. This will preserve the present status until final hearing. Costs to abide final decree.

SIMMONS HARDWARE CO. v. WAIBEL
et al.

(47 N. W. 814. 1 S. D. 488.)

Supreme Court of South Dakota. Jan. 30, 1891.

Appeal from district court, Beadle county.

Mouser & Vollrath, for appellant. A. B. Melville and E. H. Aplin, for respondents.

CORSON, P. J. On March 1, 1889, the plaintiff filed its verified complaint in the district court, in which it is alleged, in substance, that it is engaged in the wholesale and retail hardware business in the city of St. Louis; that it has a large amount of capital invested in its said business, several hundred clerks, and about 90 traveling salesmen engaged in selling its wares and merchandise in nearly all the states and territories; that it has prepared and published, at great expense, an illustrated and printed catalogue containing about 1,500 pages, for distribution among its customers; that it has invented and prepared, at a cost of many thousand dollars, a secret code or system, represented by letters, figures, and characters, showing the cost and selling price of its many articles of merchandise, which is marked in such of its catalogues as are intended for use in its said business by its traveling salesmen, and which said secret code or system is not marked in the catalogues distributed to its customers; that in January, 1887, it employed one Frank Meech as one of its traveling salesmen, and intrusted to him, as such, one of its catalogues containing its said secret code or system of letters, figures, and characters marked therein, with the key thereto; that in his business as such traveling salesman said Meech frequently visited the city of Huron, in Dakota, and made sales of goods to the defendants, who were customers of plaintiff, and engaged in the hardware business; that during the year 1888 the defendants, in collusion with said Meech, who still continued in the employment of plaintiff as such traveling salesman, wrongfully and fraudulently obtained from said Meech the said privately marked catalogue, containing its secret code or system of letters, figures, and characters, showing the cost and selling price of its said wares and merchandise, with the key thereto, and copied the same therefrom into one of plaintiff's catalogues that had been furnished to defendants as customers of plaintiff, and that defendants thereby wrongfully and fraudulently became possessed of a knowledge of plaintiff's said secret code or system, and a copy of the same; that plaintiff, upon ascertaining said fact, demanded of defendants the said copy of its secret catalogue so wrongfully and fraudulently made by them, and that on or about February 19, 1889, defendants returned to plaintiff said marked copy, but before doing so they fraudulently and wrongfully copied said secret code or system into one of plaintiff's said catalogues it had furnished to Sheffer Bros., also customers

of plaintiff, from whom defendants had obtained it, and that said defendants now retain said last-mentioned or Sheffer copy, refuse to return same to plaintiff, and threaten to make known said secret code or system, with the key thereto, to customers of plaintiff, to the great damage and injury of plaintiff; that to invent and prepare a new code or system will cost the plaintiff several thousand dollars, and require at least six months' time, and that during such change of system plaintiff will be greatly embarrassed in the transaction of its business. An injunction, receiver, etc., are prayed for.

On filing the complaint, and two supporting affidavits, the court granted ex parte a temporary injunction, and appointed a receiver, to whom defendants were required to deliver said (Sheffer) copy of the catalogue alleged to have been copied by them from the former copy returned to plaintiff. On April 18th the defendants moved the court, upon the affidavit of defendant Donaldson, pleadings, proceedings, etc., in the case, to vacate said order made March 1st. The court on the hearing refused to vacate said order, but made an order modifying it by directing that receiver to return said (Sheffer) copy of catalogue to defendants. From so much of said order of April 18th as required the receiver to return said copy of catalogue to defendants, plaintiff appeals to this court, and assigns such modification of the original order as error.

The appointing or refusing a receiver is within the sound judicial discretion of the court to which application is made, and this court will not interfere with the exercise of this discretion by the lower court when the evidence is conflicting, unless this court is satisfied such lower court has abused its discretion. *Mays v. Rose*, *Freem. Ch. 703*; *Chicago & A. O. & M. Co. v. United States P. Co.*, 57 Pa. 83; *Whelpley v. Railroad Co.*, 6 Blatchf. 271; *Story*, *Eq. Jur.* §§ 831, 832; *High*, *Rec.* §§ 7-25; *Pom. Eq. Jur.* § 1331. Was there, then, a substantial conflict in the evidence upon the material facts in this case? and, if there was such conflict, was there an abuse of discretion by the court? The respondents contend that the affidavit of Donaldson denies all the equities of the bill relating to the Sheffer catalogue, and invoke the rule of courts of equity applicable to injunctions, that, when the equities of the bill are denied by the answer, the injunction will be denied. *Anderson v. Reed*, 11 Iowa, 177; *Stevens v. Myers*, *Id.* 184. But that rule does not apply to this case, for the reason that the receiver was appointed, not upon the complaint alone, but upon the complaint and supporting affidavits, and upon the hearing additional affidavits were read on the part of the plaintiff; and the rule itself is subject to many qualifications and exceptions not necessary now to be noticed. This affidavit will therefore be considered as the other affidavits in the case.

The only evidence introduced on the part of the defendants on the hearing was the affi-

davit of defendant Donaldson, before referred to. This affidavit, while it denies each and every allegation in the complaint in general terms, does not deny the various allegations of the complaint and supporting affidavits in that clear and specific manner that entitles it to much weight in a court of equity. It is evasive and unsatisfactory, and leaves upon the mind the impression that, while there is an attempt to deny the allegations of the complaint and supporting affidavits, there is a want of good faith on the part of Donaldson, and an effort on his part to conceal the real facts in the case. All the material facts stated in the complaint were fully sustained by affidavits introduced and read in evidence on the part of the plaintiff. That defendant Donaldson did, in collusion with Meech, plaintiff's traveling salesman, wrongfully and fraudulently obtain from said Meech the secret catalogue intrusted to him by the plaintiff, and make a copy of the same, and that he did in the same manner obtain the key to the same, and did thereby become possessed of a knowledge of plaintiff's secret code or system to which he was not entitled, is proved by too clear and satisfactory evidence to admit of any doubt. That he did return to plaintiff the first copy so made is admitted. The only question remaining is, did Donaldson, before returning the said marked copy, make a second copy therefrom in the Sheffer catalogue now in controversy? After a careful examination of the evidence, we think there cannot be much doubt upon this question. It may be true that there were some slight changes made in the letters, figures, and characters used by plaintiff to represent the cost and selling prices of plaintiff in the Sheffer copy, but we think it is equally true that in the changes made, if any, defendant Donaldson had so arranged them that he preserved, in substance, the plaintiff's system. H. P. Huckins says in his affidavit that he is one of the traveling salesmen of plaintiff, and is fully acquainted with the private and secret code of plaintiff, represented by letters, figures, and characters showing the cost and selling prices of plaintiff's goods, and the key thereto, and that he had examined the Sheffer catalogue in the hands of the receiver, and that the basis of the prices marked therein is throughout the said cost price to plaintiff, and that it would have been impossible for any one to have marked the said Sheffer catalogue with the prices marked, and the explanatory remarks therein contained, unless the person who so marked the same had access to and copied from one of plaintiff's private catalogues. In connection with this testimony are to be considered the efforts made by Donaldson to obtain one of plaintiff's catalogues from some one of plaintiff's customers before he returned to it his own marked copy. After efforts by himself and through his confederate, Meech, he obtained one from George C. Sheffer, who says, in his affidavit, that he first loaned to Donaldson his catalogue on February 15, 1889,

and that when, soon after, he requested Donaldson to return it, he replied: "I have marked the price of my goods in the catalogue, but am expecting a catalogue from the Simmons Hardware Company every day, and as quick as it comes I will express it to you." It is true he couples the admission that he had marked the Sheffer catalogue with the qualification that he had marked the price of his own goods in it, but this is not inconsistent with the fact that he had marked the prices contained in plaintiff's secret catalogue, as he was a customer of plaintiff, and was then in possession of a copy made from one of plaintiff's catalogues intrusted to Meech; and he subsequently took great pains to obtain a bill of sale of this catalogue from Sheffer. Why these efforts and this haste to get another catalogue before he had returned the first copy marked by him, if he did not require it in which to make another copy? We are of the opinion that there is no substantial conflict in the evidence, and that upon the facts the court below should have retained the catalogue in question in the hands of the receiver.

It is contended on the part of respondents that the catalogue in controversy was the absolute property of defendants, and that the court, under the established rules of equity, was not authorized to take it from them, and place it in the hands of a receiver. It may be conceded, as claimed, that the Sheffer catalogue in its original condition was the absolute property of defendants; but the catalogue in controversy had been changed from its original condition by the defendants by incorporating therein the private code or system invented and prepared at great expense by the plaintiff. The original catalogue was of itself of but trifling value, but with the private code or system of plaintiff marked therein it was of great value. That such a code or system as was invented and used by plaintiff in its business, and described in its complaint, was its property, is well settled, both at common law and under our own Code. Section 2676, Comp. Laws. It was the product of the skill and labors of the plaintiff, and as such is property, and is entitled to the protection of the law; and when the injury threatened would be irreparable, and the remedy at law is inadequate, a court of equity will interfere to prevent a party who has wrongfully obtained possession of the secret from using it or disclosing it to others. And when, as in this case, a party has not only obtained knowledge of the secret code or system, but has wrongfully made a copy of the secret system, a court of equity will, in furtherance of justice and to prevent the party from fraudulently making a disclosure of the secret, not only enjoin him, but will, we apprehend, take into its possession, by means of a receiver, who is an officer of the court, such copy, so wrongfully made, to prevent fraud; and if on the trial the facts alleged are established the court will be authorized to place such copy in the hands of the plaintiff, or at least see that plaintiff's secret

marks therein shall be erased or canceled. This accords with the spirit, if not with the letter, of our Code. See sections 3213-3221, Comp. Laws. These sections embody the rules of the civil law upon the doctrine of accessions to personal property, except perhaps section 3219, which is a rule of the common law. *Silsbury v. McCoon*, 3 N. Y. 379. That courts do not hesitate to grant injunctions in such cases, is well settled by the adjudged cases. In *Yovatt v. Winyard*, 1 Jac. & W. 394, the court granted an injunction against one who had obtained a knowledge of a secret by a breach of trust. In *Morison v. Moat*, 9 Hare, 241, the court restrained the defendants from using a secret in compounding a medicine, surreptitiously obtained. In *Peabody v. Norfolk*, 98 Mass. 452, the court held that an injunction to restrain a party from communicating a secret imparted to him in the court, of his business, was proper. See 2 Story, Eq. Jur. § 952. The court was therefore clearly right in granting and continuing the temporary injunction, and, this being so, we are unable to see any legal reason why the court should not have retained in the hands of the receiver the marked catalogue in controversy in this action. The powers of courts of equity over property, the title to which is involved in litigation, is broad and comprehensive, and its power to take into its possession, through its receiver, any property that is the subject of litigation, is ample and unquestioned.

The contention of defendants that, as they were the owners of the catalogue of trifling value, into which they have copied plaintiff's valuable secret code or system, it cannot be taken into its possession by a court of equity

through its receiver, and held *pendente lite*, we cannot assent to. One of the grounds upon which a receiver will be appointed is that there is no other adequate remedy. In this case the remedy by injunction is not adequate to accomplish the ends of justice. The plaintiff, by its complaint and affidavits, shows that its business extends over a large number of states and territories, in which it has many customers. Enjoining a party, therefore, from using or communicating the plaintiff's secret code or system, while effective so long as the defendants are within the jurisdiction of the court, would yet be of little efficacy in case defendants should go beyond the jurisdiction of the court, and take with them the copy, where they might use this secret by communicating it to plaintiff's customers, to the irreparable injury of the plaintiff. The flexible nature of the equitable jurisdiction of courts of equity enables that court to so mould and administer its remedies as to prevent such fraudulent and wrongful use of the catalogue in question, by at once placing it within the control of the court, and thus placing it beyond the power of the defendants to make any improper disposition of it pending the suit, by taking it beyond the jurisdiction of the court. We are clearly of the opinion that under the established jurisdiction of courts of equity the power exists in that court to take into its possession this catalogue, and we think under the evidence it was clearly the duty of the court to do so, and that its modification of its order of March 1st was an abuse of its judicial discretion.

The modified order, so far as it directed the return of the catalogue to defendants, is reversed. All the judges concurring.

In re SCHUYLER'S STEAM TOWBOAT CO.

(32 N. E. 623, 136 N. Y. 169.)

Court of Appeals of New York. Nov. 29, 1892.

Appeal from supreme court, general term, Third department.

Proceeding for the dissolution of the Schuyler's Steam Towboat Company. From an order of the general term (19 N. Y. Supp. 565) affirming an order granting an injunction restraining the further prosecution of suits brought in the United States district court, Michael J. Moran and others appeal. Affirmed.

Carpenter & Mosher (Joseph F. Mosher, of counsel), for appellants. James W. Eaton, for respondent.

PECKHAM, J. A receiver of the property and effects of the above-named corporation was duly appointed by a special term of the supreme court of the state sitting at Albany on the 31st of July, 1891, and the order appointing him was filed and entered in the proper clerk's office August 1, 1891, at 11 a. m. The receiver executed his bond, and it was duly approved August 3, and filed in the clerk's office August 4, 1891. The proceeding was one for the voluntary dissolution of a corporation, and the distribution of its property and assets among those entitled to receive the same. Intermediate the time when the receiver was appointed and the execution and filing of his bond, and in the afternoon of August 1st, a Mr. Moran, in his own behalf and in behalf of other creditors of the corporation, libeled several vessels which were the property of the corporation, by filing libels in the United States district court for the Eastern district of New York, and upon process issued from that court the marshal took possession of such vessels. When Moran instituted his proceedings he says he had been informed that application had already been made for the appointment of a receiver, but he was not informed, and did not know, that one had been appointed. Finding the marshal in possession of the vessels, and as he refused to give up such possession, the receiver instituted these proceedings to restrain the libelants from further steps in the United States district court. The courts below have granted the order restraining further proceedings, and the other parties have appealed here. The courts below have held that by the proper presentation of a petition to a state court, praying for the dissolution of the corporation, and by the appointment of a receiver upon due notice of the application to the attorney general, the court acquired jurisdiction of the subject-matter of the proceeding, and took the property of the corporation into the custody of the law for the purpose of due administration; and that, having thus acquired jurisdiction of such subject-matter and taken the property into the custody of the law, al-

though the receiver had not actually and physically seized and taken it into his manual possession, the state court acquired the exclusive jurisdiction and right to take such possession and make a final decree; and that the libelants acquired no rights under their process, and should not be permitted to further proceed in the district court. The libelants, on the other hand, contend that this is a question of jurisdiction over the particular property, and that court obtains it which through its process and officer first actually seizes and takes possession of the property itself; and that, although the receiver may have had a prior right to take possession, it was not exercised before actual possession was taken under the process from the United States court, and hence the first manual possession must determine the question of jurisdiction. We think the contention of the libelants ought not to prevail. The question of the effect of the appointment of a receiver upon the title to the property of the person or corporation for which he was appointed is not a new one. In *Mann v. Pentz*, 2 Sandf. Ch. 257, it was said that when the appointment of a receiver was completed the title to all property and effects which were subject to the order vested in him. To the same effect are *Porter v. Williams*, 9 N. Y. 142-148, and *Van Alstyne v. Cook*, 25 N. Y. 489-496. The appointment of receiver is completed at the furthest by the filing and entering of the order appointing him, although before he proceeds to the discharge of his duties he may be directed to execute and file a proper bond. When that is done, he can take actual, manual possession of the property, and his title relates back to the time of his appointment. In *re Christian Jensen Co.*, 128 N. Y. 550, 28 N. E. 665, and cases cited by Earl, J. In *Storm v. Waddell*, 2 Sandf. Ch. 494, it was said that property that was liable to levy under execution at law could not be levied upon subsequent to an order appointing a receiver, as such order was equivalent to an actual levy upon the property. I think the proposition involved in this case has been held adversely to the claim of the libelants by the decision in *Re Christian Jensen Co.*, supra. The receiver was there appointed March 10th, his bond filed March 11th, and on March 12th he took possession of some of the property of the corporation. On the 11th of March, intermediate the appointment and qualification of the receiver, certain parties commenced an action against the corporation, and sued out process in replevin in a New York district court, and under it took possession of certain property, which was then in the possession of the corporation. On the same day an action against the corporation was commenced in the New York common pleas to recover a money judgment, and a warrant of attachment was issued, and the sheriff on the same day attached some of the property of the corporation. The receiver then asked for an order restraining the fur-

ther prosecution of these actions, and, after hearing, the order was granted permanently restraining such proceedings. At the same time the court directed the sheriff, who had seized under his process in replevin certain property in the possession of the corporation, to surrender the same to the receiver. Some question was made as to the right of the corporation to the possession of the property taken in replevin, but upon the facts it was held the receiver was entitled to possession, and, if any question arose as to whether the property seized under the replevin writ actually belonged to the corporation at the time of the appointment of the receiver, that question might be inquired of by some action or proceeding against the receiver, commenced or taken with leave of the court. What was intended to be asserted was that the appointment of the receiver vested the property of the corporation in him, although he was to thereafter qualify by giving a bond; and that, the title being in him, and the property in the custody of the law, no other court could obtain jurisdiction over the property after such appointment, even under process upon which possession was taken prior to the qualifying of the receiver.

A different rule does not prevail because one court is a state and the other a United States court. It is a question of jurisdiction in each case, and the same principles apply in both. The same rule obtains whether one court is of common-law or equitable jurisdiction and the other is a court of admiralty, although the nature of the jurisdiction of these courts is so different. Mr. Chief Justice Taney, in his dissenting opinion in *Taylor v. Carryl*, 20 How. 583-600, endeavored to establish that such a difference in the nature of the jurisdiction of common-law and admiralty courts over the vessel which was attached and libeled ought to make a difference in the decision to be made. The jurisdiction of the district court of the United States in that case was invoked for the purpose of collecting seamen's wages by the enforcement of the maritime lien upon the vessel given for that class of services, and it was said that such lien is by well-established authorities prior and paramount to all other claims on the vessel, and must be first paid, and that by the constitution and laws of the United States the district courts, acting as courts of admiralty, were the only courts which had jurisdiction over such lien or that were authorized to enforce it, and that it was the duty of that court to do it. The chief justice then argued that, as the attachment of the vessel under the state laws and by process from the state court only bound the interest of the owner, while the maritime lien upon the vessel bound the res itself, the court which had jurisdiction only of a subordinate and inferior interest should not be able, by virtue of such an attachment, to close all proceedings to enforce the paramount lien for wages for 12 months, as by the laws of the

state that period or more might elapse between the seizure of the vessel under the attachment and its sale or release from the process. The case was decided upon what a majority of the court held was no new principle, and it was solved by the application of what was said to be a principle that was comprehensive, and just, and equal, and opposing no hindrance to the efficient administration of judicial power. The jurisdiction of the state court was upheld, notwithstanding its limited character, and that of the admiralty court was denied, although it was the sole court where the lien of the seaman for his wages could be originally enforced against the vessel itself. The case shows that the fact that the different courts in the *Christian Jansen Co. Case*, supra, were courts of the same state, and of concurrent jurisdiction, is immaterial, and the same rule would hold if one court were a state and the other a United States tribunal.

The cases cited by the counsel for these appellants do not involve the question as to the effect of the appointment of a receiver in an action or proceeding where the court has obtained jurisdiction by the proper service of papers. This court has held that the effect is, in a case of this kind, to take the property of the corporation into the custody of the law, and that the court has power to preserve and protect it. As was said in *Heidritter v. Oil Cloth Co.*, 112 U. S. 305, 5 Sup. Ct. Rep. 135: "When the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it." That dominion was acquired by the order appointing the receiver in this proceeding. The same principle was declared in *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.*, 6 Biss. 197; *Steele v. Sturges*, 5 Abb. Pr. 442; *Railroad Co. v. Lewis*, 81 Tex. 1, 16 S. W. 647. Different considerations apply upon a motion to punish as for a contempt an alleged interference of a third person with property in regard to which a receiver may have been appointed, but which he has not yet taken actual possession of. In the case of *Bank v. Schermerhorn*, 9 Paige, 372, the chancellor reversed the decree of the vice chancellor adjudging the appellants to be in contempt, because the facts were not sufficient to enable the chancellor to judge whether the parties were or were not in contempt. The question was one of procedure,—whether it was proper to proceed as for a contempt for the purpose of enforcing the actual delivery of property to the receiver. The court held such proceeding was improper where the receiver had never had actual possession, although his right to possession flowed from the order appointing him. The question now before the court was neither involved, discussed, nor decided in the case cited. A party might not be guilty of contempt in taking control of

property not actually seized by the receiver, and while such party was in ignorance that a receiver had been appointed; and yet the property thus interfered with may notwithstanding have been in the custody of the law, and jurisdiction over it may unquestionably have existed in the court which appointed the receiver. Our decision here does not affect

the legal rights of the libelants in the vessels in question. The receiver will be obliged in this proceeding to distribute the proceeds arising from a sale of the property among the creditors of the corporation, as their priority of rights may appear and be held valid.

We think the order was right, and it must be affirmed, with costs. All concur.

ST. LOUIS. K. & S. R. CO. et al. v. WEAR,
Judge.

(36 S. W. 357, 135 Mo. 230.)

Supreme Court of Missouri. June 15, 1896.

In banc. Application by the St. Louis, Kennett & Southern Railway Company and others for a writ of prohibition against Judge Wear, judge of the circuit court. Writ granted.

The proceeding before Judge Wear was upon a petition in which Mr. Kerfoot was named as plaintiff, and the "St. Louis, Kennett & Southern Railroad Company, a corporation, and Louis Houck, E. F. Blomeyer, L. B. Houck, Theophilus Besel, and E. S. McCarty, as directors in said railroad company, and the Pemiscot Railroad Company, a corporation, and Robert G. Ranney, Leo Doyle, Robert T. Giboney, and John R. Jeannin, directors in said railroad company, and Louis Houck," defendants. The substance of that petition (according to the statement of the counsel for defendants in the supreme court, which statement is regarded as sufficiently full for the purposes of the prohibition case) is as follows:

"On the 17th of March, 1890, there was organized under the laws of this state the St. Louis, Kennett & Southern Railroad Company, with a capital of \$180,000, divided into 1,800 shares of the par value of \$100 each, designed to be constructed and operated from Campbell to Kennett, Dunklin county, Missouri,—a distance of 19 miles. Of this stock, A. J. Kerfoot held, and still holds, 108 shares, and E. S. McCarty, Harry H. Ferguson, Melvin L. Gray, and George Denison, respectively, held 108 shares. Prior to the — day of July, 1891, all the shares of the other stockholders in said company were purchased by said A. J. Kerfoot and E. S. McCarty. On July 8, 1891, said Kerfoot and McCarty entered into a contract with relator Louis Houck, by the terms of which said Houck agreed to transfer to said Kerfoot and McCarty ten interest-bearing extension bonds of the Cape Girardeau Southwestern Railway Company, each for \$1,000, which were represented to be worth $\frac{81}{100}$ of their face value, and also to organize a construction company for the purpose of making a connection between the said railroads at the town of Campbell, said connection being of the approximated length of 30 miles. Of the stock of said construction company, said Kerfoot and McCarty were to receive 49 per cent., and on the construction of said connection, said Kerfoot and McCarty were to be superintendent and general manager, respectively, at salaries of not less than \$175 per month. By the terms of this contract, one-half of the real estate belonging to said St. Louis, Kennett & Southern Railway Company at Kennett was to be transferred to said Kerfoot and McCarty. In consideration of the foregoing, said Kerfoot and McCarty were to transfer to said

Houck 300 shares of their stock in said railroad company, on the completion of the contract aforesaid. After the above terms of said contract had been agreed on and set forth therein, additional stipulations were inserted by said Houck in said contract, without the knowledge and consent of said Kerfoot and McCarty, to the effect that in no event was said Houck to be personally responsible for the fulfillment of said contract, and that, if said contract should not be kept on his part, such failure should not affect in any wise the said contract, and that 1,360 additional full-paid shares of stock in said company should be issued to said Houck, and that the 240 shares of said Kerfoot and McCarty should be considered full paid. While the bonds above referred to were by said Houck transferred to said Kerfoot and McCarty, not only were they not of the value represented by said Houck, but of no value whatsoever; and while said construction company was organized, and certain certificates of its stock transferred to said Kerfoot and McCarty, the purpose of its organization—the construction of a connection between the aforesaid railroads—was not only never accomplished, but never attempted to be carried out, and said certificates are consequently of absolutely no value. Shortly after the transfer of the 300 shares of the stock of the St. Louis, Kennett & Southern Railroad Company by said Kerfoot and McCarty to said Houck on the faith of the performance of the terms of said contract by said Houck, said Houck held a meeting of the pretended shareholders holding shares in excess of those held by said Kerfoot and McCarty,—to whom no notice of said pretended meeting was ever given, or attempted to be given, and of which they had no knowledge or information,—whereat said pretended shareholders did attempt and pretend to issue to said Houck 1,360 additional shares of stock of said railroad company. This action of said pretended shareholders, respondent, Kerfoot, claims to be fraudulent, illegal, and void, against which he has protested, and now protests, and in affirmance of which he has done and will do nothing. By reason of the aforesaid facts, it is claimed that the consideration for the transfer of said stock to Houck has failed, and was only brought about by the false and fraudulent representations of said Houck, with the intent to cheat and defraud said Kerfoot and McCarty.

"It is also charged in said petition: That, having thus fraudulently obtained control of said railroad, said Houck and the other relators have mismanaged, and been guilty of gross negligence and misconduct in their trust capacity as directors, officers, etc., and fraudulently combined to cheat and defraud respondent, Kerfoot, and to render his shares of stock valueless, etc., together with those of other of the stockholders. That the other relators, as directors of said company, are under the influence and control of said relator

Houck, and conform their actions to accomplish his fraudulent and illegal purposes, and to carry out his unlawful designs. That said Louis Houck is the principal shareholder in a company organized to construct a railroad through the counties of St. Genevieve and Perry, in the state of Missouri, which said road is located many miles from the St. Louis, Kennett & Southern, and that, being entirely without credit, said Houck has used in the construction of said road divers funds belonging to said St. Louis, Kennett & Southern Railroad Company, without any authority so to do from the stockholders and directors of said company, although with the pretended authority of said board of directors. That said Houck is also the principal stockholder in a certain railroad in process of construction through Scott county, Missouri, and in the construction of this road said Houck has illegally and fraudulently, in like manner and to like ends, appropriated the funds of said St. Louis, Kennett & Southern Railroad Company. That on or about February 15, 1892, the Pemiscot Railroad Company was organized,—and constructed during the year 1894,—of which said Houck was the real and substantial owner. That in the construction of this road said Houck wrongfully and fraudulently appropriated certain of the funds of said St. Louis, Kennett & Southern Railroad Company, in the manner and with the purposes as aforesaid. That on the 22d day of April, 1895, said Houck, in furtherance of his said designs to destroy the value of said Kerfoot's stock, and of the property of said St. Louis, Kennett & Southern Railroad Company, caused the said pretended stockholders of said company to adopt a contract attempted to be entered into between the directors of said last-named companies, whereby the two said railroads should be consolidated into one road. Of none of these proceedings was said Kerfoot notified, and of none of which did he have any knowledge or information, nor did he in any manner participate therein. Under this pretended contract of consolidation, the stock of the two companies was to be called in, and new stock in the consolidated company issued in lieu thereof. That said contract was submitted to a pretended meeting of said shareholders of the St. Louis, Kennett & Southern Railroad Company, and the minutes of said meeting purport to show that said contract was adopted by a majority of its stockholders, all of which is false. That a copy of said minutes, and also the minutes of a similar meeting of the shareholders of said Pemiscot Railroad Company, showing a like pretended ratification of the same contract, have been filed in the office of the secretary of state of the state of Missouri. The said attempted consolidation was fraudulent and void, in that it was not effected in conformity with the laws of the state of Missouri, and with a fraudulent intent and purpose, and because

no notice of said meeting was given said Kerfoot, who was not present thereat, although in the copy of the minutes of said meeting on file with the secretary of state he is falsely represented as voting in favor of said consolidation. That the terms of said contract of consolidation were not carried out by said Houck, or the other relators. That the earnings of said company are not sufficient to discharge its accruing obligations, and that the salaries and wages of its employes have not been paid for the last six months, and that it is now in debt to its said employes to the extent of many thousand dollars. That by reason of the acts aforesaid said company is unable to secure supplies needed in the operation of the road. That the rolling stock and other properties are in need of repair and replenishing, which the relators have failed and refused to have done. That no provision has been or is now being made for the extinguishment of the outstanding debts and bonds hereafter to accrue. That said Houck on the 2d day of December, 1895, did remove respondent, Kerfoot, from his position as superintendent of said road, and did appropriate his salary to himself, through one of the relators, his kinsman Louis B. Houck. That the said Pemiscot Railroad Company is, and was at the time of the attempted consolidation aforesaid, hopelessly insolvent. That its debts have not been paid, except such as were paid out of the earnings of the St. Louis, Kennett & Southern Railroad Company as aforesaid, and that said attempted consolidation was but a part of the plan of said Houck to secure and absorb both properties. That by reason of all of which the said St. Louis, Kennett & Southern Railroad Company has become greatly embarrassed financially, and that a continuation of such acts of mismanagement will bring about the insolvency and bankruptcy of said corporation.

"The prayer of the bill is that relators, as officers of said company, be restrained from diverting further amounts of money from the treasury of said company; that they be suspended from office as directors, etc., and that a new election be ordered to be held to supply the vacancy thus to be created; that an accounting be had with respect of the funds diverted as aforesaid; that a decree be rendered annulling said pretended consolidation, and restoring the funds so diverted from the treasury of the St. Louis, Kennett & Southern Railroad Company; that said 300 shares of stock, or their proportionate interest therein, transferred by said Kerfoot and McCarty, be restored to them, and that said contract under which the transfer was made be annulled, for reasons aforesaid; that said issuance of the 1,360 shares of stock be annulled and canceled, for the reasons before mentioned; and that said Houck be required to account for the benefits that have accrued to him by reason of the trans-

fer of said 300 shares of stock, and the issuance of said 1,360 shares; and that he be ordered to pay one-half of the same to said Kerfoot. An offer is made to return to said Houck one-half of the shares of stock in the construction company before mentioned, and like offer with respect of said extension bonds. The petition then asks for the appointment of a receiver pending the determination of the issues tendered, in order to prevent the misappropriation, and to insure the preservation of the properties involved."

The order of Judge Wear, appointing the receiver, is as follows:

"State of Missouri, County of Dunklin--ss.: In the Circuit Court, July term, 1896. A. J. Kerfoot, Plaintiff, v. The St. Louis, Kennett & Southern Railroad Company, a Corporation, and Louis Houck, E. F. Blomeyer, L. B. Houck, Theophilus Besel, and E. S. McCarty, as Directors in said Railroad Company, and the Pemiscot Railroad Company, a Corporation, and Robert G. Ranney, Leo Doyle, Robt. T. Giboney, Louis Houck, and John R. Jeannin, Directors in Said Railroad Company, and Louis Houck, Defendants. In Vacation. Order of Appointment of Receiver. Now, on this 11th day of April, 1896, comes A. J. Kerfoot, and presents to me, John G. Wear, judge of the circuit court of Dunklin county, Missouri, in vacation, at chambers, in the city of Poplar Bluff, in the county of Butler, in the state of Missouri, a certified copy of his petition filed in the office of the clerk of the said circuit court of said Dunklin county, in a certain cause entitled above; and with it he presents his motion, verified by his affidavit, by which he asks the appointment of a receiver of the real and personal property of the said defendant corporations named above, which said motion is hereto attached. And the said John G. Wear, judge as aforesaid, having heard said motion, and having duly considered the same, together with the facts offered in connection therewith, does hereby order that Samuel W. Fordyce, of the city of St. Louis, Missouri, be, and he is hereby, appointed as receiver of all and singular the real and personal property, wherever situate, of the said St. Louis, Kennett & Southern Railroad Company, and of the said Pemiscot Railroad Company, and that he shall immediately qualify as such, by giving bond for the faithful performance of his duties as such receiver, in the sum of twenty-five thousand dollars, and that after his qualification as such receiver, having duly taken the oath prescribed, he shall proceed to the county of Dunklin, and to the county of Pemiscot, in the state of Missouri, and shall take charge of the said property of the said railroad companies, including the rolling stock, the depots, books, and papers of the said companies, and that he shall then take an inventory of all of the said property so taken charge of by him; that he shall manage the said railroad properties carefully and

discreetly; that he shall continue to fulfill and perform all of the existing contracts of the said railroad companies until the further order of the court in the premises; that he shall discharge all of the current expenses of the management as such receiver out of the earnings of the said roads while they are in his hands or custody; that he shall keep an accurate and exact account of the expenses and of the income of the two said railroads, the one extending from Campbell, Missouri, to Kennett, Missouri, and the other extending from Kennett, Missouri, to Caruthersville, Missouri, preserving the said expenses and income separate in all of the transactions of himself as such receiver, and that he shall keep and maintain the said properties in good condition until the further order of the said circuit court of Dunklin county, or the judge thereof in vacation; and that he make a full report of his acts as such receiver to the next term of said court, unless ordered to do so before that date. It is further ordered that each and every agent and employé of the said defendant railroad companies named above, whether regarded as the employés of the said companies as one corporation, or as two separate corporations, shall, upon the demand of said Samuel W. Fordyce, after his qualification as such receiver, immediately yield to said receiver the possession and control of all the property, books, and accounts of the said defendant railroad companies or company, and the said Louis Houck and the other defendants named as the officers and directors of said defendant companies are hereby ordered to turn over and deliver to the said receiver all of the books and papers of the said company or companies which pertain in any wise to the management and business of the said company or companies. It is further ordered that in the event that any such employé of said company or companies shall fail or refuse to so deliver to said receiver the property in his said care and custody, or should said defendants fail or refuse to so deliver to said receiver the books, papers, or other property of the said defendant company or companies, the said receiver shall at once report the person so failing or refusing to the undersigned judge for his further orders in that behalf. The said defendants and their employés are hereby enjoined and forbidden from in any manner interfering with the said possession of the said receiver after he shall have obtained the possession of the said property hereby ordered into his hands, until the further orders of the said court, or of the judge thereof in vacation. It is further ordered that this order be filed in the office of the clerk of said court of said Dunklin county, and that a certified copy thereof be furnished the said Samuel W. Fordyce, as such receiver, and that a duly-certified copy thereof be served upon the defendants named above. It is further ordered that the said defendants be notified to ap-

pear before me, the undersigned judge of the circuit court, at the next term of the circuit court, in the county of Dunklin, in the state of Missouri, then and there to show cause, if any they can, why the appointment hereby made should not be continued, and the property kept by the said receiver, pending a hearing upon the merits of this controversy, and until the said defendants may be heard upon the merits thereof. And the service of a duly-certified copy hereof shall be deemed sufficient service of the said notice. Done at chambers in the city of Poplar Bluff, in the county of Butler and state of Missouri, this 11th day of April, 1896. John G. Wear, Judge."

The writ issued by Judge Wear for the seizure and delivery of the property of the railroad company is as follows:

"State of Missouri, County of Dunklin--ss.: In the Circuit Court, to July Term, 1896. A. J. Kerfoot, Plaintiff, v. The St. Louis, Kennett & Southern Railroad Company, a Corporation, and Louis Houck, E. F. Blomeyer, L. B. Houck, Theophilus Besel, and E. S. McCarty, as Directors in said Railroad Company, and the Pemiscot Railroad Company, a Corporation, and Robert G. Ranney, Leo Doyle, Robt. T. Giboney, Louis Houck, and John R. Jeannin, Directors in said Railroad Company, and Louis Houck, Defendants. To W. G. Petty, Sheriff of Dunklin County, Missouri: Whereas, it appears to me, John G. Wear, judge of the circuit court of said Dunklin county, Missouri, sitting in chambers, in vacation, by the report of S. W. Fordyce, whom I did on the 11th day of April, 1896, appoint as receiver of all of the property of the said St. Louis, Kennett & Southern Railroad Company, and of the said Pemiscot Railroad Company, which report is duly verified, that the said Samuel W. Fordyce did on said 13th day of April, 1896, proceed to the town of Kennett, in said Dunklin county, Missouri, and did then and there cause to be served upon one Louis B. Houck, whom he found in the charge and management of the said property of the said railroad companies or company named above, a duly-certified copy of my order made in the above-entitled cause, appointing him, the said S. W. Fordyce, as such receiver, and that he did then and there demand of the said Louis B. Houck the possession and custody of the property of the said railroad companies or company, and did demand that the said Louis B. Houck relinquish the possession and control thereof to him, the said receiver, and that said Louis B. Houck did then and there fail and refuse so to turn over and deliver to said receiver the possession and control of the said railroad or railroads, and of the said property of the said railroad company or companies, and did then and there fail and refuse to relinquish the said possession and control thereof; and that the said Louis B. Houck did willfully violate the commands of my said order of

appointment of the said Samuel W. Fordyce as such receiver: This is, therefore, to command you that you do forthwith summon the power of the said county of Dunklin, if necessary, and that you proceed to the property of the said railroad company or companies named above, and to its railroad office or offices, wherever situate or found in your county, and that you put and place the said Samuel W. Fordyce, as such receiver, in charge, custody, and possession thereof, and that you dispossess therefrom, and from every portion or part thereof, the said Louis B. Houck, or any other official or employé or agent of the said Louis B. Houck or of the said railroad companies named above, or of any defendants named herein above; that you take and deliver to the said receiver all of the engines and cars and other equipments of the said railroad or railroads, all of its books and papers, its tickets and other movable property, its depots and ticket offices, and every other property of every description. You are further commanded that you immediately take into your custody the body of the said Louis B. Houck, and him safely keep, so that you have him, the said Louis B. Houck, before me, at chambers, in the city of Poplar Bluff, in the county of Butler and state of Missouri, on Thursday, April 16, 1896, then and there to show cause, if any he can, why he should not be committed to the common jail of said Dunklin county for his disobedience of my said order of appointment of said receiver. And you are further commanded that if any other person shall attempt to obstruct the full and free execution of the above order, or to aid or assist in the attempt to remove any of the said property from the said county of Dunklin, except by orders of the said receiver, you shall, by virtue hereof, arrest each and every such person, and have him or them before me at the time and place designated above, then and there to be further dealt with according to law. In testimony whereof, I have hereunto set my hand, at chambers, in the town of Bloomfield, in the county of Stoddard and state of Missouri, this 14th day of April, 1896. John G. Wear, Judge of the Circuit Court of Dunklin County, Missouri."

The return of the sheriff upon the above writ follows:

"Executed the within writ in the county of Dunklin and state of Missouri on the 14th day of April, 1896, by placing S. W. Fordyce, as receiver, in charge of the depot and all of the property of the above-named company or companies which were at that time at the town of Kennett and in said county, including one engine and two passenger coaches, which were afterwards taken away by L. B. Houck, and carried eastward into Pemiscot county, Missouri. I did further on the 15th day of April, 1896, put the said receiver in charge of all the remainder of the property of the said companies or com-

pany in my said county. Said Louis B. Houck was not arrested as ordered above, because he left the said county of Dunklin. W. G. Petty, Sheriff of Dunklin County, Mo."

Other necessary facts appear in the opinion of the court.

M. R. Smith, for plaintiffs.

BARCLAY, J. (after stating the facts). This action is original in the supreme court. The plaintiffs are the St. Louis, Kennett & Southern Railroad Company, Louis Houck, and a number of other shareholders in said company. The defendants are the learned circuit judge of the Twenty-Second circuit, and Messrs. Kerfoot and Fordyce, plaintiff and receiver in the proceeding before the judge. The object of the action is to obtain a writ of prohibition against the enforcement of certain orders entered by the judge in vacation of the court. Copies of those orders will be printed in the official report. The claim of plaintiffs here is that the orders are void, because made without jurisdiction, or, at least, that they are in excess of any jurisdiction which the circuit judge might properly exercise in the proceeding as it then stood. In response to a preliminary rule in prohibition, defendants made separate returns, and plaintiffs replied thereto. It will not be necessary to state the terms of those pleadings at any great length. The facts on which the result of the action in this court depends are few, and need not be obscured by elaboration of the minor features of the controversy. Those facts are also admitted by the pleadings. The old St. Louis, Kennett & Southern Railroad Company (which we shall call the "Old Kennett Road" for a short name) was incorporated in 1890 to operate a railroad, about 19 miles long, between Campbell and Kennett, in Dunklin county. A new company of the same title was formed in 1895 by an alleged consolidation of the old Kennett road and the Pemiscot Railroad Company, which had been organized in 1892 to extend the railroad from Kennett to Caruthersville. The latter place is in Pemiscot county, on the Mississippi river. The validity of that consolidation is attacked in the petition filed in the case on the circuit. The ostensible public evidence of the consolidation is the certificate issued by the secretary of state of Missouri, proclaiming a compliance with the statutory requirements in regard to the union of such corporations. Rev. St. 1889, § 2567. The property formerly owned by the two old companies was in custody of the new Kennett road, which operated a line, about 44 miles in length, from Campbell to Caruthersville (via Kennett), when Kerfoot's petition was filed. For the purpose of the hearing in this court, the version which that petition gives of the dealings between Kerfoot, Houck, and the companies will be ac-

cepted as reliable, in determining the propriety of the proceedings which followed. The statements of that petition need not be repeated. They will be referred to as occasion requires. An ex parte application for the appointment of a receiver was made to the circuit judge, in vacation, on representations additional to the petition. The substance of those representations is that if such appointment were not made the property of said railway companies would "be wasted pending the determination of the said litigation," and the rights of the plaintiff "suffer irretrievable injury," etc. The application excused the want of notice thereof to defendants on the ground "that the giving of the said notice would tend to defeat the object sought to be obtained by the said appointment, in this, to wit: that the said Louis Houck is in exclusive charge of all of the books showing the condition of the affairs of the said companies, and has persons in charge of the various offices and property of the road, who are entirely under his control; that the said Louis Houck would so handle and dispose of the books and property of the said companies that the order of appointment of a receiver, if made upon notice, would not avail, and would not be obeyed; the books and movable property of the said companies would be removed from the said counties in which said property is situate, and would be removed from the state, so that the said processes of the said court would not be effectual to compel the delivery thereof to the receiver which might be appointed"; "that by the removal of the said books of the said companies the object of the appointment of such receiver would be frustrated, and his performance of his said duties would be made difficult, if not impossible; that all of the said defendants, directors in the said corporations, are under the control of the said defendant Louis Houck"; and "that, if the said defendants should have notice of this application for a receiver, they would resort to various tricks and devices to delay this proceeding, and in the meanwhile to further wreck said property; that the said defendants now are plotting to deprive this plaintiff of his property interest in the St. Louis, Kennett & Southern Railroad Company, by means of a fictitious and fraudulent assessment upon his said stock; and that the giving of the said notice would have the effect to destroy the benefits sought in the appointment of the said receiver." The circuit judge granted the application, without notice to defendants, and made a vacation order, at Poplar Bluff, in Butler county, the terms of which are set forth at large in the statement accompanying this opinion. The main features of the order are that Mr. Fordyce was appointed receiver of all the real and personal property of defendant companies. He was directed to immediately qualify, by giving bond, etc., and then to take charge of all

the real and personal property of said companies, "including the rolling stock, the depots, books and papers, of the said companies"; to "manage the said railroad properties carefully," and "continue to fulfill and perform all of the existing contracts of the said railroad companies until the further order of the court in the premises"; to keep accounts, make reports, etc. The order further directed defendants to deliver all said property to said receiver, and enjoined them from interfering with the possession of the latter. The defendants were further ordered to appear before the judge "at the next term of the circuit court in the county of Dunklin," then and there to show cause why the receivership should not be continued "pending a hearing upon the merits." This order was dated April 11, 1896. The next term of the Dunklin circuit court, as appointed by law, will begin on the second Monday (the 13th) of July, 1896. Sess. Laws 1892, p. 13, § 50. An ordinary summons to defendants to appear and answer the petition in the cause at the opening of the July term of the circuit court of Dunklin county was issued on the 10th of April, 1896. Mr. Fordyce, at the time of his appointment as receiver, was president of the St. Louis Southwestern Railroad Company, popularly known as the "Cotton Belt" route. It is alleged in the petition for prohibition in this court that the latter is "a competitive railroad company, whose policy has ever been hostile to relator railroad company, for the reason that it occupies the same territory for business," and that the connection of the Kennett road with the Mississippi river secures to the people of Dunklin and Pemiscot counties advantages of competition between that road and the Cotton Belt. There is no denial of these allegations in the return of any of the defendants to the preliminary rule in this court, and like statements as to the roads being in competition appear in the replies to the returns. The above recital shows the substance of the charges on that point. When Mr. Fordyce, in obedience to the order for his appointment, demanded possession of the Kennett road, the officers in charge of the property refused to deliver it. That demand was the first actual notification given to them of the receivership. After the refusal to turn over the property, an application was made to the circuit judge for further action, whereupon he issued the writ or warrant of date April 14, 1896, to the sheriff of Dunklin county, directing him to summon the power of his county to put the receiver in possession of the property of the two railroad companies, and to dispossess any official of said companies. The warrant is recited in full in the statement accompanying the opinion. But it may be properly noted here that the warrant was issued in Stoddard county. It directed the arrest of Louis B. Houck, and that he be produced before the circuit judge, at cham-

bers, in the city of Poplar Bluff, Butler county, April 16, 1896; to show cause why he should not be committed to jail for disobedience of the order appointing the receiver. Under the last-described writ, the sheriff put Mr. Fordyce, as receiver, into possession of the property of the Kennett railroad in Dunklin county, and otherwise returned the order unexecuted, for the reasons appearing in his return. At that stage of the case the application for a prohibition was presented to the supreme court, and a preliminary rule issued.

1. It is urged by defendants that prohibition is not applicable to the situation existing on the circuit in the receivership case, and that no review can occur at this time as to the propriety of the disputed orders. But, if those orders were beyond the legitimate authority of the judge, the enforcement of them may be prohibited. *Morris v. Lenox* (1843) 8 Mo. 252. The fact that the suit in the circuit court invokes the equity powers thereof does not preclude the use of a prohibitory writ to keep the judicial action within the limits marked by law. A court of equity, no less than a court of law, may be called back within the boundaries of its rightful jurisdiction by the process of prohibition. Where a court or judge assumes to exercise a judicial power not granted by law, it matters not, so far as concerns the right to a prohibition, whether the exhibition of power occurs in a case which the court is not authorized to entertain at all, or is merely an excessive and unauthorized application of judicial force in a cause otherwise properly cognizable by the court or judge in question. *State v. Walls* (1892) 113 Mo. 42, 20 S. W. 883; *In re Holmes* (1895) 1 Q. B. 174. Prohibition, however, will not ordinarily be granted where the usual modes of review by appeal or writ of error furnish an adequate and efficient remedy for the correction of an injury resulting from the unauthorized exercise of judicial power. But where those remedies are inadequate to the exigency of the situation, in a particular case, a supervising court may properly interfere by the remedy now asked. If the orders in the Kerfoot suit were in excess of the jurisdiction of the learned judge who entered them, and if they have resulted in the seizure of a large part of a railroad line, and its detention from those entitled to—and whose duty requires them to—operate it for the convenience of the public, the case is one which would permit, if not demand, the application of a writ of prohibition to correct the wrong complained of. The remedy of prohibition affords opportunity for a direct attack upon proceedings questioned upon the point of jurisdiction. If the facts shown by a record reveal an unwarranted application of judicial power, causing an immediate and wrongful invasion of rights of property, the writ of prohibition may go to check the execution of any unfinished part of the extrajudicial

programme that may have been outlined. Sometimes the writ may be so shaped as to undo the steps that have been taken in such a programme. To justify the use of the writ, it is not essential that the proceedings in dispute should be so entirely void as to warrant a declaration of nullity upon a collateral inquiry. The statute governing proceedings in prohibition makes no change in the ancient law on these points. Laws 1895, p. 95.

2. The plaintiffs in this court contend that the learned judge had no jurisdiction to appoint a receiver for the railroad company upon the showing made by the petition of Kerfoot, and that the order of appointment is therefore a nullity. It is true that there are precedents declaring that, in the absence of statutory authority for so doing, the property of a solvent and going corporation cannot rightfully be taken from the control of its officers at the suit of a mere creditor at large, and be placed in the hands of a receiver, on account of mismanagement merely, or to secure the performance of some engagement of the company, even in regard to its shares. Some decisions have gone so far as to correct, and even to prohibit, such proceedings, as entirely beyond the general jurisdiction of courts of equity. *Port Huron & G. R. Co. v. Judge of St. Clair Circuit* (1875) 31 Mich. 456; *Iron Co. v. Wilder* (1892) 88 Va. 942, 14 S. E. 806; *Mason v. Supreme Court of Baltimore City* (1893) 77 Md. 483, 27 Atl. 171; *In re Binghamton General El. Co.* (1894) 143 N. Y. 261, 38 N. E. 297; *People v. Weigley* (1895) 155 Ill. 491, 40 N. E. 300; *State v. Superior Court of Pierce County* (1895) 12 Wash. 677, 42 Pac. 123; *Fischer v. Superior Court of San Francisco* (1895) 110 Cal. 129, 42 Pac. 561. But in view of the other serious and sufficiently difficult question involved in the case at bar, and the desirability of prompt announcement of the conclusion that has been reached, we shall not now stop to investigate the soundness of plaintiffs' contention above stated.

3. A power to appoint receivers is expressly conferred upon judges of trial courts in vacation by section 2193, Rev. St. 1889, which greatly broadened the terms of the old law (Gen. St. 1865, p. 678, § 52) under which *State v. Gambs* (1878) 68 Mo. 289, was decided. We shall not be obliged to consider whether the judge might not appoint a receiver in vacation by virtue of inherent power in the circuit court to make such an order, for in the instance under review the order was made in another county than that in which the petition for a receiver had been filed. The inherent as well as the express powers of a court must be exercised within the territorial jurisdiction of that court, unless positive law enlarges the field of their use. But, where a judicial power is given by statute to a judge in vacation, he may exert that power (at least within his circuit) out of as well as in the county where the cause is pending, unless there is some-

thing in the statutory authority to forbid such action. It may be conceded for the present, without examining the proposition closely, that the power given to the judge to appoint a receiver carries with it, as a necessary incident, a power in his court, if not in the judge personally, to enforce obedience to orders made within the ambit of that power, and in accordance with established principles of law governing the exertion of such a power. (As to the mode of applying that power we shall have more to say in the next section of this opinion.) But the judicial authority to deal with property by means of a receivership is not unlimited or absolute. *Harris v. Beauchamp* [1894] 1 Q. B. 801. By a very late statute of Missouri an appeal may be taken from any order "refusing to revoke, modify or change an interlocutory order appointing a receiver or receivers." The same statute further provides for a very summary determination of such appeals, and for that reason directs that they shall, on motion, be advanced on the appellate docket. Laws 1895, p. 91, amending Rev. St. 1889, § 2246. The purpose of this enactment is to moderate the hardships resulting from the long continuance of receiverships granted on insufficient grounds, when no review of interlocutory appointments was permissible. The reports of court proceedings in the United States prior to the passage of that act afforded illustrations of the injuries possible from erroneous judicial action in the matter of receiverships,—injuries for which the law seemed to afford no adequate redress. The right to a summary review of an interlocutory order maintaining a receivership is clearly given by the statute cited. It is a valuable and substantial right. The administration of the law must conform to the intent of the legislature in regard to it. *Andrews v. National Foundry & Pipe Works* (1894) 18 U. S. App. 458, 10 C. C. A. 60, 61 Fed. 782. It is noticeable that a prompt review is allowed by the act of 1895 only where the order continues, not where it dissolves, the receivership. Thus the statute is plainly aimed at the possible abuse of maintaining a receivership (without just grounds) beyond a period required for an investigation of its correctness. If the purpose of the new law is kept in view and effectuated, the procedure in such cases must be shaped so as to permit a speedy review of interlocutory orders appointing receivers in vacation as well as in term. Otherwise such orders, in many parts of Missouri, might stand for nearly half a year without the possibility of even a first review, under the existing law in regard to terms of court. Laws 1892, p. 10, § 30 and following. In other states where statutes allow appeals from interlocutory injunction orders, appointments of receivers, etc., it has been held that the appeals may be taken in vacation as well as in term. *Griffin v. Bank* (1846) 9 Ala. 201; *Montana, etc., Co.*

v. Helena, etc., Co. (1887) 6 Mont. 416, 12 Pac. 916; *Railroad Co. v. Dykeman* (1892) 133 Ind. 56, 32 N. E. 823. Such rulings appear necessary to conform to the plain design of the legislation on that subject. The new provisions in this state most clearly import that persons whose possession is to be invaded by a receivership shall have at least a prompt and full opportunity for a hearing (both preliminary and by appeal) as to the justice and equity of such a drastic remedy. Keeping the purpose of the new statute in mind, how must we regard the orders of the learned circuit judge in the Kerfoot suit? The appointment of the receiver was made without notice to, or any hearing of, the defendants. They had no opportunity to offer the facts which they assert, tending to prove that the demand for any sort of receivership was without foundation. The learned judge's order fixed a time, three months distant, at which they might show cause why the receivership "should not be continued, and the property kept by the said receiver, pending a hearing upon the merits." The details of the order plainly contemplate that meanwhile the railroad was to be operated and managed by the receiver; at least, until the next term of court, then three months off. The receiver was directed, for instance, to perform existing contracts "until the further order of the court." The whole framework of the order suggests that the receivership was established for at least a three-months term. The facts which justify the appointment of a receiver, without notice to the party whose possession is disturbed, are exceptional, at best. Nothing but the plainest showing of an imperative necessity for such an order, to prevent a failure of justice, should move a court to grant a motion to that end, though there is no hard and fast rule, that we can give, prescribing when the discretionary power to make such an order may or may not be used. But of this proposition we feel sure: that under our existing law no temporary receivership can rightly be set up, to last three months, without affording first a hearing to the party whose possession of property is determined by such an order. If the court had been in session, so as to permit immediate application to modify the order, the relief then possible might affect the applicability of a prohibitory writ. But the facts here are different. In vacation, at least, a party should not be obliged to hunt up the judge for a correction of an order made in excess of his power in the premises. The right to appoint a temporary receiver in vacation is limited by the necessity from which alone the right to make such appointment springs. *Larsen v. Winder* (1896; Wash.) 44 Pac. 123. No court in Missouri may, without notice, declare a receivership, pending suit, for a longer time than is fairly and reasonably requisite to allow the defendant, whose possession is invaded, to show cause against

a further continuance of the receivership. What is such reasonable time will depend on the circumstances of each case. But we have no doubt that three months is beyond (and very far beyond) any reasonable day for the showing of cause. The statute allowing appeals from interlocutory receivership orders must be given due force. It contemplates that an early opportunity shall be allowed to combat, and, if desired, to review, the appointment. The courts must yield to that obvious purpose, and permit no receivership to stand without a summary opportunity to review the equity of it. When a judge in vacation deems the exigency sufficiently great to warrant an *ex parte* order for a receivership of property, such as that in question here, he should by the same order appoint a very early day for the showing of cause against the order by defendants, so that the latter may then have opportunity for the motion to vacate which the statute permits. Our law confers, indeed, power to appoint a receiver in vacation, but it also allows an appeal from an order refusing to vacate an interlocutory appointment. A reasonable construction of the latter act would appear to permit in vacation a motion to revoke the appointment in vacation; otherwise one of the chief remedial objects of the appeal statute on this subject would be frustrated. It has been held by some courts that a power to do a certain judicial act out of term implies a power to undo that act, if justice appears to require that move. *Railroad Co. v. Sloan* (1877) 31 Ohio St. 1; *Walters v. Trust Co.* (1892) 50 Fed. 316. We hold that the learned judge's order in the case on the circuit was in excess of the limitations on the power of appointment without notice, which we think the law imposes by the clearest implication.

4. But another patent infirmity is noticeable in the proceedings in question. Had the first order fixed a reasonable date to show cause against it, the question of the jurisdictional validity of the second order (the order to the sheriff) would demand serious attention. That order was made after the refusal of the superintendent of the new Kennett road to surrender possession to the receiver. The petition itself gave notice that the property over which the receivership was sought to be established was in possession of the new company by virtue of the alleged consolidation. The old Kennett Company and its directors were parties defendant in the petition. The new company was not a party to it, for the list of directors shows that only the old company was pointed out as defendant. The receivership asked of and granted by the court reached for the property of the old Kennett Company, and of the Pemiscot Railroad Company. The directions to the receiver exhibit that meaning of the order quite clearly. Then it was evidently beyond the power of the learned judge to order a seizure of property in the possession of the new com-

pany without at least giving the latter an opportunity to show cause against the proposed order. By that order the learned judge virtually decided that the transfer to the new company was invalid, and the union of the two old companies merely nominal. That ruling was made without any but an *ex parte* hearing, as against a stranger to the case in court. The order to the sheriff was in the nature of a writ of assistance, as known to the chancery practice. Such a writ could not rightly be issued, even on a final decree (and, for stronger reason, not upon an *ex parte* interlocutory order), as against one not a party to the suit, without a chance to the latter to show cause against the order therefor. *People v. Rogers* (1830) 2 Paige, 103; *Howard v. Railroad Co.* (1879) 101 U. S. 848; *State v. Ball* (1892) 5 Wash. 387, 31 Pac. 975. The summary writ, issued from another county, to seize the property and deliver it to the receiver, was beyond the jurisdiction of the learned judge, so far as it concerned or affected the rights of the new Kennett Company; and, as to the latter company, the effect of the writ should be checked by the prohibition now invoked.

5. The fact that no objection was made on the circuit to the want of jurisdiction is no barrier to a prohibition, where the order complained of was entered in vacation, *ex parte*, and the defect of jurisdiction appears on the face of the papers. Nor can the want of an exception to the objectionable order have any weight where no opportunity to except was had by reason of the *ex parte* nature of the order.

6. Assuming that the learned judge was without jurisdiction to require the immediate delivery of the property of the new Kennett Company to the receiver without a hearing, then the disobedience of the order by Mr. Houck, as superintendent of that company, involves no contempt. It is always permissible to show, upon process for contempt, that the order disobeyed was beyond the jurisdiction of the authority from which it emanated. If that showing is successfully made, no punishable contempt has been committed. In *re Sawyer* (1888) 124 U. S. 200, 8 Sup. Ct. 482; *Smith v. People* (1892) 2 Colo. App. 99, 29 Pac. 924; *Schwartz v. Barry* (1892) 90 Mich. 267, 51 N. W. 279; *State v. Winder* (1896; Wash.) 44 Pac. 125.

7. It is insisted by the plaintiffs in this court that the action of the learned circuit judge was void because the appointee named as custodian of the property could not lawfully be appointed receiver of their railway line. The constitution declares that: "No railroad or other corporation, or the lessees, purchasers or managers of any railroad corporation, shall * * * in any way control, any railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a

parallel or competing line. The question whether railroads are parallel or competing lines shall, when demanded, be decided by a jury, as in other civil issues." Const. 1875, art. 12, § 17. Two sections of the statute law, in furtherance of the purpose of the organic law quoted, are as follows: "It shall be unlawful for any railroad company, corporation or individual owning, operating or managing any railroad in the state of Missouri, to enter into any contract, combination or association, * * * or in any way whatever to any degree exercise control over, any railroad company, corporation or individual owning or having under his or their control or management a parallel or competing line in this state, but each and every such railroad, whether owned, operated or managed by a company, corporation or individual, shall be run, operated and managed separately by its own officers and agents, and be dependent for its support on its own earnings from its local and through business in connection with other roads, and the facilities and accommodations it shall afford the public for travel and transportation under fair and open competition." Rev. St. 1889, § 2569. "It shall be unlawful for any officer of any railroad company or corporation, or any individual owning, operating or managing any railroad in this state as a common carrier, to act as an officer of any other railroad company or corporation owning, operating or managing, or having the control of a parallel or competing line, and the question whether railroads are parallel or competing lines shall be decided by a jury, when so demanded." Id. § 2570. At various points in the state statutes concerning railroads, receivers are mentioned among other managing operators of such lines. Rev. St. 1889, §§ 2631, 2644, 2645. So that it is obvious that the president of a parallel or competing railroad, however high his business qualifications, is not eligible to appointment as receiver of the competing railway line, in Missouri. The fact is alleged in this court that Mr. Fordyce is the president of the Cotton Belt Route, and that it is a railway in competition with the new Kennett road. The fact stands admitted by the pleadings here, in their present form. But, to make it available as the groundwork of a prohibition, the fact should appear in some way in the proceedings on the circuit. It does not appear in the record of those proceedings. Nor does it appear that the learned circuit judge was aware of the fact when the appointment was made. Hence we are not called upon to say whether or not the fact would furnish of itself a cause to prohibit the execution of the order of appointment.

8. The summary order for the seizure of the property in possession of the new Kennett road was, we think, in excess of the rightful power of the learned circuit judge in vacation. We hence consider that the rule in prohibition should be made absolute, and direct that judgment for a peremptory writ be

entered, prohibiting the circuit judge from enforcing any order heretofore made in the Kerfoot case, under which said receiver has taken possession, or is attempting to take possession, of some part of the railway or other property of the St. Louis, Kennett & Southern Railroad Company, or of the Pemiscot Railroad Company, and prohibiting him from making any order (upon the pending petition of said Kerfoot in said cause) directing or permitting any receiver to take possession of any property of said companies without first allowing the present St. Louis, Kennett &

Southern Railroad Company an opportunity to be duly heard; and by the writ the said receiver will be prohibited from attempting to take or hold possession of any property of said railroad companies by virtue of said order, and the receiver will further be ordered to restore forthwith any and all property of the new Kennett road that may be in his possession by reason of his said receivership.

BRACE, C. J., and GANTT, MacFARLANE, BURGESS, and ROBINSON, JJ., concur. SHERWOOD, J., dissents.

CHILDERS et al. v. NEELY.

(34 S. E. 828, 47 W. Va. 70.)

Supreme Court of Appeals of West Virginia.
Nov. 28, 1899.

Appeal from circuit court, Tyler county; R. H. Freer, Judge.

Bill by J. M. Childers and another against S. H. Neely. Judgment for plaintiffs, and defendant appeals. Reversed.

F. L. Blackmarr, for appellant. Robert McEldowney and G. M. McCoy, for appellees.

BRANNON, J. Childers and Ramey filed a bill in equity in the circuit court of Tyler against Neely, praying that a partnership between them be dissolved, an account taken "of all its accounts, dealings, and transactions whatever," and that a manager be appointed to take charge of the property. The business was oil production. Neely admitted the joint enterprise, but denied the partnership; and he joined in request for account, and did not resist a dissolution, if a partnership. The decrees made a partial account, decreed its balance against Neely, and denied him further participation in the partnership, and he appealed.

This case raises an interesting and important subject in this mining state; that is, whether, and when, joint tenants or tenants in common, jointly operating for oil, are partners, or merely co-owners. The bill asserts a partnership, while Neely denies it; asserting that it is a case, not of partnership, but co-ownership.

In two leases of town lots for oil and gas purposes, Childers owned a one-fourth interest; Ramey, a three-eighths interest; Neely, a three-eighths interest. They were so far joint tenants. They agreed to develop the lots for oil, but made no written articles of partnership,—in fact, no oral express formation of a partnership. They simply, by an indefinite understanding, agreed to develop their common property, each giving his skill, paying his share of outlay proportionate to his ownership, and getting his share of the product proportioned to such ownership. I use the word "product," instead of "profits," because there was no contract explicit on this point to distinguish product from profit. "Partnership must be distinguished from joint management of property owned in common. Where two partners own a chattel, and make a profit by the use of it, they are not partners, without some special agreement which makes them so." T. Pars. Partn. § 76. Two heirs or other co-owners of a farm, jointly farming it for profit, are not partners. There is a peculiar partnership, called a "mining partnership," partaking partly of the nature of an ordinary trading or general partnership, on the one hand, and partly of a tenancy in common, on the other. It is an important question to those engaged in the oil and other mining business whether each one is jointly and severally liable for all the doings of every or any other of the associates in the

venture, as in ordinary trading partnerships. What is a mining partnership? 15 Am. & Eng. Enc. Law, p. 609, says: "When tenants in common of a mine unite and co-operate in working it, they constitute a mining partnership." Many authorities there cited thus define it. See the California case of Skillman v. Lachman, 83 Am. Dec. 96, and note discussing it fully; Lamar's Ex'r v. Hale, 79 Va. 147. Mere co-working makes them partners, without special contract. Barring & A. Mines & M. Courts of equity take jurisdiction of them as if general partnerships. 2 Colly. Partn. c. 35. Of course, owners of mines, oil leases, or farms can by agreement make an ordinary partnership therein; but "where tenants in common of mines or oil leases or lands actually engage in working the same, and share, according to the interest of each, the profit and loss, the partnership relation subsists between them, though there is no express agreement between them to be partners or to share profits and loss." Duryea v. Burt, 28 Cal. 569. The presumption in such case would be that of a mining partnership, rather than an ordinary one, in absence of an express agreement forming an ordinary general partnership. Perhaps the case of Bank v. Osborne, 159 Pa. St. 10, 28 Atl. 163, and other cases in that state cited in Bryan, Petroleum & Natural Gas, 283, would justify the inference that the parties operated as tenants in common; but the current of authority elsewhere recognizes the inference of mining partnerships. That state does not recognize such a partnership. Justice Field said in Kahn v. Smelting Co., 102 U. S. 645, 26 L. Ed. 266; "Mining partnerships, as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary partnerships, exist in all mining communities. Indeed, without them successful mining would be attended with difficulties and embarrassments much greater than at present." One leading distinction between the mining partnership and the general one is that the general one has, as a material element of its membership, the delectus personæ (choice of person), while the other has not. Those forming an ordinary partnership select the persons to form it, always from fitness, worthiness of personal confidence; but we know such is not always or often the case in oil ventures. It is because of this delectus personæ that the law gives such wide authority of one member to bind another by contracts, by notes, and otherwise. One is the chosen agent of the other. Hence, when one member dies or is bankrupt, or sells his interest to a stranger, even to an associate, the partnership is closed, one chosen member is gone, the union broken, because he may have been the chief dependence for success, and the newcomer may be an unacceptable person, who would entail failure upon the firm. In the mining partnership those occurrences make no dissolution, but the others go on; and, in case a stranger has bought the interest of a mem-

ber, the stranger takes the place of him who sold his interest, and cannot be excluded. If death, insolvency, or sale were to close up vast mining enterprises, in which many persons and large interests participate, it would entail disastrous consequences. From the absence of this delectus personæ in mining companies flows another result, distinguishing them from the common partnership, and that is a more limited authority in the individual member to bind the others to pecuniary liability. He cannot borrow money or execute notes or accept bills of exchange binding the partnership or its members, unless it is shown that he had authority; nor can a general superintendent or manager. They can only bind the partnership for such things as are necessary in the transaction of the particular business, and are usual in such business. *Charles v. Eshleman*, 5 Colo. 107; *Skillman v. Lachman*, 83 Am. Dec. 96, and note; *McConnell v. Denver*, 35 Cal. 365; *Jones v. Clark*, 42 Cal. 181; *Manville v. Parks*, 7 Colo. 128, 2 Pac. 212; *Congdon v. Olds*, 18 Mont. 487, 46 Pac. 261; *Judge v. Braswell*, 13 Bush, 67; *Waldron v. Hughes*, 44 W. Va. 126, 29 S. E. 505. In fact, it is a rule that a nontrading partnership, as distinguished from a trading commercial firm, does not confer the same authority by implication on its members to bind the firm; as, e. g. a partnership to run a theater or other single enterprise only. *Pease v. Cole*, 53 Conn. 53, 22 Atl. 681; *Deardorf's Adm'r v. Thacher*, 78 Mo. 128; *Smith, Merc. Law*, 82; *T. Pars. Partn. § 85*; *Pooley v. Whitmore*, 27 Am. Rep. 733. A mining partnership is a nontrading partnership, and its members are limited to expenditures necessary and usual in the particular business. *Bates, Partn. § 329*. Members of a mining partnership, holding the major portion of property, have power to do what may be necessary and proper for carrying on the business, and control the work, in case all cannot agree, provided the exercise of such power is necessary and proper for carrying on the enterprise for the benefit of all concerned. *Dougherty v. Creary*, 89 Am. Dec. 116.

These principles settle much of this case. The demurrer was properly overruled, because there was a partnership, and equity only has jurisdiction to settle partnership accounts. 5 Am. & Eng. Dec. Eq. 74; 17 Am. & Eng. Enc. Law, 1273.

Neely excepted to the commissioner's report of settlement because of the allowance to Ramey of an expenditure advanced by Ramey of \$369.75, as excessive, and because for repairs on two boilers without his consent. If the parties were mere joint tenants, consent would be necessary. *Ward v. Ward's Heirs*, 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 449. But, being partners, as above stated, a partner has power to order necessary repairs. Besides, Ramey owned a majority interest. The boilers were burnt badly, and it seems that this outlay, though large, is proven, and was necessary and usual in such a business,

and, if unattended with other circumstances, would be clearly allowable under principles above stated. The commissioner reports that the injury to the boilers came from neglect of the pumpers; but much evidence tends to show that Ramey, without consent of Neely, removed the boilers off the ground owned by the firm, upon a lease of Ramey and Childers, in which Neely had no interest, and used them with another boiler in boring and operating wells thereon in connection with these wells of the firm, in Neely's absence, and put too much work upon them, with inadequate supply of water, which, likely, by heavy firing, caused the burning of the boilers. If this is so, how can Ramey expect pay for this outlay? Would so serious an injury have occurred to the boilers had this improper use of them not been made? We cannot say so with certainty, but it seems not likely. Ramey has no just claim to be repaid expenditure for repairs caused by himself,—the diversion of the firm property to his own work, from the work of the firm. Losses from neglect of duty or bad faith of a partner, or breach of duty, or breach of a partnership agreement, or improper diversion of its property to purposes foreign to its business, will be charged to him, in accounting. 17 Am. & Eng. Enc. Law, 1217; 1 Colly. Partn. § 312; *Story, Partn. § 169*; *T. Pars. Partn. § 151*. Ramey does not deny such use.

The exception for the \$239.75 allowed Ramey for three-eighths of expense seems not well taken, and was properly overruled. The commissioner reports that Neely should be allowed nothing for such use of the boilers for business of Childers and Ramey outside the legitimate firm business, yet allows him \$100 therefor. We are unable to say that such sum is not correct in amount, and will have to sustain the commissioner as to it.

Neely excepted because the commissioner reported that he was not entitled to any allowance on the claim made by Neely, that by reason of the use of the firm's boilers in boring and operating wells of Childers and Ramey on adjoining leases owned by them, in which Neely was not interested, the two wells of the firm, which had been bored before the others were, and were paying wells, were often shut down and unproductive, while those other wells were going on, and that by reason of want of water and steam, and the inadequacy of the engines to run all the wells, five or six in number, the production of the firm's wells was diminished. The commissioner says that Neely suffered no appreciable injury thereby. If injured at all, it was appreciable, and to be estimated. Ramey states, in short, that Neely was not entitled to a cent on this score. Neely's evidence is distinct that he was there numerous times, and found these two wells still. He swears to a large loss from this cause. He furnishes considerable evidence to sustain him in some loss from this score, and it seems that equity should make some compensation for it. There is evidence

that Ramey, when asked why the wells were shut down, said that he had a larger interest in the other wells. Ramey (having bought out Childers' interest, and Neely being absent almost all the time of operation) had sole charge. The commissioner bases his opinion of no injury to Neely from pipe-line reports, which are not before us; but it does seem from the evidence that the firm business was neglected, and loss to it accrued therefrom to an appreciable extent, for which some compensation should be made. It is difficult to say what should be allowed on this account, it being a thing of only approximate estimate; and still it seems an allowance should be made, as Ramey is claiming for outlay, and himself controlled the business.

When this suit was brought, Childers and Ramey obtained in it an injunction enjoining the pipe-line companies transporting the firm's oil from paying Neely for his share of the oil to which he was entitled under his division orders, and enjoining Neely from any further participation in the partnership, and from selling his share of the oil; thus taking from him the wells and their proceeds, and leaving Ramey in sole charge of them. Neely complains that the court refused to dissolve this injunction. His counsel says there was no right to it, as the bill charged no insolvency. The bill, however, did charge that Neely had failed to contribute his part of the expense of the business, and that Ramey and Childers had made large outlays therefor, and that Neely had refused to make settlement, and was largely indebted to his associates from the transactions of the partnership. This justifies the injunction, if the oil of Neely were social assets, as partners, in advancing for expenditures for the partnership, have a lien on partnership property for advances. *Skillman v. Lachman*, 83 Am. Dec. 109; *Duryea v. Burt*, 28 Cal. 570; *T. Pars. Partn.* § 402, note. But this lien is only on partnership property, while distinctly such; for it is the law that if there is a separation or division of the property, or part of it, there is no lien. If two partners consign goods for sale, and direct the consignee to carry the proceeds to the account of each, and it is done, neither partner has any lien on the share of the other in those proceeds, though it would have been otherwise if they had remained part of the common property. 2 *Lindl. Partn.* § 683; 1 *Colly. Partn.* § 108, note. Now, these partners agreed to have division orders when they began business (that is, the pipe lines to give each a certificate of his share of the oil committed to them, which was a product of the wells); and this effected a separation of that product, making each one's share his several property, and severing it from the social property, if it was such at any moment. There being no lien, there was no justification for the injunction. It perhaps disabled Neely from paying as the bill demanded of him.

There is another error in the proceeding. The bill demanded a dissolution. It showed

abundant cause, and the evidence shows abundant cause, of dissolution. The bill charges that the plaintiffs and Neely made a settlement to a certain date, but that they had been unable to get Neely to make a settlement since then; that he was violent and abusive, had threatened them with violence, and declared he would have nothing more to do with them; that he would not contribute to expenses; that bills remained unpaid; and that because of the unsatisfactory condition of the business, and the "disagreements, dissensions, and disaffections between the partners, the property and business were suffering." The evidence shows these disagreements and dissensions. Thus, it was plain that the business was hopeless of success and prosperity, and the interests of all parties demanded absolute dissolution at the hands of the law. Reconciliation, harmony, and success were utterly beyond hope. 17 Am. & Eng. Enc. Law, 1104. Therefore the court should have decreed dissolution absolute, and directed an account of the partnership, and wound it up. But it decreed no dissolution, but, on the contrary, suffered the partnership still to subsist, and, indeed, go on in the sole hands and management of Ramey, excluding Neely therefrom, and decreed that the settlement by the commissioner should only apply to its date, leaving it open to future account. The decree perpetuated the injunction, forever prohibiting Neely from participation in the business, and provided that when he should pay \$487.15 found due from him, and costs, the injunction should cease. That excellent, very late work, containing the leading late decisions in equity in America and England, the American and English Decisions in Equity, with elaborate notes collecting decisions (volume 5, p. 52), lays down the rule that equity can only entertain jurisdiction for an account when it can make a final decree in the suit: citing *Randolph's Adm'x v. Kinney*, 3 Rand. 394. That work (page 109) says, "As a general rule, a bill for accounting between partners which does not also seek a dissolution of the partnership will not be maintained;" citing cases,—among them, *Coville v. Gilman*, 13 W. Va. 314, in which Judge Green fully sustains this position. *T. Pars. Partn.* § 206; 2 *Lindl. Partn.* 948. If ever there were cases which, by bill and proof, called for dissolution and final account, not partial, this is one. And, besides the showing of bill and proof, a petition for rehearing alleged that Ramey had sold the boilers. The evidence so shows. This would charge Ramey to credit of Neely. There was partnership property in Ramey's hands. There could only one adequate relief be given,—dissolution, sale of the property entire, and full account. But no provision was made for dissolution, sale, or full account,—only a partial settlement and decree against Neely for the sum found by it. The bill alleged that the property could not be divided in kind. If the injunction applied to property belonging to the firm, on which a

lien rested for the other partners, it would be proper to continue it until final account and decree. *Robrecht v. Robrecht* (this term), 34 S. E. 801. But Neely's share of the oil was his separate property. And I do not see why he should, without cause, be excluded from participation, letting Ramey have sole control. A receiver, impartial between them, was proper, under the circumstances. "If no dissolution is sought, a receiver and manager will not be appointed; but, with a view

to a dissolution or winding up, a receiver and manager will be appointed, if there are any such grounds for appointment as are proper in other cases, or if the partners cannot agree to working the mines until sold." *Colly. Partn.* § 381. Therefore we dissolve the injunction, reverse the decree, overrule the demurrer to the bill, and remand for further proceedings as herein indicated, and further according to principles governing courts of equity in such cases.

FECHHEIMER et al. v. BAUM et al.

(37 Fed. 167.)

Circuit Court, S. D. Georgia, W. D. January 3, 1889.

In equity. Motion for an injunction and appointment of a receiver.

The bill before the chancellor was filed by the plaintiffs, residents and citizens of Ohio, against Baum & Bro., a firm doing business at Toombsboro, Irwinton, and Dublin, in this district, to assert the right to an injunction and the appointment of a receiver given by the law of Georgia. Code, § 3149a. This section provides: "In case any corporation, not municipal, or any trader or firm of traders, shall fail to pay at maturity any one or more matured debts, payment of which has been properly demanded of such debtor and by him refused, and shall be insolvent, it shall be in the power of a court of equity, under a creditors' bill, to which one or more of the creditors who have matured debts unpaid shall be necessary parties, to proceed to collect the assets, real and personal, including choses in action and money, and appropriate the same to the creditors of such traders, firm of traders, or corporation."

The averments of the bill made and sworn to conform to the requirements of the statute in all respects; and so far as they indicate the existence of matured debts due by the defendants to the plaintiffs, the demand for payment, its refusal, and the insolvency of the defendants, the averments are not denied. In addition, the bill alleges other facts not less important to the jurisdiction in equity. They are that on May 21, 1888, the defendants, Baum & Bro., made a statement to Bradstreet's Mercantile Agency, which showed a condition of prosperous solvency upon their part, which statement is appended as an exhibit to the bill; that plaintiffs, in the usual course of business, had knowledge of that statement, believed it to be true, and knew this before their merchandise was sold to the defendants; that the defendants owe \$160,000; have made many fraudulent assignments and preferences; that some of these are given to favored creditors, upon the goods of the plaintiffs not yet paid for; that the plaintiffs' debts were created for a large stock of clothing, part of which is yet in possession of the defendants; that the purchase was made by the defendants with the deliberate intention not to pay therefor, and with no reasonable expectation that the defendants would be able to pay; that the sales are void, and that the title did not pass; that the statement made to the Bradstreet's Mercantile Agency as to the standing and condition of the firm was made with intent to deceive the public, and especially the plaintiffs, and was a part of a scheme to defraud creditors who would extend credit; that the fraudulent preferences amount to \$70,000,

which is larger than the annual amount handled in business by the defendants.

The prayer is for an injunction and receiver, and that goods purchased by defendants from plaintiffs be kept separate for the benefit of plaintiffs, and for a general judgment, and for general relief. The temporary injunction was granted upon consideration of plaintiffs' bill, and thereupon plaintiffs filed an amendment thereto. This prayed that H. M. Comer & Co., a firm of cotton factors of this district, be made parties; that the preferences to Comer & Co. are void, (they consist of certain mortgages to secure an alleged indebtedness of \$35,000, given upon stock worth \$43,000;) that in addition to these mortgages the defendants have transferred and assigned to H. M. Comer & Co. notes and accounts in a sum largely in excess of Comer's demand; that on August 22d these accounts were worth \$50,000, and plaintiffs charge on information and belief that these transferred choses in action have been increased by other transfers to \$75,000; that since the mortgage and preferences were given, the defendants, Baum & Bro., have paid to Comer & Co. \$18,000, which reduces their demand to \$17,000, and yet Comer & Co. hold as collateral and otherwise in mortgages on real and personal property the full sum of \$100,000 to secure this debt. This was stated on the hearing, without objection, to be \$24,600, and the chancellor, for the present, assumes that to be correct.

The bill alleges that the transactions between Comer & Co. and the defendants were the result of a fraudulent confederacy to hinder and delay creditors, and to compel them to accept a small pittance in full satisfaction of large debts; that the demands of Comer & Co. should not be paid by the proceeds arising from the sale of the merchandise of plaintiffs and other creditors, not yet paid for; that Comer & Co. had actual notice of the defendants' insolvent condition at the time of certain payments made to them from such proceeds. The amendment further alleges that, prior to the insolvency of the defendants, or at some other time, Comer & Co. obtained from the defendants an agreement in writing that when the defendants should become weak or insolvent that they would execute and make to Comer & Co. a mortgage covering their entire property, and should assign to them all of their notes, accounts, and choses in action; that said mortgages and preferences were given in pursuance of said agreement; that Comer & Co. permitted the defendants to retain possession of the notes and accounts and choses in action transferred to him; that the large amount of assets in the hands of Comer & Co., over and above their lawful demand, will be sacrificed to the injury of plaintiffs; that the defendants bought a large stock of goods on credit, with the intention not to pay for them, and to defraud creditors. The

prayer is that Comer & Co. be required to produce the said agreement on the hearing, and that they be enjoined from proceeding to foreclose the mortgage or mortgages, and that they be enjoined from collecting the notes and accounts, or from any way interfering with the assets of the defendants, and that a receiver be appointed to take charge of all such assets for the benefit of the creditors. The bill expressly waives discovery.

In reply to the motion for injunction, etc., the defendants Baum & Bro. deny, in their answers, that plaintiffs' debt was contracted after the financial statement was made; that they gave the statement of the 21st of May, yielding to the solicitation of the Bradstreet Company; that there were no mortgages or liens at the time the statement was made; that the statement appended to the bill itself is erroneous; that their dealings have been honorable and successful up to the time of this failure; that their failure is a thoroughly honest failure; that they have not made any preference upon which suspicion or doubt can be cast as to its entire good faith; that their creditors have given uniform evidence of their entire and unabated confidence in the defendants' integrity; that they have paid large amounts to their creditors, and have drawn out nothing from their business except for the necessary support of their families; that the mortgages were given to secure bona fide debts; and that, if a receiver is appointed, the loss in winding up the business will be so great that the creditors will get nothing.

H. M. Comer makes answer by affidavit. He states that on the 10th day of March, 1888, he took the agreement to the court shown, which was referred to in the bill. This had been done every year previously. It was taken in entire good faith, to protect the advances that deponent made. He gave the creditors knowledge of it on the 3d of December, and never attempted to conceal it. He denies utterly fraud and confederacy. That in his preferences defendants reserved no right or benefit to themselves. He never had any reason to suspect fraud on the part of the defendants. That in the spring and summer of 1888, before he knew defendants were embarrassed, they sent to him notes and accounts of the face value of \$43,263.45, as collateral for about \$27,000 then due. These notes and accounts he sent to the defendants to collect for him. This collateral was more valuable than that obtained in November. Then the debt was increased, and Comer & Co. took by transfer the notes and accounts referred to. Another affidavit was presented by H. M. Comer. It recites that his firm are cotton factors and commission merchants in the city of Savannah; that they have been the factors of Baum & Bro. and Baum & Co., the defendants, for five years; that they would make advancements in the spring and summer with the understanding that they were to be paid off

in the fall and winter; that the business has been large, and the statement taken from his books is attached. It shows an indebtedness of \$43,078.23, subject to credits from Baum & Bro.; also amounts due by the concerns at Dublin and Irwinton, all subject to a credit of 521 bales of cotton, which, estimated at \$38 per bale, leaves Baum & Bro. indebted to H. M. Comer & Co. \$24,661.07. This indebtedness is secured by a mortgage on real and personal property, dated November 13, 1888, by a mortgage on the personalty, dated November 17, 1888, by certain notes and accounts transferred by the Baums to deponent's firm. This security was given for the sole purpose of securing the debt. He denies that the charges of the bill were true.

Upon the hearing, several creditors were made parties plaintiff by intervention, among them, H. P. Clafin & Co., New York, whose debt is \$11,986.16; A. Gibian, about \$1,600; S. Waxelbaum; Culver, Moore & Culver and others. On the hearing plaintiffs put in evidence this statement of Baum & Bro. to their creditors, made December 3d, which is as follows:

STATEMENT.

Liabilities.	
Amount secured claims.....	\$89,625 80
Amount unsecured claims.....	81,277 64
Total liabilities	\$150,903 44
Assets.	
Merchandise at Toombsboro.....	\$18,095 36
Merchandise at Dublin.....	17,900 45
Merchandise at Irwinton.....	6,540 00
Real estate, mules, horses, etc..	7,165 00
Total notes and accounts	\$105,150 92
Deduct for worthless and doubtful claims..	72,310 54
Notes and accounts at actual value	32,840 38
Cash on hand.....	1,385 00
Total available assets.....	83,926 19
Recapitulation.	
Total available assets.....	\$83,926 19
Deduct for secured claims.....	69,625 80
Leaving balance	14,300 39
Amount of unsecured claims...	81,277 64

Also the affidavit of Albert M. Holstein, agent of plaintiffs, which proves the account and demand of the plaintiffs, and states that it was made on the faith of the statement to Bradstreet, made by the defendants. This showed that the defendants were entirely solvent. The statement is as follows:

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Exhibit A.

"[Late Report.]

"Executive Offices, 279, 281, 283, Broadway, New York.

"Bradstreet's.

"No. 82 West Third Street.

"Cincinnati, July 19, 1888.

"The Bradstreet Company: Give us in confidence, for our exclusive use and benefit in our business, under our agreement with you, such information as you may have or may be able to obtain concerning the re

sponsibility, character, reputation, credit, etc., of

"Name—N. B. Baum & Bros.

"Business—Gen. Store. } July 20, {

"Street and No. ——— } 1888. }

"City (or P. O. Address)—Toombsboro.

"County—Wilkinson.

"State—Ga.

"Signature of M. & L. S. F. & Co., Subscriber.

"2402—P. O. Address.

"Information will be furnished upon the proper filling up of this blank and the signature of the subscriber.

"2-13-8-10m.

"Exhibit B.

"Baum, N. B. & Bro., Toombsboro, Ga., Wilkinson county.

"A. W. Baum, aged 36 years, and married.

"N. B. Baum, aged 39 years, and married.

"States: Began business in 1875 in a small way, and have been quite successful. As per inventory taken January 15, 1888, our status is as follows: Stock of merchandise, nineteen thousand dols.; bonds and stocks, par value, twenty-one thousand dollars; market value, twelve thousand dollars; notes and accounts, thirty-five thousand dollars; real estate, town property and lands, ten thousand dollars; making total assets of the firm, seventy-six thousand dollars. Liabilities: Borrowed money for the year 1888, twenty-four thousand dollars; mercantile and other indebtedness, twelve thousand dollars; total liabilities, thirty-six thousand dollars. Net: Forty thousand dollars. We have a branch store at Irwinton, Ga. The business there is run under the style of 'Baum & Co.' Stock on hand there, two thousand dollars; notes and accounts, four thousand dollars; cash, five hundred dollars; total, six thousand five hundred dollars; and owe three thousand dollars. After allowing for shrinkages, bad debts, etc., consider ourselves worth fully thirty thousand dollars, over liabilities. There are no mortgages or liens on any of our property, either real or personal. Our stock is insured for thirteen thousand dollars; fixtures, two thousand dollars. When we borrow money from banks we deposit our bonds and stocks as security. From our cotton factors we borrow on farmers' notes as collateral, give no other security. Do an annual business of seventy-five to eighty-five thousand dollars. In addition to the above we sell 5 or 6 hundred tons of fertilizers per annum, which we buy outright. Give notes for the same, payable in fall. To only one company do we give farmers' notes as collateral. At this point we cleared ten thousand dollars on guano alone.

"The Mercantile News Agency states: We learn they carry an average stock of about fifteen thousand dollars, and do a large business, sell largely on credit, and consequently have considerable due them. Said to borrow considerable money to use in their business,

and generally put up planters' notes as collateral. They are reputed to own real estate worth five to eight thousand dols. Would be difficult to give correct estimate of their net worth, but it is the general belief that the firm is estimated worth fully twenty thousand dollars, or more. They are of good character, and steady habits, and of fine business ability. Appear to do nearly all the business that is done at this point, and are generally prompt in meeting their obligations, and are quoted in good credit.

"May 21st, 1888.

"[Indorsed:] Bradstreet's. 10-19-1888. To M. & L. S. Fechheimer & Co. The correctness of this report is not guaranteed; but having been obtained by us in good faith—from authorities deemed reliable—it is transmitted to you in strict confidence for your exclusive use and benefit, and in accordance with the terms of the contract existing between us. Respectfully,

"The Bradstreet Co.

"State of Ohio, Hamilton County, ss.: Before me personally appeared Levi C. Goodale, who, being duly sworn, says that he is the superintendent of the Bradstreet Co. Mercantile Agency, office at 82 West Third street, Cincinnati, Ohio. That on July 19, 1888, they received a ticket of inquiry from M. & L. S. Fechheimer & Co., of Cincinnati, Ohio, asking for information concerning the responsibility, character, reputation, credit, etc., of N. B. Baum & Bro., whose post-office address was Toombsboro, Ga. Said ticket of inquiry is attached hereto, made part hereof, marked 'Exhibit A.' That on the 20th day of July, 1888, we made a report in answer to said inquiry, an exact copy of which answer is attached hereto, made part hereof, marked 'Exhibit B.' We obtained this information in the regular course of our business, and for our company in that section of Georgia in which the business of N. B. Baum & Bro. is located.

Levi C. Goodale.

"Sworn to before me, and subscribed in my presence, this 19th day of December, 1888.

"William S. Little,

"Notary Public, Hamilton County, Ohio."

R. W. Patterson, one of the solicitors for the plaintiffs, testifies that he was present at the meeting of defendants' creditors on December 3, 1888. Baum offered to unsecured creditors 12½ per cent. of their claims in 30 days' time, and 12½ per cent. additional in 12 months, neither secured. Subsequently inquiry was made by Mr. H. M. Comer if the offer would be accepted if he (Comer) would guaranty the first 12½ per cent. Some of the creditors, and among them the plaintiffs, declined to accept. C. H. Cohen, attorney for H. P. Clafin, testified that on November 23d he called on the defendants at Toombsboro; that N. B. Baum told him that he had been under contract to Mr. Comer for some time to give the Comers a mortgage whenever they demanded it, and he felt com-

pelled to do as he had previously agreed, which deponent understood was to give the mortgage upon all his assets, including the goods that deponent's clients had but recently sold him. This witness proves the account of H. P. Clafin & Co. in the sum of \$11,986.16.

R. W. Patterson, J. W. Lindsay, and C. H. Cohen testify that they heard H. M. Comer state before the meeting of creditors that he had an agreement with N. B. Baum, of the defendants, to the effect that Baum would execute a mortgage to him upon whatever assets he had, and that on this agreement Comer had made him advances, and that the agreement had been in force for as much as a year prior to that time. Deponents further say that they heard N. B. Baum, at the creditors' meeting, state that he was insolvent at the time he made his statement to Bradstreet's agency, in May of the present year, although he did not know it at the time.

C. A. Turner testified by affidavit that, after the deputy-marshal had closed the store of the defendants at Toombsboro, he heard N. B. Baum say in a conversation with deponent that he had in his possession the notes, accounts, and assets of Baum & Bro. and Baum & Co., which had prior to that time been turned over to H. M. Comer & Co., of Savannah. The bills for most of the plaintiffs' goods sold to Baum were dated on August 6th, August 10th, August 13th, and a renewal note was taken on October 9, 1888. It was shown by the evidence that this was the manner in which the goods were sold: The traveling agent of the plaintiff took the order in July, subject to ratification by the house, on inquiry as to solvency. This inquiry was made to Bradstreet. The goods were not shipped unless the reply was satisfactory. The sales were not completed until the goods were sent.

For the defendants the following evidence was submitted: The agreement entered into between N. B. Baum & Bro. and Baum & Co. and H. M. Comer & Co., dated March 10, 1888. It recites that for and in consideration of certain advances to the amount of \$18,000, as evidenced by five promissory notes for \$3,200 each, signed by N. B. Baum & Bro., and indorsed by Baum & Co., and payable at the office of Comer & Co., as follows, respectively, on September 15th, October 1st, November 1st, and November 10th; and one note for \$2,000, signed by Baum & Co., and indorsed by Baum & Bro., due October 20th next. "Now, in order to secure these and any other sum that may hereafter be due them, we agree to deposit with them as collateral security, notes and mortgages of good planters and others to whom we sell goods, in amount equal to at least two dollars for every one dollar due by us to the said Comer & Co. We also agree to transfer to them as additional security our insurance policies on our buildings and stocks of goods; and we further obli-

gate and bind ourselves to give said H. M. Comer & Co. a first lien or mortgage upon all our stocks of goods and real estate, in case we shall at any time become financially embarrassed while indebted in any way to them, or in case our said notes above described are not paid promptly at maturity. It is also understood and agreed that all drafts drawn, or money advanced upon account or otherwise, over and above the eighteen thousand dollars herein named, shall be paid out of the proceeds of cotton shipments first and before said proceeds are to be applied to said notes; in other words, only credit balances as may appear from open account are to be paid on said notes unless by consent of said H. M. Comer & Co. in writing. It is understood and agreed that 8 per cent. per annum will be charged on all advances, etc. [Signed] N. B. Baum & Bro., and N. B. Baum & Co."

The mortgage dated the 17th day of November, to secure the payment of \$38,000, including the five notes before mentioned and three other notes for \$5,000 each, dated October 12, 1888, and due at various dates until December 10, 1888, and one note for \$5,000, due January 12, 1889, and one note dated March 10, 1888, for \$2,000, signed by Baum & Co., indorsed by Baum & Bro., payable October 20, 1888, upon 150 half rolls of bagging, 100 bundles cotton ties, 100 sacks salt, all in the planters' warehouse at Dublin; and also all goods, merchandise, dry goods, groceries, etc., stored in the store of L. C. Perry & Co., at Dublin, Ga.; also, a mortgage made 13th of November, 1888, to secure \$30,000, being apparently the same notes just mentioned, and given upon certain lots of land situated in Toombsboro, and upon which is erected store-houses; and also certain stocks of general merchandise in said store, describing them particularly; and also all such articles and things as may be hereafter placed in such stock; also the stock in the store at Dublin, more particularly describing it, with the same provision as to future acquisitions; also a lot of land, one-half acre in Irwinton, with store-house thereon, and also the stock of goods therein contained. The mortgages comprehend all the safes, show-cases, and fixtures of every kind in said three stores. Numerous affidavits were presented as to the policy or impolicy of granting the prayer of the bill for the appointment of a receiver, and an affidavit to sustain the good character of H. M. Comer.—in the opinion of the court a deposition altogether superfluous. Other portions of the testimony are not material or necessary to the proper determination of the cause. After a full hearing and exhaustive argument on Friday last the court took time to consider, and has reached the following conclusions:

Patterson & Hodges, for plaintiffs. Hill & Harris and Denmark & Adams, for defendants.

SPEER, J. (after stating the facts as above). Baum & Bro. and Baum & Co., two firms composed of the same individuals, are traders, in the meaning of the statute of this state quoted above. That they are insolvent it is conceded. The plaintiffs are creditors, whose demands, as the court is at present advised, are within the class provided for in the statute above quoted, (Code Ga. § 3149a,) giving, in certain cases, the equitable right to the extraordinary remedies applied for. This right of the creditor to put the debtor's assets, when the latter is an insolvent trader, in the hands of a receiver, is peculiar to the law of this state. It has no existence in the general jurisprudence of equity which obtain in these courts. It is now settled, however, that the courts of the United States may administer an equitable right granted by the law of the state in suits of which, from other reasons, they have jurisdiction. It was urged in argument for the defendant that the creditors, without a judgment at law, have no right to apply in equity for the appointment of a receiver. That this is a general rule is undeniable, but there are exceptions to it, and one of these exceptions of apparently clear distinctness is where the law-making power has enacted in terms that the debt need only be mature, with payment demanded and refused, as is the law in Georgia. It is true, also,—as held in this circuit, in *Jaffrey v. Brown* (C. C.) 29 Fed. 477,—that a party not intending to pay, by inducing one to sell him goods on credit through the fraudulent concealment of his insolvency and of his intent not to pay for them, is guilty of a fraud, which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract, and recover the goods. See, also, *Crittenden v. Coleman*, 70 Ga. 295; *Donaldson v. Farwell*, 93 U. S. 633; note to *Jaffrey v. Brown* (C. C.) 29 Fed. 485, and authorities cited. The remedy at law must be quite as complete as that in equity to defeat the power of equity to proceed. *Id.*

The demurrer filed to the bill, while not finally overruled, is not deemed sufficient, as the court is at present advised, to defeat the relief sought by the bill, should that relief be granted. The chancellor has given very anxious thought and careful inquiry to the ascertainment of his duty in the premises. It is true that the prayers of the bill seek to obtain perhaps the most vigorous and far-reaching action in the power of the court—action which should not be taken in cases of this character, except in the presence of plain fraud or irreparable injury. On the other hand, the statements of the defendants themselves show the most utter insolvency, and a failure to comply with their duty to their creditors, which evinces either negligence of the most flagrant character, or fraud scarcely less marked and decided. Upon the 21st of May, whatever may have been the motive which led to the publication,

it is undeniable that the defendants gave to the mercantile community, by means of a usual and widely known commercial news agency, a statement which shows remarkable solvency, and indeed prosperity, for their section of the country. "Our total assets," they said, "are seventy-six thousand dollars; our liabilities, thirty-six thousand dollars, net. After allowing for shrinkages, bad debts, and so forth, we consider ourselves worth fully thirty thousand dollars over liabilities, etc. There are no mortgages or liens on our property, either real or personal. Our stock is insured for thirteen thousand dollars. When we borrow money from bank we deposit our bonds and stocks as security. When we borrow money from our factors we give farmers' notes as collateral; give no other security." In a little more than six months we find this firm in debt \$150,903.44, with total assets of \$83,926.19, leaving debts to the amount \$66,976.25, altogether hopeless. In other words, in a half year there had been a change for the worse in their condition of nearly \$100,000,—if their respective statements to *Bradstreet's* and to their creditors is reliable. For this startling transformation of their condition they offer neither explanation nor excuse. There had been no disaster from flood or fire, no epidemic, none of those extraordinary circumstances which at times cause the stoutest business houses to tremble. In May there is an indebtedness of thirty-six thousand, in December a debt of one hundred and fifty thousand. In May there are neither liens nor mortgages, in December they approximate seventy thousand dollars. In the spring creditors were assured of prompt payment, in the fall they are met by hopeless insolvency; and yet the court is asked to consider this an innocent and unavoidable failure, and this, too, in the absence of a syllable of proof to account for it. What makes it more remarkable is that the business was conducted in quiet villages, and among a rural population, where all legitimate trade was marked by careful purchases and conservative transactions; where every purchaser is personally known to the merchant,—his solvency and disposition or ability to pay debts as familiar as household words. But this is not all. In the proclamation of Baum & Bro. to the business community of the country, they say "there are no mortgages or liens upon our property." At that moment it was all incumbered with a secret obligation which a court of equity in a proper case would declare to have all the effect of a mortgage. In less than six months every cent's worth of their stock or other assets, whether paid for or not, is shingled with mortgages, made in pursuance of that covert stipulation. In the presence of such facts as these it would seem futile to urge upon the court the considerations of business capacity and business integrity and mercantile popularity, which

form so large a part of the defendants' showing. "We give to our factors no security save farmers' notes." As that public pledge was being made their contract was in existence, not only to give two dollars for one, in notes and choses in action, for every dollar obtained from their factors, but to give mortgages which are undeniably other and very different security. "Our stock is insured for \$13,000," said they to Bradstreet's,—they did not say the policies had been pledged to H. M. Comer & Co., and out of the reach of other creditors.

It would seem superfluous to analyze the widely variant statements of the defendants, and it requires no elaborate inquiry to ascertain the law controlling the rights of the parties with such facts before the court. The statutes of the state are sufficiently explicit. Suppression of a fact material to be known, and which the party is under an obligation to communicate, constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties, or the peculiar circumstances of the case. Code Ga. § 3175. Can it be doubted that the fact that the defendants were under a written obligation to execute mortgages upon their entire stock and all their other property, was "material to be known" by those giving them credit? Can it be doubted that when the Baums undertook to give to Bradstreet's, for the information of the business world, a statement of their assets, liabilities, and methods of borrowing money, that the obligation was upon them to communicate the truth? Will the most credulous believe for a moment that Fechheimer & Co. would have given them credit for \$4,000; that Claffin & Co. would have given them credit for \$11,000,—had they known the existence and the nature of their obligation to Comer? We think not. The statements of such mercantile agencies as Bradstreet's are intended to influence the action of merchants and others who give credit. It is well understood that the mercantile community relies largely upon such statements, and the persons giving them are under the weightiest obligation, which will be enforced in foro conscientiæ, to speak the truth. If there has been deliberate suppression of a vital fact in a statement of this character, which does mislead, it is a fraud upon the person misled, which a court of equity will redress, if possible. Again, "misrepresentation of a material fact, made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or, if made by mistake, and innocently, and acted on by the opposite party, constitutes legal fraud." Code Ga. § 3174. See, also, section 2634.

Now, it appears from the evidence of Messrs. Patterson, Lindsay, and Cohen that N. B. Baum admitted in their presence and hearing that he was insolvent at the time the statement to Bradstreet was made, although he there asserted a net worth, above all liabilities and doubtful assets, of fully \$30,000, but that he did not then know his insolvent condition.

Conceding, therefore, that this statement was honest, it is none the less fraudulent in contemplation of these provisions of the Code. It follows that, even in the absence of the insolvent traders' act, before quoted, the plaintiffs would be entitled to the relief they seek if it can be made to appear that there is a prospect of redressing their wrongs thereby. Much more, then, are they so entitled under the provisions of that act. It is said, however, for the defendants, that the liens created by Baum & Bro. to Comer and others will exhaust the assets, and that the unsecured creditors can get nothing through the action of a receiver, however vigilant he may be. But the defendants themselves admit that the assets amount to about \$86,000 more than the preferences he has given. It is true that he states that \$72,310.54 of notes and accounts are worthless and doubtful, but the court is not inclined to accept this statement as final. It would be very remarkable if his doubtful debts in December should be as much as his total assets in May. A diligent receiver will collect many of those claims, or the court will know the reason why. Besides, by the same statement there is a balance of \$14,300.39 to be divided among the unsecured creditors. This is itself no mere bagatelle. We have known original suits to be brought for less. But perhaps more important than either of these is the fact that Comer & Co., who only claim \$24,671.07 as the sum of their demands against the Baums, have now in their possession \$50,000 worth of good notes and accounts, and mortgages on \$49,000 worth of property consisting of merchandise and other personality and certain realty. However valid may be the demand of Comer & Co., when it is paid they will not be permitted to retain a dollar in excess of their proven claims. It is true that by the law of Georgia, section 1953, "a debtor may prefer one creditor to another, and to that end he may bona fide give a lien by mortgage or other legal means, or he may sell in payment of the debt, or he may transfer negotiable papers as collateral security, the surplus in such cases not to be reserved for his own benefit or that of any other favored creditor, to the exclusion of other creditors." The large surplus conveyed to Comer & Co. to secure their debt they hold as trustees for the creditors of the defendants, the Baums. Besides, the balance which Comer & Co. present is ascertained by estimating more than 500 bales of cotton shipped to them at \$38 a bale. They have turned over notes and accounts of the insolvent firm to one of its members for collection. This will not be permitted. The insolvent debtor who has failed under such circumstances is not the best custodian for convertible assets of this character.

This investigation has satisfied the court that this is a suit where it is manifestly the duty of the chancellor to make the orders prayed for. A receiver will be appointed, and an injunction granted. Comer & Co., who are now formally made parties defendant to the

bill, will be required to make proof of their account, and if found just and true and a valid lien, as it now appears to be, it will be paid in full if the funds are sufficient. This is true of other debts of superior dignity, and the remainder of the fund in the hands of Comer & Co. and elsewhere within the reach of the	court will be apportioned to the creditors. The court will appoint receivers of undoubted qualifications, who will at once take possession of the assets of the insolvent firm, and as fast as collected pay the funds into the registry of the court, and the cause will proceed with the utmost expedition.
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OGDEN CITY v. BEAR LAKE & RIVER
WATERWORKS & IRRIGA-
TION CO. et al.

(55 Pac. 385, 18 Utah, 279.)

Supreme Court of Utah. Dec. 5, 1898.

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by Ogden City against the Bear Lake & River Waterworks & Irrigation Company, Bear River Irrigation & Ogden Waterworks Company, and others. Judgment for plaintiff, and defendant Bear River Irrigation & Ogden Waterworks Company appeals. Modified.

Bennett, Harkness, Howat, Bradley & Richards and Rogers & Johnson, for appellant. E. M. Allison, Jr., C. C. Richards, and J. H. Macmillan, for respondents.

ZANE, C. J. This is an appeal by the Bear River Irrigation & Ogden Waterworks Company, a defendant, from the order of the court below approving the report of Thomas D. Dee, receiver, and allowing the various items thereof, and ordering them to be paid out of funds in his hands. As to the motion of plaintiff to dismiss this appeal for the reason, as alleged, the order appealed from was not a final judgment, we are of the opinion the order requiring the compensation to the receiver and I. N. Pierce, and the payment to Griffin and the Ogden Standard, out of funds in the receiver's hands, was final, and therefore appealable, and we therefore overrule it.

It appears from the record that Mr. Dee was appointed receiver pendente lite of the waterworks system in Ogden City on January 17, 1898, on the application of plaintiff, Ogden City; that he immediately qualified and took possession and charge of the system and its buildings, and managed and operated it until April 20, 1898; that the order appointing him receiver was reversed by this court, with directions to the lower court to order a return of the property to the appellant, which was done; that on April 27, 1898, Dee filed his report as such receiver, showing a collection of water rents to the amount of \$11,247.07, and that he had disbursed \$1,266.45 for labor, \$148.53 for material, and \$90.50 for general expenses, and, in addition, he asked the court to allow him \$750 out of the funds as compensation as receiver; and to I. N. Pierce, as inspector, \$219.30; and S. G. Griffin, for a stamp, \$3.25; and the Ogden Standard, for advertising, \$14.00. To the allowance of these last four items the appellant objected, and it assigns the order of the court allowing them and ordering their payment out of the fund as error.

That the compensation to the receiver and to Griffin were customary and reasonable for their time and services, and that the charges for the stamp and publication were reasonable, no question is made. The sole question is, was it error to order their payment out of the fund? It appears the receiver was appointed on the application of the plaintiff, and over the objections of the appellant, and that it would not have been necessary to incur the items of compensation to the receiver, or to Mr. Pierce, or for the stamp or publication, had the property remained in appellant's hands and the business under its control. The appellant was wrongfully deprived of the possession of its property, and of the control of its business without its consent, upon the petition of the plaintiff. It would be inequitable to require the appellant to pay the extra expense of conducting its business caused by the erroneous order obtained by the plaintiff. We understand the rule supported by the weight of authority is that when a receiver is appointed on the application of one of the parties, and takes possession, and the appointment is afterwards set aside because erroneous, and the property is returned, all expenses incurred in consequence of the appointment, additional to those that would have been necessary had the property remained with such opposite party, ought not to be paid out of the fund, but by the party at whose instance the appointment was made. The expenses incurred by the receiver that would have been necessary for the appellant to incur had it remained in the possession of its property, and in the control of its business, were properly paid out of the fund, but such as it would not have been necessary for it to incur should be charged to the party procuring the order. Such expenses should be regarded as incurred in consequence of an error at his instance. *Weston v. Watts*, 45 Hun, 219; *City of St. Louis v. St. Louis Gaslight Co.*, 11 Mo. App. 237; *Bank v. Bayne*, 140 N. Y. 321, 35 N. E. 630; *Moyers v. Coiner*, 22 Fla. 422; *French v. Gifford*, 31 Iowa, 428.

We hold that so much of the order appealed from was erroneous as authorized compensation to the receiver and to I. N. Pierce, and the items for a stamp and for the publication of notice, out of the fund. Such expenses should have been taxed against the plaintiff. The remainder of the order is affirmed. The cause is remanded to the court below, with directions to tax the expenses in accordance with this opinion, and to so order them paid; costs of appeal to be taxed against plaintiff.

BARTCH and MINER, JJ., concur

WHITNEY v. HANOVER NAT. BANK et al.
(two cases).

SAME v. BANK OF GREENVILLE et al.
(15 South. 33, 71 Miss. 1009.)

Supreme Court of Mississippi. April 9, 1894.

Appeal from chancery court, Washington county; W. R. Trigg, Chancellor.

Proceedings between George Q. Whitney and the Hanover National Bank and others relative to the funds of the Bank of Greenville. From three adverse decrees, Whitney appeals. Affirmed.

Nugent & McWillie and S. H. King, for appellant. Yerger & Percy, for appellees.

CAMPBELL, C. J. These three cases were argued and submitted together, and will be so considered. Their history is this: The Bank of Greenville was found to be insolvent, and came to a stop, on the 22d day of December, 1891, when the directors, headed by the president, applied, by petition to the chancellor, to take charge of the assets of the bank, by appointing a receiver to collect and manage its affairs. The chancellor appointed the president of the bank receiver, and, on his application, enjoined all persons from proceeding by suit against it. The receiver appointed entered upon his duties as designated, and continued until he resigned, on the 6th of July, 1892. On the 11th July, 1892, the Hanover National Bank and other creditors of the Bank of Greenville exhibited their bill, in the chancery court in which the receiver had been appointed, against the Bank of Greenville, and averred the foregoing facts, and that since the 22d December, 1891, the officers and directors of the bank had ceased to manage it, and that its affairs had been managed wholly by Pollock, as receiver, who had collected a large sum of money due said bank, and that the appointment of another receiver was necessary for the preservation of the assets of the bank and the protection of the rights of its creditors; with other specific allegations, designed to show the necessity for the immediate appointment of a receiver. Upon due notice to the defendant a receiver was appointed in this proceeding on the 18th July, 1892, and the former receiver was directed to deliver to him all the assets of the bank in his hands. On July 23, 1892, George Q. Whitney and others, creditors of the Bank of Greenville, united in a bill against the bank and G. D. Thomas, who had qualified and was acting as receiver by virtue of his appointment on July 18th, and against other defendants, in said chancery court. This bill set forth the suspension of the bank on the 22d December, 1891, and the appointment by the chancellor of Pollock as receiver on the application of the president and directors of the bank, and that Pollock took exclusive control of all the assets of the bank, and acted as receiver, but that

defendant Thomas, at the time of exhibiting said bill, claimed to be receiver of said bank by virtue of an appointment by the chancellor of said court; that the application to the chancellor on December 22, 1891, and all the proceedings had, including the procurement of the appointment of Thomas as receiver, were devices to hinder, delay, and defraud creditors, and "invalid and void." Discovery was sought by the bill as to all the assets of the bank, of whatever kind, and a lien upon them prayed to be established from the date of filing the bill, and their appropriation to the demands of the complainants. The Bank of Greenville interposed a plea to this bill of the proceeding by the Hanover National Bank et al. v. Bank of Greenville, and the appointment in that case of Thomas as receiver, and that he had qualified as such, and was in possession of the assets of the bank under that appointment, and relied on this plea as a bar to the bill filed 23d July, 1892. The plea was set down for hearing upon its sufficiency, and was sustained, and the bill dismissed. From that decree an appeal was taken, and case No. 7,460 on the docket of this court is that appeal.

On October 4, 1892, George Q. Whitney petitioned the chancery court of Washington county, in which these cases were pending, and which had been consolidated, setting forth that he was a creditor to a large amount of the Bank of Greenville, and had recovered judgment for a large sum against it in the court of the United States at Vicksburg, Miss., July 28, 1892, which had been duly enrolled, and, he claimed, was a paramount lien on all the assets of said bank, notwithstanding all the various proceedings in the said chancery court, which are set forth with detailed particularity, and denounced as void, and no obstacle in law to the application of the assets of the bank to the claim of the petitioner, who prayed to be allowed to be made a party defendant to said cause. At the same time he presented a petition and bond for removal of said cause, in which he prayed to be made a defendant, to the United States court at Vicksburg. The complainants in the cause in which Whitney sought to intervene as a defendant opposed his application, and it was denied by the court, and from this he appealed, and that appeal is contained in No. 7,459 on the docket of this court.

Defeated in his effort to be made a defendant as stated, Whitney made an abortive effort to have the United States court at Vicksburg take charge of his suit, and enforce his claim to be paid out of the assets of the Bank of Greenville in preference to other creditors; but with that we have no concern, and state the fact historically only, being in the record before us. On February 6, 1893, Whitney, who had been baffled in all his efforts to obtain payment as a creditor entitled to precedence out of the assets

of the Bank of Greenville, exhibited an original bill in the chancery court of Washington county against the complainants in the bill of the Hanover National Bank and others against the Bank of Greenville, exhibited July 11, 1892, and the Bank of Greenville and W. A. Pollock, receiver, and G. D. Thomas, receiver. In this bill is narrated with detail the history of the dealing by and with the bank from the time of its suspension and taking refuge from creditors in the chancery court to the filing of this bill, which also relates the persistent, but ineffectual, efforts of the complainant, in state and federal courts, to secure recognition of his right, as claimed, to be first paid out of the assets of the Bank of Greenville. It assails the action of the chancery court of Washington county as void for want of jurisdiction over the subject-matter dealt with, and seeks to vacate all orders that stand in his way, and the payment of his as a preferred claim out of the effects of the bank. The bill seeks injunction, which was obtained. This bill was answered, and most of its allegations admitted, but the claim made by it to the right of the complainant to priority of payment out of the assets of the bank was denied. A motion was made to dissolve the injunction, and some affidavits were taken, and some facts were agreed on for the hearing of the motion to dissolve, and it was agreed that the case should be heard on the motion to dissolve, and for final decree on such hearing. The respondents gave notice of a claim for damages to be allowed on dissolution of the injunction to amount of \$2,500 for attorney's fees in defense of the suit. The case was heard in accordance with the agreement, and a decree was made dissolving the injunction, dismissing the bill, and awarding damages against the complainant in the sum of \$2,000 as attorney's fees, the decree reciting that the court had heard testimony in open court as to the attorney's fees, and taxed the costs against the complainant, who appealed, and this is No. 7,749 of the docket of this court.

From this complete but succinct history of this litigation, as disclosed in voluminous form in the three cases before us, it is apparent that the only question presented for decision by the appeal in No. 7,459 is as to the propriety of the action of the court in refusing to permit Whitney to intervene as a defendant in the case of Hanover National Bank et al. v. Bank of Greenville, against the objection of the complainants, who protested earnestly against it. The court did right in this refusal. "No such practice is known in equity as making a person a defendant to a suit upon his own application over the objection of the complainant." 1 Daniell, Ch. Pl. & Pr. 287, note 2, and cases cited; *Stretch v. Stretch*, 2 Tenn. Ch. 140,—where the subject is fully treated, and the action of the court in the case before us is fully vindicated on principle and authority.

The question presented by cases 7,460 and

7,749 is whether the chancery court of Washington county was so wanting in jurisdiction of the case of Hanover National Bank and others exhibited against the Bank of Greenville, July 11, 1892, as to render its action in the case void, and liable to be assailed collaterally, and treated as a nullity, whenever and however called in question; for, if it be conceded that the action of the court was erroneous, unless it was void, the fact that it had assumed jurisdiction, and taken control of the assets of the Bank of Greenville, and appointed a receiver in the case, was an answer to the original bill exhibited by Whitney and others on the 23d July, 1892, and likewise to Whitney's bill of February 6, 1893. We regard the action of the chancellor on the 22d December, 1891, appointing a receiver on the ex parte application of the directors of the bank, and his subsequent action in pursuance of that appointment, as utterly void, and of no legal effect. It could be assailed collaterally, and disregarded with impunity, by anybody. The proposition that an insolvent debtor can take refuge in a chancellor's decree on his or its own application, and obtain protection against pursuing creditors, who may be enjoined from pursuing their ordinary remedies, is without foundation. We cannot account for the mistake fallen into in the proceeding of December 22, 1891, and all that was done under it, except by supposing that what is provided for by statute in other states was considered admissible in the absence of statute in this state. The suit of Hanover Bank et al. v. Bank of Greenville, instituted July 11, 1892, is evidence of the fact that it was considered necessary to strengthen the grasp of the chancery court on the assets of the bank, and that it was a timely proceeding for the purpose of the complainants in that suit, for it results from what we have said that all that went before was of no legal validity; and, but for that suit, there would have been no barrier to his proper proceeding by any creditor, the injunction issued to the contrary notwithstanding. But, if the court was not wholly without jurisdiction in that suit, it was inadmissible to inject into it other suits, as sought to be done by the bill of July 23, 1892, and that of February 6, 1893.

The question, then, is as to the case of Hanover Bank et al. v. Bank of Greenville, begun by original bill July 11, 1892. Was the action of the court as to that case void? It is to be observed that the bill in that case is not one to secure any priority or advantage to the complainant in it, to the injury of other creditors, but it is for all creditors of the Bank of Greenville, as shown by its prayer for the appointment of a receiver to preserve and collect the assets, and distribute the money among all the creditors, according to their rights as ascertained. There was no time when Whitney could not join in this suit as a complainant, or assert his right of priority as claimed, if he had chosen

to do so; but his persistent effort was to obtain priority over other creditors and secure full payment, if the assets were sufficient; and he was unwilling to make common cause with all creditors, but, asserting the voidness of all the proceedings in the chancery court as to these matters, he sought, as he had a right to do, to obtain precedence as a creditor by getting judgment against the bank, and enforcing it. He got judgment, and, if that entitled him to be paid out of the bank's assets in the hands of the receiver, he might have propounded his claim of priority in the chancery court, and demanded its recognition and payment by an order therefor, but he maintained his attitude of asserting the nullity of all the proceedings in this matter of the chancery court, and attacked them as void; and the maintenance of his bill of February 6, 1893, depends on maintaining the legal proposition on which it rests. His learned counsel has been not only persistent, but consistent, in the many methods employed to obtain for his client an advantage over other creditors. It remains to be stated whether or not he shall succeed in securing the reward of his industry in behalf of his client. By his bill of February 6, 1893, he has pursued the proper course to obtain an adjudication of the question on which the claim made by his client depends. This bill attacks the validity of the proceedings in the chancery court in the case of Hanover Bank et al. v. Bank of Greenville, on the ground that it is not the province of a court of chancery to dissolve a corporation, or interfere with the exercise of its franchise, or displace its officers, or appoint a receiver, or otherwise exercise jurisdiction over it, at the instance of creditors who have no judgment against it. In this case there was no interference by the court with the bank or its franchise, and the performance of the ordinary functions of its officers. There was no attempt to dissolve or restrain the corporation. Its directors had voluntarily surrendered its assets to the keeping of the chancellor, and ceased to perform their duties as to them. The chancellor had accepted the trust, and designated a receiver to take charge of these assets, and care for them, and had enjoined all creditors of the bank from suing it, and had proceeded in the administration of the trust he had accepted, as if there had been a creditors' bill; and, although this fell little short of being a mere farce, saved from it only by the seriousness of the performance with judicial gravity, in good faith, it was, nevertheless, the condition in which the complaining creditors found the affairs of their debtor on the 11th July, 1892, when they instituted their suit representing the deplorable conditions existing, and prayed the interference of the chancery court to take charge of the assets of their debtor, the bank, thus abandoned by it, and surrendered to the chancellor, who, though without authority to receive them, had yet

taken control of them as if he did have the right to receive them, and had been dealing with them accordingly. The bill urged the necessity for the immediate appointment of a receiver for the preservation of the assets of the bank, which had suspended, and ceased to care for them since December 22, 1891. It is true that none of the complainants was a judgment creditor of the bank, and none had a specific lien on the assets of the bank. Yet these assets constituted a trust fund, in a general sense, for the payment of the creditors of the bank, and, having been abandoned by the managers of that corporation, and transferred to the chancellor, who was dealing with them as of right, when he had no more legal authority over them than a private individual, who might have found them, if it may be said that, under these circumstances, it was erroneous for the chancellor to entertain the suit of general creditors of the bank, and appoint a receiver, it certainly cannot be maintained that this proceeding was wholly unauthorized and void, so as to be subject to collateral attack for want of jurisdiction to entertain the suit. *Vanfleet, Collat. Attack*, § 100; *Brown v. Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604; *Mellen v. Iron Works*, 131 U. S. 352, 9 Sup. Ct. 781; *Graham v. Railroad Co.*, 102 U. S. 148; *Goodman v. Winter*, 64 Ala. 410; *Barbour v. Bank*, 45 Ohio St. 133, 12 N. E. 5; *Rouse v. Bank*, 46 Ohio St. 493, 22 N. E. 293.

Many other books might be referred to in support of the proposition asserted, but, if the doctrine announced did not prevail elsewhere, there can be no doubt as to the law here since the constitution of 1890. By section 160 of that instrument, "in all cases where said court [chancery] heretofore exercised jurisdiction, auxiliary to courts of common law, it may exercise such jurisdiction to grant the relief sought, although the legal remedy may not have been exhausted, or the legal title established by a suit at law." This is in harmony with the scheme of the constitution reversing the former relations of the courts, in which the circuit court possessed general jurisdiction, and was the repository of the power to administer legal remedies, and the chancery court had jurisdiction of certain designated matters, and where there was not a full, adequate, and complete remedy at law. Now the circuit court has original jurisdiction "in all matters, civil and criminal, in this state, not vested by this constitution in some other court." Section 156. A residuary grant is thus made to the circuit court. This manifests the policy of enlarging the domain of chancery, and limiting that of the court of law. What may be the effect of the provisions mentioned in widening the scope of the courts of chancery cannot be determined now, and is not necessary to be decided; but that they will be influential in considering the class of cases in which chancery courts

may entertain jurisdiction is undeniable. When we look to section 147 of the constitution, all doubt as to the proper resolution of the question presented by this case vanishes. Because of that section, error is not predicable of "any error or mistake as to whether the cause in which it was rendered was of equity or common law jurisdiction." "No judgment or decree in any chancery or circuit court, rendered in a civil cause, shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common law jurisdiction," is the mandate of the fundamental law, and sweeps away all distinction between equity and common-law jurisdiction, after it has been entertained, in a civil cause in the chancery or circuit courts. It may be an action of crim. con., or for libel or slander, or trespass, or any other civil cause in the chancery court, or an equity matter in a court of law; if entertained there, error is not predicable, and the decree or judgment shall not be annulled for want of jurisdiction. The chancellor or circuit judge conclusively and finally settles the question of jurisdiction, as between equity or common-law jurisdiction, of the particular case; for it would be the height of absurdity to hold that, while error may not be affirmed

of it, such judgment or decree is void. The reason we do not apply the provisions of the constitution mentioned to the matter of December 22, 1891, and uphold it, and what followed, is that it was not a cause. There was no suit or action, and no parties plaintiff and defendant, but a mere *ex parte* surrender by the bank to the chancellor of its affairs, for which there is no authority in law; and therefore the constitution does not apply, but relates to a civil cause, as properly understood, and not to all that a chancellor or judge may do. The case of *Hanover National Bank et al. v. Bank of Greenville* is a suit regularly begun by bill against a defendant, and regularly proceeded with to a final decree; and, while we will not be understood to hold that there was even error in the action of the chancellor,—which question is not before us for decision,—we are sure his action cannot be held void or annulled, and that disposes of cases Nos. 7,749 and 7,460.

The decree allowing \$2,000 for damages in the way of attorney's fees is complained of, but, as the evidence on which the chancellor decided this sum to be reasonable was not put in the record, and is not before us, we cannot disturb the decree for this. The result is that the decree in each of the three cases hereinbefore mentioned must be affirmed.

STATE ex rel. INDEPENDENT DIST. TEL. CO. et al. v. SECOND JUDICIAL DISTRICT COURT OF SILVER BOW COUNTY et al.

(39 Pac. 316, 15 Mont. 324.)

Supreme Court of Montana. Feb. 18, 1895.

Certiorari by the state of Montana ex rel. the Independent District Telegraph Company, the Citizens' District Messenger & Burglar-Alarm Telegraph Company, and G. A. Lauzier against the Second judicial district court of the state of Montana in and for the county of Silver Bow, and the judges presiding, to review the action of such court in appointing a receiver for the two corporations. Dismissed.

This is a writ of certiorari directed to the district court to review its action in appointing a receiver of the properties of two of the relators, viz. the Independent District Telegraph Company and the Citizens' District Messenger & Burglar-Alarm Telegraph Company, it being claimed by the relators that the district court acted in that matter without jurisdiction. The receiver was appointed in an action entitled as follows: "H. L. Haupt and E. A. Nichols, trustee, Plaintiffs, v. Independent District Telegraph Company, Citizens' District Messenger & Burglar-Alarm Telegraph Company, Fred B. Puddington, H. Sommers, John O'Rourke, Thomas D. Butterfield, G. A. Lauzier, Alex. Johnston, and John Doe (whose true name is unknown), Defendants." The appointment was made upon the complaint in that case and upon affidavits filed. The following facts appear from the complaint:

Each of the companies defendant in the case in the district court (and who are relators here) is a corporation organized under the laws of this state. The plaintiff Haupt is owner of 76 shares of the stock of the Independent Company. The plaintiff Nichols, as trustee, is also owner of 76 shares of said company. The Independent Company is the owner of a franchise from the city of Butte permitting it to carry on the district messenger business, and granting to the company the use of the streets and alleys of the city for the purpose of said business. The Citizens' Company owns a similar franchise. On May 1, 1892, the said two companies entered into an agreement by which they should put their respective stocks, franchises, and property into a common business, to be carried on by officers and agents to be appointed by the two corporations jointly. This agreement was to run for 20 years. All moneys earned should go into a general fund, and be in the hands of a general treasurer. After paying expenses, a reserve fund of \$500 was to accumulate in the hands of the treasurer. After paying expenses and the accumulation of this reserve, the profits were to be paid by the general treasurer to the

respective corporation treasurers in the proportion of five-ninths to the Independent Company, and four-ninths to the Citizens' Company, to be distributed by the said respective companies as dividends on their stock. Thereupon the general manager and general treasurer were elected to carry on this joint business. The reserve fund of \$500 was accumulated. The business was carried on until June 1, 1893. At that date the stockholders Sommers, Lauzier, Butterfield, and O'Rourke united together and obtained a majority of the stock of each company. After obtaining this stock, those stockholders united and conspired together to manage and conduct the combined corporations for their individual benefit, and to exclude from the management, profits, and benefits the plaintiffs Haupt and Nichols. Since that time said plaintiffs Haupt and Nichols have been entirely excluded from the profits, management, and benefits of said corporations and the combination of the corporations. From the time said association of the two corporations was formed until said Sommers, Lauzier, Butterfield, and O'Rourke obtained control of the said combined business, there was paid to the treasurers of the said corporations \$500 a month, to be distributed by them as dividends on the stock of the corporations. That, when said Sommers and others obtained control of the said associated corporations, there was in the hands of the general treasurer said reserve fund of \$500, and also cash in the sum of \$1,000, and also interest on the reserve fund of \$25. That this total sum of \$1,525 was turned over to Lauzier, the general treasurer elected by his friends Sommers, Butterfield, and O'Rourke. That the current expenses which then remained unpaid did not exceed \$300, and that there was therefore \$1,225 available as a dividend to be paid to the stockholders. That, ever since said Sommers and others obtained control as aforesaid, they have refused to give the plaintiffs any account of the profits of the association, and have refused to pay any dividends on the stock. Plaintiffs allege, on information and belief, that, since the Sommers control obtained,—that is, since June 1, 1893,—the net profits of the associated corporations have been \$500 per month, and that said Sommers, O'Rourke, Butterfield, and Lauzier, instead of paying those profits as dividends, have converted the same to their own use. On February 9, 1894, the officers elected under the Sommers management executed to Fred B. Puddington three promissory notes, payable each in nine months, for the sums, respectively, of \$5,000, \$2,000, and \$2,000, bearing interest at the rate of 1¼ per cent. per month. That said Sommers management, also as security for said notes, executed to said Puddington a chattel mortgage upon the franchises and all the property of said corporations. That said notes purported to

be given for the purchase price of a certain franchise granted by the city of Butte to said Puddington,—a franchise to erect and maintain a district messenger and burglar-alarm telegraph system in the city of Butte. That said franchise was granted by the city subject to certain conditions precedent. The complaint then sets out those conditions, and then alleges that none of those conditions were fulfilled. The complaint alleges that said Puddington's franchise is forfeited and void, and was forfeited and void at the time of the pretended sale of the same to the two said companies and the execution of said notes and mortgage. The complaint further states that said Sommers and others, at the time of said pretended sale, well knew that the Puddington franchise was forfeited and void and was of no value whatever. It is further alleged that said Sommers, Lauzier, Butterfield, and O'Rourke conspired together to defraud the plaintiffs, and to obtain possession of the plaintiffs' stock, and all interest in the Independent Company, and of the said combination of the two companies; and that in fact they executed said mortgage and notes without any consideration, and for the purpose of bringing about the sale of said property and franchises of the said companies, and of foreclosing all interest of the plaintiffs therein. The complaint further alleges that unless the negotiation of the said notes is restrained, and the notes and mortgage declared fraudulent and void, all the property of the Independent Company will be sold under the mortgage, and plaintiffs will be deprived of their interests in the said corporation. The complaint prays for several items of relief, among them that said Fred B. Puddington, and all persons claiming under him, may be enjoined from negotiating said notes or mortgage, or from collecting or foreclosing the same, or from interfering in any manner with the properties or franchises of the said companies, and that said mortgage and notes be adjudged null and void.

In addition to the allegations made in the complaint, a number of affidavits were filed and used on the hearing. One Le Clare deposes that he heard John O'Rourke and G. A. Lauzier, two of the defendants in the district court, conversing about the business of the said district messenger companies, and that O'Rourke said "that if they [meaning himself, Butterfield, Lauzier, and Sommers] would stand together, they would do that Dutch outfit up [referring to the Shultzes and the other stockholders]." H. A. Neidenhofer deposes that from December, 1890, to February, 1892, he was manager of the Independent Company, and that all that time monthly dividends were paid to its stockholders amounting to \$750 per month, excepting during the time when there was an opposition company, and that those dividends were net profits. This affiant also states that after the combination was made

between the two companies they paid dividends of \$500 a month. Seth B. Smith, another affiant, stated that, prior to the time when Sommers and his party obtained control of the combined corporations, he (affiant) was treasurer of the combination. He testifies in his affidavit rather fully about the formation of the combination between the two companies. He testified that the reserve fund above mentioned, of \$500, accumulated in the hands of the treasurer; that finally Sommers and his party bought the affiant's stock, and he retired from the management; that he turned over to the new management all the funds in three different checks of \$911.80, \$107.94, and \$14.25; that at that time there were expenses outstanding and unpaid of only \$400; that when he retired he was just preparing and ready to declare a dividend of \$500, but he was instructed by the Sommers party not to pay said dividend; that while affiant was treasurer of the company he paid dividends to the stockholders of about \$500 a month. Carl Shultz and his wife, Mary Shultz, each made an affidavit in which they testify as to Lauzier's and Butterfield's negotiations for the purchase of affiants' stock, and threats that if they did not sell that they (Lauzier and Butterfield) would freeze out said affiants. Haupt, one of the plaintiffs, also makes an affidavit that for more than a year after the combination of the two companies he received monthly dividends on his stock of 50 cents per share. This affiant also alleges, on information and belief, that the combined corporations keep two sets of books, one of which sets of books shows the actual receipts and disbursements and the net profits of the association, and the other set of books does not show the correct accounts of the said corporations, but is kept for the purpose of deceiving and misleading stockholders who have been excluded from the management and participation in the management of said business; that, since the Sommers party obtained control of the business, affiant has received no dividends on his stock, although there have been large profits. This affiant then sets forth the execution of the Puddington notes and mortgage. He also sets forth the facts showing that the Puddington franchise which he (Puddington) purported to sell to the companies for \$9,000 was absolutely void and worthless. One of the employés of the combined corporations testifies to hearing Butterfield say that the business was good and paying as well as any business in town.

An answer was filed by the defendants, and also some affidavits. It is not necessary to recite the contents of these papers, for on the writ of certiorari in this court the question of the discretion of the lower court in appointing a receiver is not under review. After hearing argument in the district court as recited in its order, the court found that the plaintiffs were entitled to the appoint-

ment of a receiver *pendente lite*. It was therefore ordered that A. H. Barrett be appointed receiver *pendente lite* of the franchises, plants, business, books, and accounts, and of all other property belonging to the said two corporations, for the purpose of managing and conducting said business; and he was by the order authorized and directed to take possession of the said premises, franchises, plants, and all property, books, and accounts, of any nature whatsoever, belonging to the said corporations, and to manage and control the same during the pendency of this action, and for that purpose to take care of and manage and control the said property and business, and to pay all debts and obligations, and collect all moneys due to the said corporations. It was ordered that the receiver give a bond, with sureties, in the sum of \$10,000. Upon the appointment of the receiver, the said G. A. Lauzier made an application to this court upon behalf of himself, and purporting to be also on behalf of the two district telegraph companies, asking for a writ of certiorari to review the action of the district court in appointing a receiver. The application, of course, is made upon the ground that the district court had no jurisdiction to make the appointment. That is the point discussed and decided in the opinion below.

Robinson & Wapleton and John W. Cotter, for relators. Geo. Haldorn and Oliver M. Hall, for respondents.

DE WITT, J. (after stating the facts). The question in this case is simply whether under the facts, as recited in the statement above, the district court had jurisdiction to appoint a receiver. *State v. Judge of Second Judicial Dist. Ct.*, 10 Mont. 401, 25 Pac. 1053. See, also, *French Bank Case*, 53 Cal., at page 550. There is here no question of the court's discretion under consideration. The relators in this application rely very largely upon the decision in the *French Bank Case*, but we think that the case at bar is distinguishable from that case in many respects, and, in order to make the distinction apparent, we quote as follows from the California case: "Irrespective of the effect of the fifth subdivision of section 564 of the Code of Civil Procedure, which will be presently considered, there is no jurisdiction vested in courts of equity to appoint a receiver of the property of a corporation in a suit prosecuted by a private party. This is only to say that there is no jurisdiction vested in these courts in such a case to dissolve a corporation; for the power of a receiver, when put in motion, of necessity supersedes the corporate power. It necessarily displaces the corporate management, and substitutes its own, and assumes, in the language of the order under review, 'to do all and everything necessary (in the judgment of the receiver, under the advice of the court) to protect the rights of the cred-

itors and depositors of said corporation.' This precise question was brought directly under consideration here in the case of *Neall v. Hill*, 16 Cal. 145, where, in a suit brought by a stockholder, a receiver had been appointed by the district court to take possession of the property of the Gold Hill & Bear River Water Company, a corporation existing under the laws of this state. The opinion in that case, rendered by Mr. Justice Cope, and concurred in by the whole court, after referring to the adjudicated cases in England and in this country, uses this language: 'This decree, if permitted to stand, must necessarily result in the dissolution of the corporation; and in that event the court will have accomplished, in an indirect mode, that which, in this proceeding, it had no authority to do directly. It is well settled that a court of equity, as such, has no jurisdiction over corporate bodies for the purpose of restraining their operations or winding up their concerns. We do not find that any such power has ever been exercised in the absence of a statute conferring the jurisdiction.' Of course, it is not to be doubted that the trustees of a corporation, the persons who constitute its direction, and from time to time exercise the corporate authority in the management of its affairs, are subject to the control of courts of equity; or, as observed by Chancellor Kent, 'that the persons who from time to time exercise the corporate powers may, in their character of trustees, be accountable to this court [the court of chancery] for a fraudulent breach of trust; and,' he adds, 'to this plain and ordinary head of equity the jurisdiction of this court over corporations ought to be confined.' *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 388. And in exercise of these admitted equity powers of the court, referable to the well-known grounds upon which its jurisdiction ordinarily proceeds, embracing the cognizance of fraud, accident, trust, and the like, the rights of natural persons, injured or put at hazard through corporate proceedings unauthorized by law, will find ample protection and redress. But, even in such a proceeding as that, the trustees must, of course, be made parties defendant; and it will be observed, upon looking at the complaint of Gallagher in this view, that it is not substantially sufficient in its scope to put the equity powers of the court in motion for any purpose. The corporation itself being the sole party defendant, the trustees—those persons upon whom the management of its affairs is devolved—are not parties, nor is any relief sought against them personally. That there is no inherent power in the district courts, as being courts of equity, to appoint a receiver in such a case as that presented by the complaint of Gallagher, is therefore apparent, both upon principle and authority."

In the California case an important element in the decision, as it appears, was that

the appointment of the receiver acted as a dissolution of the corporation. In the case at bar no such result is intended by the order appointing the receiver, or is accomplished by that order. It is true that the complaint in the case in the district court asks for a dissolution of the corporation, but whether such relief may be granted in that action is not now before us for review. The complaint also asks another relief, as set forth in the statement, namely, that the negotiation of the notes described be restrained, that the foreclosure of the mortgage be prohibited, and that the notes and mortgage be declared null and void. While the determination of these matters is pending in the action, the receiver is to act. His appointment is *pendente lite* only, and he is authorized to do only those acts which are peculiarly *pendente lite*. Again, in the French Bank Case, one ground of the decision was that the action was against the corporation only (see page 546 of the decision), and not against the malfeasing trustees; that is, the "persons upon whom the management of its affairs is devolved" (at page 551). But in the case at bar the managing officers of the corporation are joined as defendants, and their unlawful acts are sought to be set aside, and their future wrongful conduct enjoined. The receiver is not to wind up the corporation under his appointment. He is simply to manage the affairs of the same while charges of the most outrageous frauds by the managers and controllers of the corporation are being investigated in the trial of the action. We are fully aware of the reluctance of courts of equity to interfere by receivership in the management of corporations, or to take that management from trustees elected by the shareholders. It is said in Morawetz on Private Corporations (section 281) as follows: "A court of equity will grant all relief to a shareholder which the nature of his case may require. But it has always been a settled principle that no interference with the management of a corporation can be justified, unless such interference is absolutely necessary to the attainment of justice. The reason of this rule is obvious. The officers of a corporation are generally elected by a vote of the shareholders. Every shareholder has a voice in their appointment, and may insist that they shall represent the corporation when duly appointed. If an officer is guilty of a breach of duty, he may in many cases be removed by act of the corporation; but no minority of the shareholders have any authority to restrain his action, or remove him and appoint another officer in his place. Nor can a court of chancery interfere at the suit of a portion of the shareholders, and remove an offending officer, or even enjoin him generally from acting for the corporation, unless this be essential to the protection of the corporate rights; as, for example, where the directors have con-

spired to defraud the corporation, or have otherwise shown themselves to be totally unfit to be intrusted any longer with the management of the company's affairs. The court must ordinarily confine its remedy to the redress of the specific wrongs which have been charged."

But the case before us is not an ordinary one, and perhaps it may be doubted that many such histories of fraud will be found in the conduct of human affairs. It is difficult to imagine a case more thoroughly saturated with fraud than this which was presented to the district court on the application for the appointment of a receiver. Four shareholders of two small corporations, which were paying handsome dividends, obtained control of the majority of the stock, and elected their own officers. These four conspirators, instead of paying \$500 a month dividends which the corporations were earning, proceeded to put that money into their own pockets. They kept false books to deceive the shareholders. They pretended to buy for the corporations an absolutely worthless franchise, when they already owned two good and valid franchises, which were more than ample for the same purpose. They gave the corporations' notes for this worthless franchise, and mortgaged all of the property of the corporations for the purpose of having the mortgage foreclosed, and the property of the corporations wiped out. It is needless to enlarge upon these facts. They are all set forth in the statement preceding this opinion. This is a story of wrecking and robbing that would make a pirate of the Spanish main exclaim, in the language of Lord Clive, "I am surprised at my own moderation." Is not interference here absolutely necessary, as Morawetz says, to the attainment of justice? Again Morawetz remarks, as quoted above, the court of chancery will not interfere at the suit of the shareholders unless this be essential to the protection of the corporate rights. We can scarcely conceive of a case where it would be more essential than it is here, for the protection of the corporate rights, for, if the interference is not had, the corporate property will be swept away from the corporations into the grasp of the conspirators; and, while the investigation into the acts of the Sommers-O'Rourke party is being made by the court, should the court allow this same band of marauders to remain in possession of the corporations and their property, and continue to convert the assets to their own use, and exercise their own pleasure as to the trusts imposed upon them? To allow such a proceeding, it seems to us, would shock the conscience of the most indifferent court. Our statute provides that "a receiver may be appointed by the court in which an action is pending, or by the judge thereof: * * * Sixth. In all other cases where receivers have heretofore been appointed by the usages of courts of equity." Code Civ. Proc. § 229. We are of

opinion that the decisions of the courts sustain the doctrine of the powers and the usages of courts of equity in such a case as that which was made in the showing before the district court. We note the following language from a very recent decision (January, 1894) of the Kansas supreme court. While the Kansas statute is broader than ours, and the case of *In re Lewis*, 52 Kan. 660, 35 Pac. 287, is decided largely upon the statute of that state, still the following remarks of the Kansas court are valuable, as is also the collection of authorities appended to the decision. We extract from the opinion as follows: "By the averments of the petition, it would appear that all the officers of the corporation have conspired together to divert its business to another company, and to absorb its earnings and assets, and appropriate the same to their own uses. Under those circumstances, it would be useless to apply to the officers to bring an action against themselves, and in such cases the law permits the appointment of a receiver at the instance of a stockholder. In most cases of this character no other adequate remedy exists. The appointment of a receiver is not necessarily a proceeding to dissolve a corporation, nor will it necessarily result in its extinction. The property and assets of the corporation, which are being dissipated and fraudulently absorbed, will be preserved and rightfully appueu under the supervision of the court, and may be restored to the officers of the corporation when there has been a change of officers, or when it is deemed prudent and safe to restore the property and affairs of the corporations to its duly-constituted officers. See *First Nat. Bank v. United States Tile Co.*, 105 Ind. 227, 4 N. E. 846; *Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487; *Order of Iron Hall v. Baker* (Ind. Sup.) 33 N. E. 1128; *Haywood v. Lumber Co.*, 64 Wis. 639, 26 N. W. 184; *Consolidated Tank-Line Co. v. Kansas City Varnish Co.*, 43 Fed. 204; *Mor. Priv. Corp.* § 281; *Pom. Eq. Jur.* § 1334; *High, Rec.* § 313; *Spel. Priv. Corp.* § 1001; 20 Am. & Eng. Enc. Law, 272." We also find it stated in *High on Receivers* as follows: "It has already been shown that in most of the states of this country the general jurisdiction of courts of equity over corporations has been enlarged to the extent of authorizing the appointment of receivers in behalf of creditors and shareholders." Section 13.

The supreme court of Michigan (October, 1892), in *Miner v. Ice Co.*, 93 Mich. 97, 53 N. W. 218, after reviewing the history of a fraud which perhaps is worthy to be ranked with that of the case at bar, says: "The present case furnishes an instance of gross abuse of trust. Must the cestui que trust be committed to the domination of a trustee who has for seven years continued to violate the trust? The law requires of the majority the utmost good faith in the control and management of the corporation as to the minority. It is of the

essence of this trust that it shall be so managed as to produce for each stockholder the best possible return for his investment. The trustee has so far absorbed all returns. What is the outlook for the future? This court, in view of the past, can give no assurances. It can make no order that can prevent some other method of bleeding this corporation, if it is allowed to continue. If Lorman be removed, who shall take his place? He has the absolute power to determine. Once deposed, he may elect a dummy to fill his place. There are practically but three persons concerned, Miner, Lorman, and Lorissa Carpenter, and she has for seven years, in fraud of complainant's rights, been paid a dividend to secure her acquiescence. Who has any right to complain if ample and complete justice is awarded to Miner? Who shall be permitted to stand between him and an adequate remedy? This corporation has utterly failed of its purpose, not because of matters beyond its control, but because of fraudulent mismanagement and misappropriation of its funds. Complainant has a right to insist that it shall not continue as a cloak for a fraud upon him, and shall not longer retain his capital, to be used for the sole advantage of the owner of the majority of the stock, and a court of equity will not so far tolerate such a manifest violation of the rules of natural justice as to deny him the relief to which his situation entitles him. I think a court of equity, under the circumstances of this case, in the exercise of its general equity jurisdiction, has the power to grant to this complainant ample relief, even to the dissolution of the trust relations. Complainant is therefore entitled to the relief prayed. A receiver will be appointed, and the affairs of this corporation wound up." In the Michigan case the decision went to the winding up of the corporation, but in the case before us the receiver is only to hold until the charges of fraud are investigated. The Michigan decision is an able discussion of the powers of the court of equity in this respect, and a valuable review of decisions. It may be said here, as was said in the Michigan case, that the corporations have utterly failed of their purpose, not because of matters beyond their control, but because of the fraudulent mismanagement and misappropriation of their funds. An equal if not greater mismanagement and misappropriation has been done by the officers of the corporations who are here made defendants, and whose acts are sought to be restrained and set aside and declared null and void. We also find the same general subject mentioned in the following language in *Waterman on the Law of Corporations* (volume 2, § 356): "The power to appoint a receiver is necessarily inherent in a court which possesses equitable jurisdiction. It is exercised when an estate or fund is in existence, and there is no competent person entitled to hold it; or the person so entitled is in the nature of a trustee,

and is misusing or misapplying the trust; or the property is about to be removed beyond the reach of the court; and, generally, when it is necessary to secure rights and prevent a failure of justice. The property is thus placed in the hands of an officer of the law in order that it may be under the protecting care and control of the court, and be delivered unimpaired to the persons to whom it is legally ascertained to belong." See, also, *Ranger v. Cotton-Press Co.*, 52 Fed. 611; *Mor. Priv. Corp.* § 642.

Upon questions of equity jurisdiction, aid is always found in the records of the courts of chancery of New Jersey, and from a decision rendered in May, 1894, by that learned court, we quote as follows: "The power of this court to appoint a receiver of a corporation, either because it has no properly constituted governing body, or because there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders, I think must be regarded as settled; but I think it is equally well settled that this power is subject to certain limitations, namely, it must always be exercised with great caution, and only for such time and to such an extent as may be necessary to preserve the property of the corporation, and protect the rights and interests of its stockholders. As soon as a lawfully constituted and competent governing body comes into existence, whether it is brought into existence by an adjustment of the dissensions or by the election of a new body, and such body is ready to take possession of the property of the corporation, and proceed in the proper discharge of its duties, the court must lift its hand and retire. This is the doctrine, as I understand it, which was laid down by Vice Chancellor Malins in *Featherstone v. Cooke*, L. R. 16 Eq. 298, and *Auxiliary Co. v. Vickers*, Id. 303, and which was approved by Chancellor Runyon in *Einstein v. Rosenfeld*, 38 N. J. Eq. 309, and by Chancellor McGill in *Archer v. Waterworks Co.*, 50 N. J. Eq. 33, 24 Atl. 508." *Edison v.*

Phonograph Co., 29 Atl. 197. It is true, of course, that the power must be exercised with great caution, but we are of the opinion that the most scrupulous caution would not cause a court to hesitate in the matter which was before the district court. Furthermore, the district court did not go any further in the appointment than was necessary to preserve the property of the corporations, and protect the rights and interests of its stockholders, as was stated in the New Jersey case. It does not seem necessary to go further in this discussion. The facts of this case will not afford a precedent in the future for any imprudent or unauthorized appointment of a receiver for corporations, or the unwise withdrawal of the business of a corporation from the management of its duly-elected and lawfully acting trustees. The case is a precedent only as to its own facts. Here the objects of the existence, and, indeed, the practical existence itself, of the corporations, are being totally destroyed by the unlawful (not to use a stronger term) acts of its managers; and one object, at least, of the action in the district court, is to set aside and prevent such unlawful acts of such managers, and the action itself is against such unlawfully acting persons. If they are allowed to go on in their course which they are pursuing, the corporations are to be totally wrecked, their funds are to be embezzled, and their property is to be taken from them by a fraudulent conspiracy of the managers, whose position is one of trust towards the plaintiffs in the action in the district court. Under such a vigorous showing of facts, we believe that the decisions of the courts of equity uphold the powers and usages of those courts to interfere by a receivership. See the cases cited in this opinion and the cases referred to in those citations. We are therefore of the opinion that the writ of certiorari must be dismissed, and it is so ordered. Dismissed.

PEMBERTON, C. J., and HUNT, J., concur.

MERCHANTS' & MANUFACTURERS' NAT.
BANK OF DETROIT v. KENT
CIRCUIT JUDGE.

(5 N. W. 627, 43 Mich. 292.)

Supreme Court of Michigan. April 14, 1880.

Mandamus.

Morris & Uhl, for the writ. Jacob Ferris and Blair, Kingsley & Kleinhaus, against.

COOLEY, J. The application for a mandamus in this case brings under review questions of the validity and propriety of the order appointing a receiver. The bill was filed to foreclose a chattel mortgage. The mortgage was by Hebbard & Graff, merchant millers of Grand Rapids, to Philip M. Graff, and bore date March 17, 1880. The purpose was to secure the mortgagee for having become accommodation indorser for the mortgagors on a large amount of commercial paper. The mortgage covered "all the flour, wheat, corn, oats, bran and feed owned by the parties of the first part, and situated in the city of Grand Rapids, Michigan, whether on the track, or in the mills or warehouses, or in the elevator at Berlin, Ottawa county, Michigan; all the barrels, sacks, bags, tools and office furniture and fixtures, including safes, situated in and about and used in connection with their two mills, being three large teams and larries, two pairs of large sleighs and one light delivery wagon, and the blankets used with said teams. Also the engine and boiler used in the Valley City Mills, and put in by Hebbard & Graff since their lease of the same, and the shafting and pulleys used by them in connecting the engine with the mill and machinery. Also all the wheat, corn and oats which may be purchased by the parties of the first part and delivered to them in the city of Grand Rapids, either on the track, in store or in their mills, and all flour, feed and bran manufactured by them while any portion of the debts secured by this mortgage remains unpaid."

The mortgage reserved to the mortgagor the privilege of making sales in the ordinary course of their business, and provided that "in case of the non-payment of the said notes, or any of them, at maturity, by the party of the first part, or if the party of the second part shall at any time deem himself insecure, he, * * * whether the party of the second part shall have paid anything on said notes or not, is hereby authorized to enter upon the premises of said party of the first part, or any place or places where the said goods and chattels, or any part or portion thereof, may be, and take possession thereof, and sell and dispose of the same at private sale or public auction, * * * whether any of such notes have matured or not, and apply the proceeds thereof to the payment of said notes as fast as they mature."

A bill to foreclose this mortgage was filed

the day after its date. It was alleged therein that one of the notes, the payment of which was secured by the mortgage, was long past due, and that another became due March 17, 1880, and another March 18, the day the bill was filed, and both remain unpaid, and that by reason thereof the whole sum secured by the mortgage, amounting to \$38,800, has become due and payable immediately; that by reason of disastrous speculations the mortgagors have become insolvent, and have transferred to complainant the mill property whereon they conducted their business; that the wheat and other unground grain described in the mortgage cannot be profitably sold and converted into money except after being ground; that to manufacture said grain into flour, and other proper products, will yield larger returns, and be more for the interest of all parties concerned, than to sell or dispose of the same in an unmanufactured state; that the total value of all the mortgaged property will not exceed \$40,000, and if disposed of at forced or auction sale will not yield more than \$30,000, or thereabouts. The bill prays for the appointment of a receiver, and nominates the law partner of the solicitor for complainant as a suitable person to be appointed.

No persons were made parties defendant to this bill except the mortgagors. Late in the evening of March 18th, and before the bill had been filed, it was presented to the circuit judge, at his dwelling-house, and an application made for the appointment of a receiver as prayed. The mortgagors appeared at the same time, by a solicitor of the court, and consented to the appointment. The circuit judge, apparently looking upon the case as an amicable proceeding, in which all parties concerned were working in harmony to preserve and dispose of the property for the benefit of all, made the appointment prayed for. The appointment purports to be one made in open court, but the court was not in session at the time, and the bill not being then filed, there was no cause pending. The order of appointment directed the receiver to proceed to manufacture the grain mortgaged into flour and other proper products, and to sell in the usual course of trade and on credit.

It soon appeared that the proceeding was far from being an amicable one, except so far as the mortgagors and mortgagee were concerned. At the very time the mortgagee was having his bill for foreclosure prepared and obtaining his order for a receiver, other parties were suing out writs of replevin for some portions of the property. One of these parties was William B. Ledyard, by virtue of whose writ the wheat in the Crescent Mills, previously operated by the mortgagors, was seized an hour or so before the order appointing a receiver was made. Another was by Euphrasia Aldrich, who replevied a quantity of wheat at or about the time when the order was made. Another was by the Merchants' & Manufacturers' Bank of De-

troit. The circuit court appears to have come to the conclusion that the writ of this plaintiff was not served until the receiver had become possessed of the property in dispute, which could not have been earlier than about 10 o'clock on the night of March 18th, that being the hour when his bond as receiver was filed.

On March 19, 1880, the receiver petitioned the circuit court in chancery for an order restraining the several plaintiffs in the replevin suits from proceeding further therein. A hearing was had on this petition, and its prayer was granted so far as the suit by the bank was concerned, and denied as to the other suits. The bank, however, was granted leave to bring an action of trover to recover the value of the property described in its writs. The receiver was, by the same order, required to deposit in bank the net proceeds of sales of the property made by him. Both the receiver and the bank appealed from this order.

1. The appeal of the receiver was from those parts of the order which refused an injunction against the Ledyard & Aldrich suits. The order in that regard was not a "final order," and was therefore not appealable under the statute. *Wing v. Warner*, 2 Doug. 288; *Caswell v. Comstock*, 6 Mich. 391; *Boing v. Coats*, 17 Mich. 411; *Spencer v. Stearns*, 28 Mich. 463. These appeals must therefore be dismissed.

2. The order, in so far as it enjoined the bank from interfering by suit with the possession of property to which the bank claimed title, inasmuch as it finally took from the bank a legal right, was in the nature of a final order, and was appealable. *Lewis v. Campau*, 14 Mich. 458; *Barry v. Briggs*, 22 Mich. 201.

3. The order appointing a receiver was void, for the reason that it was made when there was no suit pending. It is perhaps fortunate for all parties interested that such was the fact, inasmuch as, if it had been legally valid, the appointment, though of a person eminently fit for the position, but for the relations to the litigation through his law partner, must necessarily at some time have been set aside, and the longer it should stand the greater must have been the probability of confusion in the rights of the parties growing out of his proceedings, and of unnecessary costs and expenses to be borne by some one or more of the claimants to the property. In *Ex parte Pinche*, 2 Meriv. 452, the lord chancellor refused to appoint the solicitor to the commission as receiver of a lunatic's estate, though it was stated that no one else would accept the office. The ground of the refusal was that it might become the duty of the solicitor himself to call the receiver to account. So in *Stone v. Wishart*, 2 Madd. 63, where the parties united in a request that the next friend of infant complainants be appointed receiver, the vice chancellor said: "I cannot accede to this mo-

tion, although it is consented to. It is the duty of the next friend to these infants to watch the accounts and conduct of the receiver; to be control over him. The two characters cannot be united, they are inconsistent."

We cannot shut our eyes to the fact that the law partner of the solicitor is presumptively as much interested in the proceedings as the solicitor himself, and it would be peculiarly objectionable that he should act in a position requiring impartiality in a case like this, where the parties to the suit are manifestly acting in concert, and adversely to the interests of other persons, who cannot watch their proceedings. The practical result would be that the receiver would supervise his own accounts. *Garland v. Garland*, 2 Ves. 137. The practice in equity does not even permit the receiver to employ a solicitor in the case as his own counsel, lest it might disarm his vigilance in watching the receiver's proceedings. *Ryckman v. Parkins*, 5 Paige, 543; *Adams v. Woods*, 8 Cal. 306. This rule may, no doubt, be departed from by consent of all parties concerned, but this must mean by consent of all parties concerned in the results of the receivership, and one not a party to the suit may be as much concerned in these as the persons who are parties. The present suit is an illustration.

4. The order appealed from by the bank was improper, in that it forbade a person not a party to the suit from testing, in the customary common law method, the title which is asserted to specific property, and in so doing stretched unnecessarily, improperly and oppressively the power of the court of equity in abridgment of the jurisdiction of the court of law. There may be cases in which it would be proper for a court of equity, by means of a receivership, to draw to itself the jurisdiction to try disputed titles to property; but the jurisdiction to do so is exceptional, and must be supported by circumstances which render the common law remedies inadequate, or for some reason unfit and unsuitable in the particular case. No such circumstances appear or are suggested here. It was proper and just that the bank be allowed to go on with the suit in replevin, if that seemed most for its interest, and improper and unjust that it should be restricted to a suit in trover, which would be, in effect, for net proceeds only, after the costs of a receivership, which the bank did not desire or assent to, had been deducted. If the property belonged to the bank the injustice of requiring the owner to submit to such management, manufacture and sale of it as another person might think expedient, and to recover the net proceeds only after the costs of a receivership in a suit between other parties had been wholly or in part deducted, would be too manifest to require more than mere mention.

5. It cannot escape attention that the whole scheme of giving a chattel mortgage which would be immediately due, filing a bill

in equity upon it at once, and obtaining the appointment of a receiver, who should take possession of the property to the exclusion of other creditors, and go on with the business as the mortgagors themselves might have done, and as the order in this case contemplated, was an attempt, by means of the machinery of the law, to accomplish indirectly what, without calling in the aid of the court, could not be legally done at all.

We do not enlarge upon this aspect of the case, as it is not necessary here; but it must

be manifest that the parties were creating a trust, by means of the mortgage and of a consent order, which could not stand the test of the law, if made by an assignment. It resembles very closely an attempt, by circuitous methods, to avoid a legal principle.

The order which is appealed from by the bank must be reversed, with costs against the complainant in the suit. What has been said will render unnecessary any award of the writ of mandamus. The other justices concurred.

**MERCANTILE TRUST CO. OF NEW YORK
v. MISSOURI, K. & T. RY. CO. et al.**

(36 Fed. 221.)

Circuit Court, D. Kansas. Oct. 8, 1888.

In equity. Bill for foreclosure and appointment of a receiver.

Bill by the Mercantile Trust Company of New York, trustee for certain bondholders secured by a mortgage on the property of the Missouri, Kansas & Texas Railway Company, against said company and the Missouri Pacific Railway Company, to foreclose the mortgage, and appoint a receiver.

Alexander & Green, Thos. H. Hubbard, John J. McCook, and William N. Cromwell, for complainant. Simon Sterne, Charles F. Beach, Jr., James O. Broadhead, and L. B. Wheat, for defendants.

BREWER, J. (orally). In this case, I have had no opportunity to write out the conclusions to which I have come, nor, for that matter, to arrange my thoughts in any very orderly and systematic manner. I should have preferred to take a little further time to put in better shape what I have to say; yet, aware of the fact that many of you gentlemen are from a distance, and are anxious to return home, I concluded to waive the matter of form and order, and state, in a crude way, my conclusions. Nor are these conclusions reached simply from information developed in these few days. This bill was presented to me more than three months ago. I have had a copy of it in my possession since, and have taken frequent occasions to examine the stipulations of this mortgage. Further than that, the newspapers have been full of many of the features of this controversy; and the property itself, being a property starting in my own state, and growing up there, is, neither in itself nor its history, a stranger. So that many of the facts which have been presented and discussed are facts which were not new.

This bill was filed a few days after default in the payment of interest, June last. And the first question—a vital question—is whether this suit was prematurely brought; for, being a suit to foreclose, and not one for the preservation of the property, if prematurely brought, it would finally have to be dismissed, and a receiver ought not to be appointed ad interim. The ground upon which the claim rests is the fact that this mortgage or deed of trust requires a six-months delay after the default before certain proceedings—and foreclosure, it is claimed, is one—are permissible. The second article provides for entry by the trustee, but by its terms such entry cannot be till six months after default and demand of payment. The third article likewise authorizes sale by advertisement, and that is equally limited. At the close of that article follows this paragraph: "This provision is cumulative to the ordinary remedies by foreclosure in the courts; and the trustee herein, or its successor or success-

ors in this trust, upon default being made as aforesaid, may, at its discretion, and upon the written request of the bondholders of a majority in value of said bonds then unpaid, shall," etc.

Now, the contention is that those words, "upon default being made as aforesaid," being in the last part of this article, by fair construction refer back to the entire provision in the first part in respect to default, and include both the happening and continuance of the default. The argument rests merely on the force of the last two words, "as aforesaid," and is forcibly put by counsel. That is the real question in the case, for, if this last paragraph in article 3 were omitted, the decision of the supreme court in the case of Railroad Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, would leave no question. In that case, as appears from the statement, there were in the mortgage stipulations providing for entry and sale by advertisement six months after default. The validity of those provisions was recognized by the supreme court; but it held that, notwithstanding this, if by other stipulations in the mortgage it was a security for the payment of interest as it semi-annually accrued, as well as of the principal, the trustee, or, on his failure to act, any bondholder, might, on the non-payment of interest, bring suit and foreclose. Turning to this mortgage, I find the same provision. It is given as security for the payment of the interest as well as of the principal. By article 2 possession is secured to the railroad company,—the mortgagor,—until default be made in the payment of principal or interest. Unquestionably the right of action at law on the coupon exists. Unquestionably, if articles 3 and 4 were omitted, the mere fact that this property was by the mortgage pledged as security for the payment of coupons would permit the coupon-holder to come into a court of equity and enforce that pledge.

It is insisted that these articles, not excluding the jurisdiction of courts of law, not debarring a party from his right of action upon the coupons, deprive him of a present right of action upon the mortgage by a suit in equity to enforce that pledge. Language requiring such construction should be clear. If the parties—and it is to be assumed that they who drafted this mortgage or deed of trust were competent for that business—contemplated not merely that no entry should be made, no sale under the power until the lapse of six months after default, but also that the coupon-holder, having his right of action at law on the coupons, should not have a right of action in equity, such purpose, it seems to me, would naturally have been expressed in clear and unmistakable language, and not in that of doubtful interpretation. In every other place that I have been able to find in this mortgage, where a right rests upon the continuance of the default, and that appears in articles prior and subsequent to this paragraph, the language is express: "In case default shall be

made in payment of interest, and shall continue for six months." Now, if it was intended to limit the jurisdiction of a court of equity until after the lapse of six months from the time of the happening of the default, it seems to me that the draughtsman would have placed the stipulation therefor in a separate article, and would have made its meaning so plain that there would be no question. We all know in the preparation of instruments how common the expressions "said" or "as aforesaid" are used without any clear or definite intent. They are words which we use, not thoughtlessly, but carelessly; and although they are used here, yet as it is also found that the continuance of the default is not mentioned, it seems to me it is giving to those words an enlarged and unnecessary force to hold that they broaden the expression "making default" into "making and continuing default," as expressed in the first part of the article. Nor is this a mere resting upon the language of the paragraph. It opens with the distinct announcement that these special provisions in respect to entry and sale under a power are cumulative to the ordinary remedies by foreclosure; contemplating, in its opening words, a proceeding in a court of equity in any case of default. Nor is it strange that there should be special limitations upon the two matters provided in articles 2 and 3, and none about proceedings in a court of equity. An entry is a speedy remedy; it runs to the corpus of the property; it takes instant hold of it, and takes it away from the mortgagor. The parties may well have contemplated that, if there was a temporary default, there should be no such speedy interference and summary seizure by the mortgagee. So a sale by advertisement—in this case an advertisement of eight weeks—is speedy and summary; and if, upon the happening of a temporary default, the trustee at the instance of a single coupon-holder should thus advertise and sell the property, it is obvious that great wrong might be done; and six months' delay is a very natural provision. But proceedings in a court of equity are not thus hasty. They are not within the control of any coupon-holder or any trustee. They stand advanced or delayed, as in the judgment of the chancellor the best interests of the property require. If it appears in any case that a coupon-holder, from improper motives, or from a simple greed for his money, is willing to wreck a large property, and comes into a court of equity upon the happening of a temporary default, it goes without saying that the chancellor holds his hands until it becomes apparent that the property as a whole cannot be saved to its owners. Inasmuch as these proceedings stand upon the discretion of a court of equity, it is not strange that the parties were willing to leave to the bondholders and coupon-holders an open door into such a court. They left an open door into a court at law, and there is at least equal chance, if not greater, that the freer motions of a court of equity will afford as full pro-

tection to the mortgagor. These considerations, perhaps not very clearly expressed, are the reasons which have led me to hold that this case is within the rule laid down in 106 U. S. 47, 1 Sup. Ct. 10, *supra*, and that this suit is not prematurely brought.

That only passes from one trouble to another. The right to foreclose does not carry with it the right to a receiver. There are many considerations that bear upon that question. Every case, of course, stands on its own merits. It is difficult to formulate any rule which, briefly stated, will control in all cases. It should appear that there is some danger to the property; that its protection, its preservation, the interests of the various holders, require possession by the court before a receiver should be appointed. It does not go as a matter of course; and yet it is not a matter that a court can refuse simply because it is an annoyance. If, looking at the situation of the litigating parties, and of the property, with the prospects of the future, it should appear to a court that they would be benefited, that their interests would be subserved by the appointment of a receiver, why, no court—although a matter resting, as it is said, in its discretion—could refuse to make the appointment.

I shall not go over all the matters that have been discussed. I want to suggest some things that have impressed me. Of course, so far as the adequacy of this security, so far as the solvency of the corporation, is concerned, so far as the question whether this is a temporary embarrassment or permanent, these facts stand out confessed, indisputable at least. It has ceased to pay interest on its mortgages; one, two, three, and four have defaulted. The amount of that interest runs considerably over a million; and the payment of interest on the large mortgage comes due in two months. The business of this year from the 1st of June to the 1st of September, as shown by the statistics, is decreasing; from the 1st of September to the 14th there was a slight increase. The road is not along the main highway of travel eastward and westward. It is one running north and south, along which business to-day is, as we all in the west know, comparatively in its inception. It crosses for two or three hundred miles a territory which is occupied by Indians, and furnishes little business. It has been for years the only road that traversed that territory. Within the last year or two, two more roads have crossed, and a third is seeking to cross. Competition between these roads traversing that territory, and bringing Texas and its commerce into relations with Kansas, Missouri, and the north, as a matter of necessity, it seems to me, must tend against the increase of earnings.

The report of the committee—a committee appointed by the company—tends to show that the payment of interest which has been made prior to this year, has been largely at

the expense of the proper repairs and improvement of the road. I do not mean to say that all this is absolutely conclusive on the question, but these are matters which have forced themselves upon my mind. While it is true that—the road paying no interest since the 1st of June—the revenues have diminished by four or five hundred thousand, the amount which is due as claimed to the Missouri Pacific for advancements, yet the earnings must increase largely before these back interests can be met, to say nothing of future interests speedily maturing. That a road thus situated, some 1,600 miles in length, is burdened with a mortgage of \$28,000 a mile, carries with it, to my mind, very strong evidence that there is no reasonable probability of its ever being kept in proper condition when paying the interest on such a debt. The only way in which any mortgagee can get possession of the rents and profits is through a receiver. The law of Kansas forbids any other remedy upon a mortgage than a foreclosure in the court. No possession could be had under article 2. No sale could be made under the power attempted to be given in article 3. The sole remedy is by foreclosure. Unless a receiver is appointed, the rents and profits pass into the possession of the mortgagor, to be expended by it according to its best judgment. That is affirmed by the three cases of *Railroad Co. v. Cowdrey*, 11 Wall. 463; *Gilman v. Telegraph Co.*, 91 U. S. 603; and *Dow v. Railway Co.*, 124 U. S. 652, 8 Sup. Ct. 673. Not merely that; suppose this foreclosure proceeding should pass to a decree, and the defendant appeal, its bond on appeal would be no protection to the mortgagee in respect to the rents and profits. That is settled in the case of *Kountze v. Hotel Co.*, 107 U. S. 378, 2 Sup. Ct. 911. So that this litigation might proceed and continue for a long time in this and in the supreme court, without ever giving the mortgagee a hold upon the profits, unless a receiver is appointed. This mortgage is a second mortgage on a large part of the road. As such mortgagee it has, more than any other party, an interest in reaching after and securing those rents and profits. The first mortgagee, having a limited amount upon the part of the road upon which its mortgage rests, may feel safe; for his principal and interest must be paid before the second mortgagee can come in. So that the complainant has a special interest in reaching for, and as soon as possible obtaining possession of, the surplus earnings. More than that, it is perfectly obvious that the real owners of this property are not in harmony. The stock controls the road, but with \$45,000,000 of bonded indebtedness—\$28,000 a mile—on the road, the real owners are the bondholders, and that they are not agreed in respect to what shall be done with this property is, I think, confessed. For years the property was in the management of a cer-

tain interest. That interest was removed last spring from the control. It was not removed so long as the road was apparently prosperous, and paying its coupons. When adversity threatened it, as was natural, those who held interests in the road were not satisfied with the management, and sought control. If these gentlemen now in control could make it a promptly paying road within a reasonable time, why, it might be expected, according to the laws of human nature, that they would remain in control; but we all know how, when one fails and continues to fail, all who are interested are prone to lay the responsibility upon him, and to seek a change. And there is no certainty that another year different interests might not combine, and so the road be subject to different control. At any rate, it is very evident that there is no harmony—no unity of purpose—between those who are the real owners. Now, if it were a partnership, and it was apparent to a court that the partners had got into a quarrel, the very fact of their quarrel would be a strong reason why it should take possession of the property. Of course that consideration has not so much force in respect to a corporation, but it strengthens other considerations. Those are the principal reasons that have operated on my mind,—the default in interest, the fact that the rents and profits can only be appropriated in this way, the decreasing revenues, the recent construction of parallel roads, the fact that it passes through such a portion of territory so unprofitable, the condition of the road as developed by this report of the committee, and the conflict between various parties having real and substantial interests. Much as I should be glad to be free from the annoyance of a receivership,—and I know something about it,—it seems to me I should be delinquent if I refused this application. There are some minor matters that I might refer to, yet, perhaps, they would not strengthen anything I have said.

There is one matter, however, I must notice,—the suggestion of the Missouri Pacific that it could defeat this application, and that it was here in the attitude of a party to consent upon the condition that the balance due it was properly protected, and that no order should be made in reference to the possession by the receiver of the International & Great Northern Railroad or its stock. If I understood the situation to be that this application depended on the consent of the lessee, the Missouri Pacific, and its consent was tendered upon any such condition as that, there would be no receiver appointed. The rights of the lessee, as I look upon these two instruments, are subordinate to the rights of the mortgagee, and it is the mortgagee whose application is sustained, and all parties having claims of any kind must depend upon the inherent equity of their claims. So far as the stock in the

International & Great Northern is concerned, as well as some other assets, they are, as stated, now under pledge, and in the possession of this complainant; perhaps, also, attached by certain garnishment proceedings. I think the interests of the mortgagor require that there should go an order upon the complainant not to part with that possession, except in obedience, of course, to the process of the courts in New York, until the ultimate rights of the parties are determined. As to the possession of the International & Great Northern, I doubt whether it is within the province of this court to determine that question. It is a separate road, whose stock, I believe, in part has become the property of the Missouri, Kansas & Texas corporation; but it is wholly situated in another circuit, and certainly at present I am not prepared to say that this court would

have a right to determine whether a receiver of the Missouri, Kansas & Texas should take possession of that separate road. It may be that is a question which will have to be determined by the judge of that circuit. At any rate, I should not at present, without further consideration, perhaps consultation with Judge Pardee, feel like making any order in respect to it. It is a matter in which I shall be glad to hear counsel hereafter upon, and perhaps try and arrange with Judge Pardee jointly to hear them as soon as practical. That, I think, is about all I have to say in reference to this matter, except as to the receiver. If parties agree upon a receiver, of course I shall appoint whoever you agree upon. If not, I will hear any suggestions from any of the parties in interest, and reasons for or against any person to be named by one side or the other.

BELDING et al. v. MELOCHE et al.

(71 N. W. 592, 113 Mich. 223.)

Supreme Court of Michigan. May 28, 1897.

Appeal from circuit court, Ionia county, in chancery; Frank D. M. Davis, Judge.

Suit by Alvah N. Belding and another against Albert F. Meloche and others. From a decree for complainants, defendants Meloche appeal. Affirmed.

R. A. Hawley, for appellants. McGarry & Nichols, for appellees.

HOOKER, J. On May 2, 1892, the complainants sold to the Meloches (two of the defendants), upon contract, a business block in the village of Belding, at an agreed price of \$36,000, to be paid in 120 monthly installments of \$300, without interest. The contract does not expressly state that the vendees shall be entitled to possession, but does provide that, in case of default, the vendors may "elect to consider themselves released and discharged of and from any and all liability in any of the covenants specified to be done and performed by them, and all improvements made by the said parties of the second part shall be deemed forfeited as stipulated damages for the non-fulfillment of this contract; and said parties of the first part, or their authorized agent, may, without notice to quit or demand of possession, re-enter into and repossess the said premises, and the said parties of the second part, and each and every occupant hired by, through, or under them, to remove and put out; it being expressly understood that such failure of said second parties shall forfeit all claim, either in law or in equity, which might otherwise exist on the provisions of this contract in favor of the said parties of the second part." The vendees made default in the payments, and this bill of complaint was filed to foreclose their rights under the contract. At this time portions of the building were rented, and the bill prayed the appointment of a receiver, to receive the rents and profits of said premises, and such receiver was appointed, and has received said rents. A decree of foreclosure and sale was made, and, after the sale occurred, an order of confirmation was entered. No appeal was taken from any of the proceedings thus far. Subsequently, the complainants filed their petition, alleging that on March 9, 1896, a decree was entered for the complainants for the sum of \$6,172.44 and costs, making a total of \$6,648.30; that, at a sale of the interest of the Meloches in said premises, the complainants purchased the same for \$3,000, and that there was a deficiency of \$3,648.30; that the final account of the receiver, duly filed, shows a balance in his hands at the date of the report of \$2,349.36, which, after the allowance of compensation to and disbursements by the receiver, would leave \$1,856.98, which the petition prays may be applied upon the deficiency, and that it be declared that the remaining deficiency consti-

tute a personal judgment, upon which execution may issue against the Meloches. A decree was made in accordance with the prayer of the petition, and the defendants Meloche appealed.

It is claimed—First, that the court had no authority to appoint a receiver to take the rents during the foreclosure, and that the moneys collected should not be turned over to the complainants; second, that there should be no decree for a deficiency against the appellants, because, upon the trial of the case, counsel for complainant stated that they did not care to ask a personal decree.

Counsel base their first contention upon a class of cases which hold that, under How. Ann. St. § 7847, the mortgagee is not entitled to the profits of land during foreclosure. See *Wagar v. Stone*, 36 Mich. 366. In that case the court said: "The mortgagor is entitled to the possession during the proceedings taken to foreclose the mortgage, and until a sale has been made and the title of the purchaser has become absolute; and, until the title has become absolute upon a foreclosure of the mortgage, an action of ejectment cannot be maintained by the mortgagee, his assigns or representatives, to recover possession of the mortgaged premises. 2 Comp. Laws, § 6263. Since the passage of this act, which prevents the mortgagee from obtaining possession until he has acquired an absolute title to the mortgaged premises, the mortgage binds only the lands. The rents and profits of the land do not enter into or form any part of the security. At the time of giving the security, both parties understand that the mortgagor will, and that the mortgagee will not, be entitled to the rents, issues, or profits of the mortgaged premises until the title shall have become absolute upon a foreclosure of the mortgage. Until the happening of this event, the mortgagor has a clear right to the possession and to the income which he may derive therefrom; and the legislature, by the passage of this statute, contemplated that he should have such possession and income to aid him in paying the debt. It would be a novel doctrine to hold that the mortgagee had a right to the profits incident to ownership, and yet that he had neither a legal title, nor right to possession. The legislature, in depriving him of the means of enforcing possession, intended thereby also to cut off and deprive him of all rights which he could have acquired in case he obtained possession before acquiring an absolute title. To deprive him of this particular remedy, and yet allow him in some other proceedings to, in effect, arrive at the same result, would be but a meaningless proceeding, and would not be securing to the mortgagor those substantial rights which it was the evident intent he should have. We do not overlook the fact that a contrary doctrine has been held elsewhere under a similar statute. We cannot avoid thinking, however, that for us to so hold would be but a mere evasion of our statute." In *Michigan Trust Co. v. Lansing Lumber Co.*, 103

Mich. 393, 402, 61 N. W. 668, we recognized the validity of a contract whereby possession by the mortgagee may precede foreclosure; and the case of Wagar v. Stone shows that in other states possession may be given to receivers pending foreclosure of mortgages, and the decision in that case is made to rest upon the statute. The statute does not in terms apply to equitable mortgages if we should hold this to be one. In the Wagar Case the court said that the object of the legislature was that the mortgagor "should have possession to aid him in paying the debt"; but in this case the vendee seeks to avoid the payment of the debt, and to appropriate the fund in the hands of the

receiver, to the exclusion of the complainants' just claim.

Again, it is contended that the complainants are not entitled to a personal decree for the deficiency. This claim seems to rest upon an alleged waiver or estoppel, by what occurred upon the hearing of the original case. It does not appear to have been set up in the answer to the petition, and is said not to have been claimed in the circuit court upon the hearing. We do not discover that this statement is disputed. Under these circumstances, we think the order of the circuit court in chancery should be affirmed, with costs; and it is so ordered. The other justices concurred.

MARSHALL & ILLSLEY BANK v. CADY
et al.

(77 N. W. 831, 75 Minn. 241.)

Supreme Court of Minnesota. Jan. 9, 1899.

Appeal from district court, Ramsey county;
Charles E. Otis, Judge.Action by the Marshall & Illsley Bank
against Frank M. Cady and others. Judgment
for plaintiff. Defendant Cady appeals.
Affirmed.Chas. J. Berryhill, for appellant. William
G. White, for respondent.

PER CURIAM. Assuming, without deciding, that an order appointing a receiver in foreclosure during the pendency of the action can be reviewed on appeal from the final judgment or decree, we are of opinion that, while the plaintiff did not present a very strong case, yet we could not hold that the court abused its discretion in appointing a temporary receiver. The affidavits presented would have justified the court in finding that the mortgaged premises were inadequate security; that the mortgagor was insolvent; that four years' taxes were unpaid and delinquent, for three of which the premises had been sold, and unredeemed; that portions of the building on the premises were somewhat out of repair, and that repairs were necessary for the full preservation of the property; and that the mortgagor was receiving rent for part of the premises, which he was not applying to the payment of taxes or the making of repairs. There was some evidence that the mortgagor was using a part of the building as his sleeping apartments, and, hence, that the premises were his homestead. While a court should ordinarily require a somewhat stronger showing for the appointment of a receiver of the mortgagor's homestead than in the case of other property, yet, when a debtor mortgages his homestead, he subjects the property to all the ordinary legal and equitable rights of a mortgagee, among which is the right to have a receiver appointed when necessary to prevent waste or to preserve the property. The same facts which would justify the court in appointing a receiver during the pendency of the action would justify it in providing in the final judgment that the receivership should be continued. As there is neither a "case" nor bill of exceptions, the question whether the evidence justified the findings is not presented. The findings are presumed to have been based upon the evidence introduced on the trial, and not upon the affidavits presented on the motion for the appointment of a receiver during the pendency of the action. The judgment is silent as to the duration of the receivership. No point is made on this by the defendant; but we mention the fact in order that it may not be inferred that we impliedly hold that a receivership could be continued after a foreclosure sale, or that the rents and profits of the property could be applied towards paying the mortgage debt, or used for any other purpose than to prevent

waste and preserve the property. The judgment should be affirmed. So ordered.

BUCK, J. I dissent. I think that the evidence quite conclusively shows that the premises are Cady's homestead, and this is one of the material facts that lead me to think that the receiver should not, upon the evidence adduced, have been appointed. When the trial court appointed the receiver, it was done by the court upon affidavits submitted by the respective parties. The application therefor was made in the month of July, 1897, but not granted until October 29, 1897. All of the affidavits upon which the receiver was appointed appear in the record, and the sufficiency of the plaintiff's affidavits are assailed and contradicted by the defendants' counter affidavit. Not only was a receiver appointed by order of the court, and therein directed to collect, all and singular, the rents, profits, and income of the premises, but by a subsequent order of the court the defendant Cady was ordered, within five days after the service upon him of the order, to quit, surrender, and deliver up to the receiver said premises, and vacate the same. It is true that the judgment appealed from is dated November 12, 1897, and the last order directing the defendant Cady was not made until November 20, 1897, and not appealed from. But, as I regard this case, this is immaterial. The gist of the controversy is over the right to appoint a receiver at all. Probably, if there existed a sufficient cause to appoint a receiver in the first instance, and the case appeared to be one where ordinarily the right of a receiver to act at all was presented, the appointment would carry with it the right to the possession of the property. It is the right to invoke the aid of the court in the first instance, upon the case being presented, which in my opinion is one of more than serious doubt. Such a proceeding is an extraordinary remedy, sometimes, and perhaps I might say frequently, operating harshly, and the circumstances of peril which invoke the remedy should be established with reasonable certainty. Such appointment is not a matter of right, and should not be used where its exercise will produce injustice, and the fact should be clearly proved. Beach, Rec. 65-68. And this rule is strictly applied in mortgage cases, where it must clearly and fairly appear that the security is inadequate, or there is imminent danger of waste, removal, or destruction of the property. *Id.* 574. Mere default in the payment of the debt would not be sufficient ground for the appointment of a receiver. It is true that power to make the appointment of a receiver is generally discretionary, yet "the judicial authority to deal with property by means of a receiver is not unlimited or absolute." *Id.* 2. "It must be exercised in conformity to the general principles of equity jurisprudence. The petition should, therefore, state clearly the facts upon which the application is made, and also give proof of the same. If this is not done, the relief will be denied, and the burden

of proof is always upon the petitioner." *Id.* 567.

As I differ from my associates, it is proper that I should fully examine the evidence which formed the basis for such appointment. The only evidence presented was by affidavits. The plaintiff presented three which showed that the property was worth \$3,500, and one that the house alone was worth \$1,500. The defendants presented five affidavits which showed that the value of the property ranged from \$5,800 to \$4,400, averaging \$5,220, and the affidavit of another person states the value of the house to be \$2,500 alone. The total average value of the property was \$4,360. This is more than \$500 over the entire judgment in foreclosure, including interest and costs up to the time of the judgment. This was all the evidence introduced upon the question of the value of the premises, and I think that the plaintiff's evidence in this respect was clearly refuted by that of the defendants. The only evidence of waste or act of omission of duty in this respect on the part of Cady was that of one witness for plaintiff, who gave details tending to show that the dwelling house needed repairs to the amount of \$400; but no other one of plaintiff's witnesses testified to any such fact, and this testimony is squarely refuted by five of defendants' witnesses. I am not willing to take his testimony alone as outweighing that of all of the others. It certainly does not, in my mind, justify the appointment of a receiver, where the rule is, in such case, that the injury or impairment of the security must be imminent. *Union Mut. Life Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. 286.

I now come to the consideration of the question that the premises were the homestead of the defendant, and which he was occupying as such, and whether a stricter rule should not be applied in the appointment of a receiver to take possession of such property, and apply the income, rents, and profits thereof towards the payment of the mortgage debt. This question is one of great importance, and, if a receiver can thus be appointed, it will greatly disturb, if not substantially destroy, the homesteads of thousands of people, especially in our cities and villages, where the use of homesteads, and rental therefrom, often constitute part of the income, and frequently the only income, for the support of the family itself. As I have stated, the appointment of a receiver is a drastic measure, and to permit it to be used to oust a man and his family from their home, and sequester the income, rental, and profits thereof, is to deprive them of all the benefits of a homestead in a most summary manner. It certainly is a most extraordinary proceeding which authorizes such a step. *Waples*, in his work on *Homestead* (page 720), says: "It is questionable whether it is ever proper to take possession of a mortgagor's homestead while proceedings to fore-

close are pending. Certainly it is not proper practice as a general rule. An application for such appointment should always be refused when the amount of the mortgage debt is a subject of contention in the case." Of course, I do not overlook the doctrine laid down in this court in the case of *Lowell v. Doe*, 44 Minn. 144, 46 N. W. 297, where it was held that the homestead rights of the mortgagors are subject to the ordinary legal and equitable rights of the mortgagees in respect to the mortgaged premises, which may be enforced by the appropriate remedies; citing *Gen. St. 1878*, c. 68, § 2 (*Gen. St. 1894*, § 5522), which provides that the homestead exemption shall not extend to any mortgage thereon lawfully obtained. But the homestead law looks with favor upon homesteads, for the good of society and for the protection of family life in all classes, and seeks to save them from the rapacity of creditors, and from destruction, so far as it can without injustice to others. The reasons for this are many and cogent. To this end, I think that all steps to deprive the owner of a homestead of the right of himself and family to occupy and receive the benefits of it during foreclosure of a mortgage upon it should not be permitted, or should be resorted to only in extreme cases, and where justice would be defeated by withholding it, and only in cases reasonably clear and free from doubt. This is not such a case. It is a notorious fact that in many instances the receiver, in the performance of what he claims to be his duty, incurs large expenses, greatly lessening the assets which should go to the payment of the debt itself, and this operates to the detriment of both parties to the action. In other words, the benefit to the owner of the homestead and his family, as a home and support, might be appropriated to the support of the receiver, by way of fees and expenses, with loss to both parties to the action. Our statute provides that "a mortgage of real estate is not to be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real estate without a foreclosure." *Gen. St. 1894*, § 5861. This is an express statutory enactment, so far as possession is concerned, and the owner of the mortgage is prohibited from taking possession of the property without foreclosure. Of course, this means that no right of possession arises until the period of redemption expires, viz. one year after foreclosure. If possession of land is wrongfully withheld after foreclosure, and after final decree, the court may then compel delivery of possession to the party entitled thereto, by order directing the sheriff to effect such delivery. *Id.* § 6073. Thus, by clear and express statutory provisions, means are provided for obtaining possession of lands upon which mortgages are foreclosed. But until such time the mortgagee has no title, and no right of possession. It is true that, notwithstanding the law expressly exempts a home-

stead, Gen. St. 1894, § 5522, provides that "such exemption shall not extend to any mortgage thereon lawfully obtained"; but this provision does not operate to deprive the owner of the right to the possession of the homestead during the period of redemption from foreclosure sale. Now, the appointment of a receiver is one purely of an equitable origin; and whether it can, in the case of a homestead, supersede the express statutory enactment which forbids possession by the owner of the mortgage during foreclosure, may well admit of serious doubt. Equity is not intended to operate harshly, but a doctrine which permits a receiver, upon the commencement of a foreclosure action, to take immediate possession of the homestead, oust the family, and receive the rents and income

of the property, seems unjust and a harsh measure. Such a right is denied in *Investment Co. v. Farrar* (Iowa) 54 N. W. 361, upon the ground that it is a violation of the statutory rights of the mortgagor, even in a case not involving homestead rights. See, also, cases cited in 2 Jones, Mortg. § 1522. But even if the power exists to appoint a receiver to oust the owner of a homestead and his family, and take possession of the property, and deprive them of the use and benefits thereof, and thus cut short the statutory right of redemption, I think the facts in this case fall far short of making this an extraordinary case which justifies such an extraordinary remedy, and that the receiver ought not to have been appointed. I think that the judgment should be reversed.

WIEDEMANN v. SANN et al.

(31 Atl. 211.)

Court of Chancery of New Jersey. Feb. 26, 1895

Bill by Frank W. Wiedemann against Annie Sann and others to foreclose a mortgage, and for an injunction, and for appointment of a receiver. Receiver appointed.

Gilbert & Atkinson, for complainant. H. Budd, for defendants.

BIRD, V. C. The bill in this case is filed to foreclose a mortgage of chattels given by Annie Sann, asking for an injunction against an attaching creditor, whose attachment issued against Charles Sann, and also asking for a receiver. The chattel mortgage bears date January 11, 1895, and was duly recorded on the same day. It was given to secure the payment of \$550, money loaned to the mortgagor. The whole of the said loan, together with interest, is claimed to be due to the complainant. The bill states that on the 9th day of January, being two days before the execution and delivery of the chattel mortgage aforesaid, one Sarah M. Hall procured to be issued a writ of attachment out of the circuit court of the county of Burlington against one Charles Sann on the demand for \$650, under which writ of attachment an auditor has been appointed, and that the said auditor has been ordered by the said circuit court to sell all of the said goods and chattels as perishable property, and that the said auditor has advertised all of the said goods and chattels for sale, in his advertisement or notice of sale giving assurance to bidders that he will sell the said goods and chattels free from all liens or incumbrances. The complainant, having obtained an injunction restraining the auditor from selling, now asks for the appointment of a receiver with authority to sell the said personal property. This is resisted by the plaintiff in the attachment. It will be perceived that the complainant claims that these goods and chattels were the goods and chattels of Annie Sann, and that the plaintiff in the attachment claims them as the goods and chattels of Charles Sann. Charles Sann is the husband of Annie Sann. The complainant rests his case upon the rule laid down by Chancellor Green in *Smithurst v. Edmunds*, 14 N. J. Eq. 408. The case in hand is not like that. In that case the property which execution creditors offered for sale was not claimed by such creditors as the property of another person than the mortgagor of the same goods. As to that there was no dispute. Hence the question now before me is, can this court appoint a receiver in a foreclosure case to take charge of and sell personal property for the purpose of preserving it, covered by the mortgage sought to be foreclosed, when that

same property has been attached by the creditor of another person, as the property of that other person, and has been advertised to be offered for sale by an auditor appointed in said attachment proceedings? In *Moore v. Diament*, 41 N. J. Eq. 612, 7 Atl. 509, in the court of errors and appeals, a question somewhat like the present was before the court. In that case Hammell confessed judgment to his creditors, who levied upon certain goods and chattels. Moore filed a bill in this court, alleging that he had been in partnership with Hammell, and that Hammell became indebted to him as partner, and that, to satisfy such indebtedness, Hammell had made to him a bill of sale of all his interest in these goods and chattels, and asked for and obtained an injunction restraining the execution creditors of Hammell from proceeding to a sale. A receiver was appointed in that case, and, upon Moore's offering to give a bond to take care of the property, and to return it or to pay the value thereof, except in case of unavoidable accident, such bond was accepted. From this brief statement it will appear that execution creditors claimed a lien upon the property as the property of one man,—Hammell, their debtor,—while Moore claimed it as his own individual property absolutely, by virtue of a bill of sale made to him by Hammell, and that a receiver was appointed. The question involved in that case was one of title to personal property; Moore, the complainant, claiming the title was in himself, while the creditors of Hammell claimed that the title was in Hammell, and that they, as his creditors, by virtue of their judgments and executions, had a right to sell the same. It is claimed in this case that the question involved is purely a question of title to personal property, strictly legal in its nature, and can be determined by an action of replevin, and that consequently a court of equity has no jurisdiction. The case cited seems to present the same characteristics. Moore filed his bill, and claimed the property levied upon by virtue of a bill of sale, praying an injunction against such sale under the executions at law. Clearly, in such case, the principal question to be decided was whether the title was in Moore or Hammell. In the case now under consideration the question to be determined is whether the title to the property named in the chattel mortgage was in Annie Sann or in her husband, Charles Sann. If that were all, it might well be said that in neither case would this court be justified in assuming jurisdiction. But in the case cited, if the property which Moore claimed were to be sold by the execution creditors, with the conflicting claims of title thereto, he might, in a variety of ways, suffer great loss; which view is, in every sense, applicable to the case before me. In that case it was distinctly held in the court of errors and appeals that this court had the right to pro-

ceed to settle the rights of the parties by virtue of the bond given, notwithstanding a decree dismissing the bill of complaint. In this case the complainant claims a lien upon the goods and chattels by virtue of her mortgage. She undoubtedly has a right to file her bill to foreclose such mortgage, which beyond question gives the court jurisdiction.

But still the further question arises, can this court, because it is the only tribunal authorized to foreclose a mortgage upon goods and chattels, appoint a receiver to take charge of and sell such goods and chattels, when they are claimed by and under attachment by the creditors of another person than the mortgagor, and offered for sale by an auditor appointed in such attachment proceedings? There is a well-settled rule that courts of equity have the right and power to take possession of property about which are conflicting claims, for the purpose of preserving it until the rights of the respective parties thereto have been settled. May this rule be applied to the present case? It is evident, if the auditor makes sale of the goods and chattels because they are perishable, they will be likely to sell for a nominal price only, and will also be likely to go into the possession of many different persons. The fact that the complainant makes claim in the manner in which he does will cast such a shadow upon the title as to deter prudent men from bidding. The fact that they will in all probability go into the hands of many different persons would make it obligatory upon the complainant, if it should turn out that the title thereto be in him, to bring as many actions at law as there are purchasers. High, Rec. § 192. "A court of equity, appointing a receiver to take possession of property pending a litigation concerning the rights of the parties

thereto, is vested with the power to sell the property in the receiver's hands, whenever such course becomes necessary to preserve the interest of all the parties." Id.; *Crane v. Ford*, Hopk. Ch. 114. When a court of equity properly acquires jurisdiction of the parties and of the subject-matter in a cause, and appoints a receiver therein, and orders him to sell the property in controversy, such order, although irregular and improvident, cannot be assailed or questioned in a collateral action, and such action will not lie to set aside the order of sale and proceedings thereunder. High, Rec. § 196; *Libby v. Rosekrans*, 55 Barb. 219; *Brande v. Bond*, 63 Wis. 140, 23 N. W. 101. It being evident that the auditor cannot make sale of these goods except under great disadvantage, and that, if it should ultimately appear that the title is in the chattel mortgagor, and it also appearing that since the mortgagee was justified in filing his bill in this court, thereby acquiring jurisdiction of the subject-matter, and the court unquestionably having the authority to appoint a receiver, and it being the constant practice, when a receiver is appointed, to take possession of the perishable goods and chattels which are the subject of litigation, to make sale thereof for the purpose of preserving the value of them for the parties who may ultimately appear to be entitled thereto, I conclude that it is my duty to advise the appointment of a receiver in this case, with authority to make sale of the goods and chattels in question. The defendant, the attaching creditor, offered to give bonds for the value of the goods. A bond was offered and accepted in the case of *Moore v. Diamant*, supra, but in that case the person who gave the bond did not propose to sell them, as in this case the auditor proposes to do. I will advise accordingly.

STETSON v. NORTHERN INV. CO. et al.
(70 N. W. 595, 101 Iowa, 435.)

Supreme Court of Iowa. April 7, 1897.

Appeal from district court, Woodbury county; George W. Wakefield, Judge.

This appeal is by the plaintiff from an order and decree entered upon a motion to discharge the garnishees. The issues and facts appear in the opinion. Affirmed.

Shull & Farnsworth, for appellant. Joy, Call & Joy and William Milchrist, for appellees.

GIVEN, J. 1. Appellees moved to strike the appellant's abstract, which motion was overruled, and therefore we are to take the facts to be as shown in the abstract, the material parts of which are as follows: On April 11, 1895, this plaintiff commenced three separate actions to foreclose three mortgages executed by the defendant company to him to secure certain debts. These mortgages covered all of lots 4, 5, and 6, block 26, Middle Sioux City. Attachments were sued out in each case, and A. C. Baker and 16 others were served as garnishees. The answers of these garnishees showed that they are tenants of the defendant company, occupying premises other than that covered by plaintiff's mortgages, and that some of them occupied under verbal leases, and some under written leases, extending to different periods of the future. Their answers also showed that some of them were indebted for rents due, and that all would become indebted in the future under said leases. Plaintiff's three actions were consolidated, and formed the present action. On the 9th day of May, 1895, T. A. Black, though not a party to this action, filed his motion herein, supported by his affidavit, for the discharge of all of said garnishees except W. Chaffee, and showing as grounds therefor, in substance, as follows: That on the 11th day of April, 1895, in the case of Charles C. Harrison v. The Northern Investment Co. et al., then pending in said court for the foreclosure of a mortgage upon the real estate occupied by said garnishees, he was appointed and qualified as receiver of all the property of said company involved in said action; also, that he was appointed and qualified prior to the time said garnishees were served with notice of garnishment. Charles C. Harrison, though not a party to this action, did on the 18th day of May, 1895, file his motion joining with said Black in asking the discharge of said garnishees. By the record in the Case of Harrison, as it appears in the abstract, it was alleged in the petition that the Northern Investment Company was insolvent; that the property covered was insufficient to pay the mortgages and taxes thereon. It was asked, for these and other reasons stated, that a receiver be appointed; and Mr. Baker was appointed and qualified as receiver for all the property of the company described in

the mortgage to Mr. Harrison, and ordered to collect all rentals, income, and profits therefrom. It does not appear that any objections were made to the right of these persons to make such motions in this action. The motions having been submitted, the court says in the order complained of that "the court is of opinion, and doth adjudge, order, and decree, that as to all rentals payable or accruing on or before the 11th day of April, 1895, the said motion be, and is hereby, overruled, and as to all rentals accruing and payable after the 11th day of April, 1895, the said motion of T. A. Black, receiver, and C. C. Harrison is sustained." Following this, it was ordered that the amounts found to be due from the several garnishees up to April 11, 1895, be paid to the clerk of the court, and that upon payment the garnishees be discharged. It was further ordered as follows: "And upon the motion of T. A. Black, receiver as aforesaid, time is given him until the 20th day of August, 1895, to file his petition of intervention, claiming the funds so ordered to be paid to the clerk aforesaid."

2. Appellant presents in argument three contentions, namely, that the court had no authority to appoint a receiver under the allegations of Harrison's petition; that Harrison and Black could not give the court jurisdiction to discharge garnishees by simply filing motions in this cause; they not being parties thereto and not filing petitions of intervention; that the garnishment of the tenants made them liable to appellant, in case he is successful in this case against the company, for all rent accrued and to accrue. That part of Harrison's petition asking a receiver states numerous grounds, and at such length as that we should not take space to set them out. It is sufficient to say that the petition shows that the rents of the mortgaged premises are pledged for the payment of the debt, that they are not being applied, that the company is a foreign corporation; that it is insolvent, that the property is insufficient to pay the mortgages and overdue taxes, and other facts showing that the rents were in danger of being lost to the mortgagees. Conceding that the sufficiency of that petition in this respect may be questioned in this case, we think it was sufficient to warrant the appointment of a receiver.

3. Appellant does not question the right of Mr. Black, as receiver, if duly appointed, to intervene in this action to claim said rents, but denies his right to do so by motion. The record fails to disclose, except inferentially, that any such objection was made in the lower court. The abstract was prepared by other than the counsel now appearing, and with the view, no doubt, of not incumbering the abstract with more than was actually necessary to an understanding of the questions to be presented. Questionable as the record is as to this contention, we will consider it. It will be observed that

the order of the court is not final, as between these parties, as to the rents due up to April 11, 1895. The court, having full jurisdiction over that fund, ordered it to be paid into court, to be held until the rights of these parties thereto are determined. There has been no final order or judgment against appellant as to that fund, and he has nothing of which to complain. The question as to which of these parties is entitled to that money is not before us, and we express no opinion thereon.

4. If nothing further appeared than the pendency of this action and the service and answers of the garnishees, it might be said that they are liable to appellant, in case he is successful in this action against the company, for rents accrued and to accrue under their leases. The mortgage from the Northern Investment Company to Charles C. Harrison contains the following: "And it is further agreed that if default shall be made in any of the conditions of this mortgage, or in

the bond which it is made and given to secure, that the right of possession of the mortgaged premises, with all the appurtenances thereunto belonging, shall immediately vest in the party of the second part, his heirs or assigns, and he may immediately take possession of the same, and collect all rents, profits, and incomes therefrom, or, at his option, may proceed by foreclosure, and shall then be entitled to have a receiver appointed immediately, and in vacation, for all of the property herein described and embraced, to take charge of the said property, and collect rents, incomes, and profits of the same, to be applied upon the said mortgage debt." It seems to us entirely clear that under this provision the rents accruing from said mortgaged property after the appointment of the receiver are assets in his hands, and not subject to garnishment by other creditors. We do not think the court erred in either of the respects claimed, and the order and judgment are therefore affirmed.

FIRST NAT. BANK OF JOLIET v.
ILLINOIS STEEL CO.

(51 N. E. 200, 174 Ill. 140.)

Supreme Court of Illinois. June 18, 1898.

Appeal from appellate court, Second district.

Creditors' bill by the First National Bank of Joliet against the Ashley Wire Company and others for the appointment of a receiver, with which was consolidated a petition by the Illinois Steel Company, also for the appointment of a receiver. From a decree of the appellate court (72 Ill. App. 640) affirming a decree in favor of the Illinois Steel Company, the First National Bank of Joliet appeals. Affirmed.

This was a bill in the nature of a creditors' bill, filed December 26, 1893, by the First National Bank of Joliet, the appellant, against the Ashley Wire Company, a corporation in Joliet, Will county, Ill., which for many years had been engaged in the manufacture of barbed fence wire, wire nails, etc. The bill alleged the recovery of a judgment by said First National Bank of Joliet on the 14th day of December, 1893, for \$12,657.77, against said Ashley Wire Company; that execution was issued and delivered to the sheriff the same day, which execution was returned, after demand made, "No property found." Alleged the recovery of a judgment on the 8th day of December, 1893, by John Y. Brooks against said Ashley Wire Company for \$11,090, upon which execution had been issued and levied upon all the tangible personal property of said Ashley Wire Company, and that the value of such property so levied upon would not exceed \$5,000; that the sheriff had not sold said property so levied upon, and it was not sufficient to satisfy the said Brooks execution. Alleged the execution by said Ashley Wire Company on the 19th day of July, 1893, to the Illinois Steel Company, of a note for \$67,246.24, payable on or before two years after date, with interest at 5½ per cent. per annum, payable semiannually, and secured by a mortgage on its manufacturing plant; that said Ashley Wire Company is insolvent, and for many months has suspended its business, and its plant has remained idle; that it has not been able for the last year to meet its trade obligations, and has been seriously embarrassed in its financial affairs; that said wire corporation is and remains in the possession of its real estate and manufacturing plant, and, while it is not worth said mortgage indebtedness, is a valuable property, and ought not to be allowed to deteriorate in value or be greatly hazarded by neglect or want of care; that watchmen should be in charge, insurance should be kept up, and taxes paid; that all this should be done in the interest of said corporation, its stockholders and creditors generally; that said corporation is without means to protect

and preserve said property, and keep up its insurance or taxes; that the tangible property levied upon is of a kind and character so peculiar in its nature that it could not be sold at ordinary execution sale, except at a grievous sacrifice. Avers that the interests of defendant and all its creditors demand that a receiver should be appointed of its assets, both equitable and tangible; that said receiver should be directed to take possession of said manufacturing plant, its books of account, and its equitable assets and property. The Ashley Wire Company, John Y. Brooks, and Thomas Hennebry, as sheriff, were made parties defendant. Although the bill showed that the Illinois Steel Company, of Chicago, held a first mortgage on the Ashley Wire Company plant, machinery, etc., and was the principal creditor, yet it was not made a defendant to the bill. The appearance of the defendants was entered, and on the 26th day of December, 1893, the defendants not objecting, the court appointed George W. Bush receiver. The order invests him with all the authority and power usually granted receivers of courts of chancery, and directs that he at once take possession of the real estate and manufacturing plant of said Ashley Wire Company, together with all the machinery, tools, implements, and appliances connected therewith, and constituting real estate, as part and parcel of said plant; that he care for all such property, that it may not be wasted or deteriorate for want of proper care; that he keep the buildings insured in responsible insurance companies in a reasonable amount; and that he pay all taxes legally levied upon such real estate. It was further ordered that the said sheriff turn over to the receiver all the personal property levied upon by him under the execution in favor of John Y. Brooks, such sheriff to retain the execution, and the lien of such execution is preserved upon all such property levied upon, and the proceeds thereof levied upon by said sheriff, and turned over to said receiver. The receiver presented a petition on February 19, 1894, as to the payment of taxes, which states that there was duly assessed against and levied upon the personal property of the Ashley Wire Company for the year 1893 \$799.10 taxes, and that he has no money with which to pay said taxes, or the real estate taxes then due, and prays that an order be entered authorizing him to pay such taxes, and that he may be permitted to borrow money therefor. On the 26th of February, 1894, an order was entered authorizing the receiver to pay the taxes assessed upon the real estate, and authorizing the receiver to borrow money for that purpose at such legal rate of interest as he may be able, and to issue therefor his receiver's certificate, which was by the order of the court declared to be a first and prior lien upon the real estate of said Ashley Wire Company. The court denied the prayer of the petition as to the payment of

the personal property tax. On March 5, 1894, the Illinois Steel Company asked leave of the court to make George W. Bush, receiver, a party defendant to a chancery proceeding, which the court granted; and on the 7th day of March, 1894, the steel company filed a bill to foreclose its mortgage against the Ashley Wire Company plant, making said Ashley Wire Company, the First National Bank of Joliet, John Y. Brooks, and George W. Bush, the receiver, defendants. On the 12th day of July, 1894, after the commencement of the foreclosure proceedings, the receiver borrowed of the Illinois Steel Company \$2,037.82, in pursuance of the court's order, for the purpose of paying taxes, and issued a receiver's certificate therefor. The mortgage upon which the foreclosure proceedings were based, against the Ashley Wire Company, was to secure the note for \$67,246.24, payable on or before two years after date, with interest at $5\frac{1}{2}$ per cent. per annum; and the mortgagor expressly covenanted to keep the buildings insured for \$50,000, for the benefit of the Illinois Steel Company, mortgagee. It also contained a clause authorizing the appointment of a receiver, with power to collect the rents, issues, and profits during the period of redemption, in case of a foreclosure of the mortgage, and that such rents and profits should be applied towards the payment of the indebtedness. Answers were filed by the Ashley Wire Company and the First National Bank, defendants. A final decree of foreclosure was awarded the Illinois Steel Company January 14, 1895, and the property was sold to the said steel company for \$70,000. The master reported an unpaid balance, and a deficiency decree or judgment under the statute was entered for the deficit of \$5,316.50, with interest from March, 1895, and execution was awarded thereon. On the 10th of April, 1895, the Illinois Steel Company filed its petition in the foreclosure case, setting up the decree of foreclosure and the sale, the deficiency decree for \$5,316.50, and the foregoing provision in regard to the appointment of a receiver by the court to collect rents until the time of redemption, and asking for the appointment of a receiver. A hearing was had June 20, 1895, and the court refused to appoint a new receiver, but extended the receivership of George M. Bush existing over the property of the Ashley Wire Company by virtue of an order in the case of the First National Bank of Joliet, so that said receiver should stand as a receiver appointed in the case of the Illinois Steel Company against the Ashley Wire Company, and that the receivership be extended to include the property and effects of the Ashley Wire Company; and the receiver was directed to receive the rents, and hold the same for all persons who should be found entitled thereto. The receiver had previously, under the order of the court, leased the Ashley wire

plant for one year from December 1, 1894, for \$6,000, with the privilege of another year, at the option of the lessee, on the same terms. The receiver collected in all for rents \$12,000, and after paying the taxes and expenses there was left in his hands \$4,373.48. On March 3, 1897, the petition of the Illinois Steel Company was, by agreement of parties, consolidated with the cause of the First National Bank of Joliet against the Ashley Wire Co. et al., and was to be heard and disposed of as one case by decree to be entered in the case of the First National Bank of Joliet against Ashley Wire Co. et al. The principal contention is over the distribution of the balance of \$4,373.48; the trial court decreeing this amount to be paid the Illinois Steel Company out of the moneys in the receiver's hands derived from rents, to be indorsed on the deficiency decree. From this decree of the circuit appellant appealed to the appellate court for the Second district, which affirmed the decree of the circuit court; and from the judgment of the appellate court appellant has appealed to this court, and asks for the reversal of the judgment of the appellate court.

George S. House, for appellant. Garnsey & Knox (Elbert H. Gary, of counsel), for appellee.

CRAIG, J. (after stating the facts). It is first contended by appellant that the Illinois Steel Company, the mortgagee, having obtained its decree of foreclosure and sale, and applied the proceeds, the mortgage has accomplished its purpose, and is functus officio; that no further rights or equities can be enforced by the Illinois Steel Company. The claim of appellee is that the provision in the mortgage authorized the appointment of a receiver by the court to collect the rents and profits during the period of redemption, and, as the sale under the foreclosure decree did not pay the debt, to apply them in payment of the deficiency. The agreement in the mortgage is as follows: "Upon the filing of any bill to foreclose this mortgage, in any court having jurisdiction thereof, such court may appoint A. F. Knox, or any proper person, receiver, with power to collect the rents, issues, and profits arising out of said premises during the pendency of such foreclosure suit, and until the time to redeem the same from any sale that may be made under any decree foreclosing this mortgage shall expire; and such rents, issues, and profits, when collected, may be applied towards the payment of the indebtedness and costs herein mentioned and described." Under this clause in the mortgage a lien is given, by express words, upon the rents and profits, and such an equitable lien a court of equity will enforce. Rents and profits are the subject of mortgage. Jones, in his work on Mortgages (volume 1, § 140), says: "A mortgage may be made of rents under a lease, and, although a right of entry be given the mortgagee, the mortgage is a mere security, like

any other mortgage of real estate, and the mortgagor remains the real owner until foreclosure and sale." In section 771 he says: "A mortgagee has no specific lien upon the rents and profits of the mortgaged land, unless he has, in his mortgage, stipulated for a specific pledge of them as part of his security." This was expressly stipulated in this mortgage given by the Ashley Wire Company to appellee. Had there been no deficiency after the foreclosure sale of the Ashley Wire Company property and plant, the rents would have belonged to the owner of the equity of redemption. Under the express agreement in the mortgage, there being a deficiency of \$5,316.50 after the sale, the Illinois Steel Company had an equitable right to have the rents and profits applied towards the payment of the deficiency decree, from the time of the foreclosure sale until the expiration of the time of redemption, and this right might properly be enforced on an application to the court to appoint a receiver. The contention by appellant in this case that the enforcement of this provision rests entirely in the sound discretion of the chancellor is not tenable. The chancellor was authorized to act under this clause in the mortgage, and appoint a receiver for the collection of the rents and profits during the period of redemption, to be applied on the deficiency decree. In the case of *Oakford v. Robinson*, 48 Ill. App. 270, which is similar to the one at bar, the mortgage contained a clause authorizing the appointment of a receiver, with power to take possession of the premises and collect the rents due and to become due thereon during the period allowed for redemption, and to apply the same in payment of any deficit, should the premises prove insufficient to pay the amount secured by the mortgage. In the decision of the case the court said: "The rents and profits of the land, as well as the land, were pledged by the mortgage for the security and payment of the amount due the appellee. This authorized the appointment of a receiver, in the discretion of the court, without regard to the solvency of the mortgagor. 2 Jones, *Mortg.* § 1516; 8 Am. & Eng. Enc. Law, p. 234. And such appointment was lawfully made, though by a decree subsequent to the original decree. *Id.*, p. 239. By the appointment of the receiver the appellants obtained an equitable lien on the rents and profits of the land during the statutory period allowed for redemption, if necessary for the full payment of any deficiency in the security. In support of this view, see 1 Jones, *Mortg.* §§ 773-775; 2 Jones, *Mortg.* § 1536; High, *Rec.* §§ 643, 644; Beach, *Rec.* § 532." That a court of equity has power to appoint a receiver and grant equitable relief where there are no express words in the mortgage giving a lien upon rents and profits derived from the property is conceded. In such a case, whether relief will be granted is dependent upon the facts and circumstances at the time the application is made. This court said in *Haas v. Society*, 89 Ill. 498, at

page 502: "We find the decided weight of American authority to be in favor of the proposition that the court may, even when the mortgage does not by express words give a lien upon the income derived from such property, appoint a receiver to take charge of it and collect the rents, issues, and profits arising therefrom. Such action will not be taken, however, unless it be made to appear the mortgaged premises are an insufficient security for the debt, and the person liable personally for the debt is insolvent, or at least of very questionable responsibility. A combination of these two things seems to be required in all the cases we have examined, and in one or more of the states it is held necessary still other elements should be conjoined to these before such procedure is justified." Tested even by this requirement, if the mortgage did not give a lien by express words, or authorize the appointment of a receiver, the facts in the case at bar show that the court committed no error. The deficiency decree itself evidences the fact that the Ashley Wire Company's property was insufficient security for the mortgage debt, and the facts established the allegation in the petition that the Ashley Wire Company, the mortgagor, was insolvent. Undoubtedly, a court of equity exercises a certain discretion, even where express words are used for the purpose of giving a lien on the income of the mortgaged property. The court must determine whether the language used in the mortgage is sufficient to give a lien on the income. In the one case the authority arises from the contract, the express words giving a lien on the rents and profits; in the other, the court exercises its equitable powers under the facts and circumstances presented at the time the application to appoint a receiver is made.

Appellant also contends that the final decree foreclosing the mortgage ought to have provided for a receiver to take possession of the rents and profits of the Ashley Wire Company pending the redemption; that a decree of foreclosure and sale, as to all questions that might have been adjudicated between the parties, is final. It could not be ascertained until after the sale whether there would be a deficit requiring the appointment of a receiver to collect the rents and profits during the time of redemption. Under the decree of foreclosure the property described in the mortgage was sold. The rents and profits to accrue during the period of redemption were not sold, and no order could be entered until it was ascertained at the foreclosure sale that the mortgaged premises were insufficient to pay the indebtedness evidenced by the mortgage. In *Haas v. Society*, *supra*, it was said (page 506): "The necessity for the appropriation of the rents to the payment of the mortgage debt may frequently not appear until after both decree and sale. The amount due is often matter of dispute, and can only be determined by the decree, and what the property will sell for can only be ascertained with certainty from the result of the judicial sale.

If an appropriation of the rents on the indebtedness is justified by the surrounding facts before sale, we see no good reason why the same and more weighty facts existing after sale may not warrant a similar procedure. The security, plainly, is not exhausted by the sale, for there is a fund included in it which is secondarily liable. It is true, the mortgagee has elected to foreclose and sell; but then he has pursued that remedy to the end, and without getting satisfaction of his debt, and he may avail himself of any just and equitable means of collecting the residue, —not that he may have such extraordinary remedy in all cases of a deficit in the proceeds, but only where it is indispensably necessary for his protection, and just and equitable. We hold, then, both upon the principles of equity that lie at the foundation of the chancery court, and upon authority, a receiver may sometimes be allowed after decree and sale, and that a mortgagee does not in all cases exhaust his security by a foreclosure and sale. It is, however, a power that the chancellor will be slow to exercise, except in an extreme case, and to prevent palpable wrong and injustice." The cases of *Seligman v. Laubheimer*, 58 Ill. 124, *Ogle v. Koerner*, 140 Ill. 170, 29 N. E. 563, and *Davis v. Dale*, 150 Ill. 239, 37 N. E. 215, cited by appellant in support of its contention that a decree of foreclosure and sale extinguishes the mortgage and renders the mortgage functus officio, are decided on a state of facts entirely different from the facts in this case. In *Seligman v. Laubheimer*, after a sale for less than the debt a junior mortgagee redeemed, and a petition was filed to order a resale to pay the balance due the first mortgagee. It was held that as to the property sold the mortgage was not operative, and a resale could not be had. No question of a mortgage of rents accruing during the statutory period of redemption was involved. In *Ogle v. Koerner* the facts were the same as to the mortgage, the sale, and redemption by an assignee of a second mortgage, who was a party, as in the *Seligman Case*. The tenor of the case, as to its application here, may be seen by the following quotation from the court's opinion (page 179, 140 Ill., and page 565, 29 N. E.): "A mortgage, or, as in this case, a deed of trust in the nature of a mortgage, vests in the party secured a lien upon the mortgaged premises. By virtue of that lien the mortgagee is entitled to have the mortgaged property sold under a decree of foreclosure, and the proceeds of the sale applied to the payment of the debt secured. This is the mode provided by law for the enforcement of the lien, and when the lien has been once enforced by the sale of the property it has, as to such property, expended its force and accomplished its purpose, and the property is no longer subject to it." In *Davis v. Dale* a mortgage was foreclosed. Pending foreclosure a receiver was appointed. The property was sold for the full amount of the debt, in-

terest, and costs; but the receiver was continued, as appears, unnecessarily. The court said (page 243, 150 Ill., and page 216, 37 N. E.): "The only purpose of appointing a receiver at the instance of the mortgagee or cestui que trust under or trustee in the trust deed is to preserve the security of the mortgage or trust deed, and apply the rents, issues, and profits, when necessary, in discharge of the indebtedness; and it follows, necessarily, that where the property is bid off at the foreclosure sale for the full amount of the decree, interest, and costs, as was here done, the necessity for continuing the receiver ceases, and he should be discharged, and the possession restored to the owner of the equity of redemption. In any event, the possession of the receiver, and his receipt of the rents and profits arising from the property, would be for the benefit of the person entitled to the same, so that the parties acquired no additional right because the fund is in the hands of the receiver." The question involved in this case, to wit, where the property sold does not pay the mortgage debt, and where the mortgage has a provision that the rents and profits may be applied towards the payment of the indebtedness and costs, was not before the court in either of the cases cited by appellant. Here the receiver was properly appointed after the foreclosure decree and sale, as the security of the steel company was not exhausted by the sale. Moreover, the necessity for the appointment of a receiver, and the collection of the rents and profits, and their application to the payment of the deficiency, did not appear until after the foreclosure decree and sale.

Appellant also contends that the court erred in directing the receiver, in its several orders, to pay the taxes on the property of the Ashley Wire Company out of the funds in his hands derived from rents of the real estate. Appellant filed its bill to have the equitable assets of the Ashley Wire Company applied to the satisfaction of its judgment, and also to have these taxes paid by the receiver out of moneys collected by him. The bill alleges that said corporation defendant is and remains in the possession of its real estate and manufacturing plant, and, while not worth the said mortgage indebtedness, is a valuable property, and ought not to be allowed to deteriorate in value or be greatly hazarded by neglect or want of care; that watchmen should be in charge, insurance should be kept up, and taxes paid; that all this should be done in the interest of said corporation, its stockholders and creditors generally; that said corporation is without means to protect and preserve said property, keep up its insurance, or pay the taxes, and is without means to preserve, care for, and collect its equitable assets. The receiver was appointed on appellant's motion, and its own solicitor's name is recited in the order of the court December 26, 1893, inter alia: "That upon obtaining possession he properly care for all such property, to the end that

it may not be wasted or deteriorate for want of proper care, that he keep the buildings and all improvements insured in responsible insurance companies in a reasonable amount, and that he pay all taxes and assessments legally levied upon such real estate." This order of the court has never been rescinded, so far as the record shows. The order of March 11, 1895, authorizing the receiver to pay the taxes of 1894, recites: "It is therefore ordered, adjudged, and decreed by the court that the said George W. Bush, as receiver, out of the moneys in his hands pay to the said township collector the personal property taxes assessed against the said Ashley Wire Company for the year 1894, being the sum of \$669.12, taking proper receipt therefor, and that said receiver in the making of said payment, all parties in interest in open court consenting thereto," etc. On June 20, 1895, the receiver, by appellant's counsel, presented his petition, and in the order of the court directing him to pay the taxes on the real estate the same order of consent appears. In *Armstrong v. Cooper*, 11 Ill. 540, this court said: "A decree made by consent cannot be appealed from, nor can error properly be assigned upon it. Even a rehearing

cannot be allowed in the suit, nor can the decree be set aside by a bill of review. 1 Barb. Ch. Prac. 373." *Smith v. Kimball*, 128 Ill. 583, 21 N. E. 503; *Roby v. Trust Co.*, 166 Ill. 336, 46 N. E. 1110. These orders being made at the request of appellant, and by consent, it cannot question their validity.

Objection is also made to the order of court directing the payment of the real and personal taxes for the year 1895 by the receiver. The amount paid was \$1,874.41. The order extending the receiver on the petition of the Illinois Steel Company was made June 20, 1895, authorizing him to receive the rents and profits, to be held by him subject to the order of court. The redemption from the sale under the mortgage foreclosure of the Illinois Steel Company against the Ashley Wire Company expired June 9, 1896. This money derived from rents belonged to the Illinois Steel Company by virtue of the specific lien in the mortgage, and, the receiver having paid these taxes from funds belonging to appellee, appellant cannot complain. Finding no reversible error in the record, and the decree of the court appearing to be equitable, the judgment of the appellate court is affirmed. Judgment affirmed.

CENTRAL TRUST CO. v. NEW YORK CITY & N. R. CO. (ATTORNEY GENERAL, Intervener).

(18 N. E. 92, 110 N. Y. 250.)

Court of Appeals of New York. Oct. 2, 1888.

Appeal from supreme court, general term, First department.

On the petition of the attorney general the supreme court, at special term, in New York county, made an order directing Joel B. Erhardt, the receiver appointed in the action of the Central Trust Company against the New York City & Northern Railroad Company, to make provision for the payment of the taxes levied on the corporate franchise of the railroad company. From this order the receiver appealed, and the general term (Daniels, J., delivering the opinion, Van Brunt, P. J., and Brady, J., concurring) reversed the order. From the order of reversal the attorney general takes this appeal.

Charles F. Tabor, Atty. Gen., for appellant.
Artemas H. Holmes, for respondents.

PECKHAM, J. The railroad company above named was incorporated under the laws of this state, and had its principal business office in the city of New York. In May, 1882, a receiver thereof was appointed in proceedings taken to sequester its property by a judgment creditor whose execution had been returned unsatisfied. Such receiver operated the road from the time of his appointment to February 3, 1885, when another receiver was appointed in the action above entitled, which is brought to foreclose certain mortgages executed by the company upon its property. The first receiver turned over the property and the possession of the road to the receiver appointed in the foreclosure proceedings, and from the time of the appointment of the latter up to a time subsequent to the year ending June 30, 1886, he has operated the road by virtue of such appointment. Taxes became due and payable under the corporation tax act of 1880, as amended by chapter 361 of the Laws of 1881, which amounted at the time of the filing of his petition by the attorney general, in February, 1887, to about the sum of \$8,000; being for taxes on the gross earnings of the road as thus operated for the years ending June 30, 1883, 1884, 1885, and 1886, respectively. No question is made as to the amount of the tax in each year, or that there is a sum in the hands of the receiver which may be applicable to their payment; but the counsel for the receiver insists that the corporation is alone answerable for the taxes, and that recourse must be had to it for the payment of the same, or to such funds as may remain in the receiver's hands after the claims of the mortgagees have been satisfied; which in this case is but another manner of stating that there is no way of collecting these taxes, for, if their payment is to be postponed to the payment of the whole amount of the mortgage debt of

the company, all of its property will have been wholly exhausted long before payment in full of its mortgage indebtedness could be made. Various other objections were taken to the granting of the petition of the attorney general.

The taxes in question, having been levied by virtue of the above-mentioned corporation tax law, were taxes upon the franchise, as distinguished from the property, of the corporation. *People v. Insurance Co.*, 92 N. Y. 328. Upon this assumption the counsel for the receiver claims that the taxes are not made a lien upon property by the act creating them, and cannot, therefore, be held to be a prior or paramount charge upon the funds in the receiver's hands, on the ground that they are debts due to the state, or on the ground of public policy. The manner of proceeding to collect these taxes has been designated in the act which imposes them, and is to be found in sections 7 and 9 of such act. By section 7 the tax "shall be collected for the use of the state as other taxes are recoverable by law from such corporation," etc.; and by section 9 the taxes "may be sued for in the name of the people of the state, and recovered in any court of competent jurisdiction in an action to be brought by the attorney general at the instance of the comptroller." Under section 7, the proceedings to collect the taxes being the same as other taxes are recovered by law, (not relating to those imposed on real estate,) those proceedings would be regulated by the Revised Statutes, as amended by chapter 456 of the Laws of 1857. It is argued that, as proceedings to enforce the collection of taxes thus imposed are provided for in the very act which imposes them, such proceedings must in all cases be taken, and that all other remedies are absolutely excluded. It is upon this ground that the learned judge who wrote the opinion at the general term proceeded, the result of which was to reverse these proceedings, because not undertaken pursuant to the provision of the statute in question. Generally speaking, the rule as thus laid down is to be followed, and the remedy is confined in the manner stated. But in such a case as this we think the rule is not to be applied. When the property of a corporation is already sequestered, and a receiver appointed, and where in addition thereto foreclosure proceedings are pending against it to foreclose mortgages to an amount in excess of all its property, and a receiver has also been appointed under such proceedings, and where the corporation is largely and hopelessly insolvent, and all of its property in the hands of the receiver appointed by the court, and where the money to pay the taxes has arisen from the gross earnings, and an amount sufficient to pay them is in the hands of the receiver, we are of opinion that the proceedings to obtain payment of those taxes thus in the receiver's hands are not confined to those provided for by the act cited, but that a direct application for an order on the receiver for

their payment may be made to the court by petition, as in this case, having made the corporation and the receiver a party thereto. If there are any disputed questions of fact to be determined, the court may direct an action to be brought, or may determine it in some other and more summary way.

We feel more certain in regard to this question by looking at the proceedings which are provided to be taken under the general laws. They are to be instituted by petition upon which the court may sequester such part of the property of the company as shall be necessary for the purpose of satisfying the taxes in arrear with the costs, etc.; and in its discretion the court may proceed further, and enjoin the company and its officers from any further proceedings under the charter, in order to enforce the payment of the taxes. But, in a case where the whole of the property has already been sequestered under other proceedings, the sequestration provided for would not be very efficient. Neither would an injunction which simply enjoined the company and its officers from further proceedings under the charter be in and of itself very efficient as against a receiver who was operating the railroad under the order of the court. In such case, if the injunction were granted, it would only become effective because the court would then order its officer, the receiver, to pay the tax, and go on with the operation of the road. But it would be a farce for the court to first issue the injunction against the receiver, restraining him from operating the road until he paid the tax, and then ordering him to pay it for the purpose of continuing its proper operation. The result would be that the receiver in the end would pay the tax, because he was ordered to do so by the court. The order might just as well be issued in the first instance, without this circuitous method. The privilege granted by the other section of the act of 1881, to sue for the taxes in the name of the people, in an action brought by the attorney general at the instance of the comptroller, would also result in the court ordering the receiver to pay the tax, for in no other way could the judgment for the recovery of the tax become effectual. In all cases, therefore, the payment by the receiver would be made by order of the court, and in all cases the order might just as well be made in the first instance.

We do not think that these provisions of the statute should, under such circumstances, be held to restrict the general power of the court to direct its officer to pay those claims which exist in favor of the state for taxes imposed upon the corporation, where the claim of the state for the payment of such taxes is, as we think, a paramount one. An insolvent corporation in the hands of and operated by a receiver was not in the minds of the framers of the statute when providing for the enforcement of payment of taxes from what may be termed a "going corporation."

It may be admitted that in a strict and technical sense these taxes, when first imposed, are not a lien upon any specific property of the corporation. But we are of the opinion that the railroad, when in the receiver's hands and operated by him, is operated under and by virtue of the franchise which has been conferred upon the corporation by the state; and that when he receives the gross earnings arising from its operation, and has in his hands money enough to pay these taxes, the state has a paramount right to collect them before the moneys applicable to such payment shall be paid away by the receiver. Having such paramount right, the court may in its discretion listen to the petition of the state through its attorney general, and direct its officer to make the payment asked for.

It is claimed, however, that when a receiver is appointed by the court, if he operates the railroad under its order, he does so by virtue of the equity powers of the court conferred by the constitution; and hence that the receiver is not bound to pay the taxes, although he receives all the earnings of the company. But what does the receiver operate? Under this order of the court he takes possession of all the property of the corporation, and proceeds to operate, that is, to run, its trains, and to do all that was formerly done under the direction of the board of directors. In this way he uses the franchise which has been conferred by the state upon the company, and he uses it as an officer of the court which is administering the affairs of the company, and through the court he acts as the company to the same extent, *pro hac vice*, as if the board of directors were operating the railroad. It is the franchise which is being used in both cases, only in one case it is used for the company, and substantially by it, by means of its board of directors; while in the other case the same franchise is being used, and the road is operated under it, by an officer of the court, until, by virtue of the legal proceedings connected with the receivership, the receiver is discharged, and the road returned to its former possessors, or other proceedings taken under a reorganization, as provided by law.

The learned counsel for the receiver has cited the case of *Com. v. Bank*, 123 Mass. 493, as authority for the proposition that after a corporation is placed in the hands of a receiver no tax of this nature can be levied upon or collected from it. But the case is not in the least analogous to the one under discussion. In the case in Massachusetts the tax was laid upon the amount of the average of deposits in the bank for the preceding six months, which was held to be a tax on the value of the franchise thus ascertained; and it was further held that if on the day when the tax was to be laid the bank was in the hands of a receiver it was not liable to pay any part of the tax, although it transacted business during a part of the preceding six months. It will be seen, however, that the

receiver was appointed under a decree of the court perpetually enjoining the bank from doing any further business, and the receiver was appointed to wind up its affairs, and the bank was at once and forever deprived of the exercise or use of its franchise. The court held that as the tax was upon the franchise, the value of which was to be ascertained on the day the tax was imposed, by reference to the amount of the average of deposits for the past six months, if on that day the franchise had ceased to exist, no tax could for that reason be imposed; and it was wholly immaterial that for a portion of the preceding six months the franchise had been in existence and was actually used. It thus appears that the appointment of the receiver was one of the steps to wind up a corporation which was, on the day set for the imposition of the tax, to all intents and purposes dissolved, and was no longer in existence, and hence the decision of the court was entirely unassailable. No such fact exists in the case before us. The corporation was not dissolved in form nor in substance, so far as this question is concerned. The franchise was in existence and was actually used, and no decree of dissolution had ever been pronounced. The agent who used the franchise was an officer of the court, acting under its authority, instead of the board of directors; but it was the franchise of the company which was in use at all times. In *Trust Co. v. Railroad Co.*, 117 U. S. 434, 6 Sup. Ct. 809, the supreme court of the United States, while declining to give preference to receiver's certificates over mortgage bondholders under the facts in that case, did grant preference to the claims of the state for taxes. The taxes were, it is true, upon property; but the case is not authority for the proposition that if the tax is

not a technical lien on specific property when imposed, then no preference can be granted in a case like this. We reiterate the statement of Porter, J., in *Re Columbian Ins. Co.*, 3 Abb. Dec. 239, that there is great force in the claim that "the state has succeeded to all the prerogatives of the British crown, so far as they are essential to the efficient exercise of powers inherent in the nature of civil government, and that there is the same priority of right here, in respect to the payment of taxes, which existed at common law in favor of the public treasury."

We certainly have no doubt that, in a case like this, the court can make the order, (slightly modified as mentioned below,) which was made herein at special term, and that the statutory remedies for the collection of taxes of the nature herein specified are not controlling in the case of an insolvent corporation and upon such facts as are herein proved. The parties hereto both agree that, as there is a fund applicable to the payment of these taxes, there is no necessity for the insertion in the special term order of the provision for issuing certificates by the receiver to raise money to pay the taxes. Without discussing or deciding the question, therefore, whether, in case the receiver had not the money on hand with which to pay these taxes, the court would order him to issue and sell receiver's certificates, and with the proceeds pay them, we shall modify the special term order by striking out such a provision. As thus modified, we think that order was correct.

For these reasons the order of the general term of the supreme court should be reversed, and that of the special term be modified, as already stated, and as modified affirmed, without costs. All concur.

FARMERS' LOAN & TRUST CO. v. GRAPE CREEK COAL CO.

(50 Fed. 481.)

Circuit Court, S. D. Illinois. May 7, 1892.

In Equity. Bill by the Farmers' Loan & Trust Company against the Grape Creek Coal Company to foreclose a mortgage. A receiver was appointed, and he now asks leave to issue receiver's certificates.

Runnells & Burry, for Farmers' Loan & Trust Co.

W. J. Calhoun, for J. G. English, receiver.

Hess & Johnson, for Travellers' Ins. Co. and other objecting bondholders.

GRESHAM, Circuit Judge. The defendant, a private corporation, whose chief business is mining and selling coal, conveyed to the complainant, in trust, lands and two coal mines in Vermilion county, Ill., to secure an issue of bonds amounting to \$500,000. An installment of interest was allowed to remain due for more than six months, and this bill was filed to foreclose the trust deed. Joseph G. English, who was appointed receiver, asks for an order authorizing him to issue receiver's certificates not exceeding in all \$24,000, which shall be a first lien upon the trust property, to enable him to pay taxes now due, amounting to \$3,428.64, take up outstanding certificates amounting to \$6,400, which were issued under an order of the Vermilion circuit court, in a suit to foreclose the same trust deed, and to continue the operation of the mines. The receiver represents that, with additional working capital, he could operate the mines profitably, and better protect them. The holders of 75 per cent. of the bonds and the corporation join in the receiver's request. The holders of the remaining 25 per cent. resist the application. The corporation is insolvent. It is not claimed that the receiver is without means to pay taxes, and it is chiefly to enable him to continue the operation of the mines for anticipated profits that he desires authority to issue certificates.

When it becomes necessary for a court of chancery to take possession of property which is the subject of litigation, by placing it in the hands of a receiver, all expenses incident to its safe-keeping and preservation are properly chargeable against it; and, if there be no income, such expenses will be paid out of the proceeds of the corpus before distribution to lien or other creditors. It does not follow, however, that because property of a private corporation or a natural person may be thus protected and preserved before sale, that, in order to raise money to operate it for profit, a court may place a charge upon it in advance of existing liens. Pending a suit to foreclose a mortgage executed by a railroad corporation, the road may be operated by a receiver, and debts contracted for labor, supplies, and other necessary purposes before as well as after the appointment of a receiver,

may be made a first lien upon income, and, if that is not adequate, upon the corpus of the property. In the exercise of this exceptional and extraordinary jurisdiction, which is of comparatively recent origin, courts have entered orders making receiver's certificates first liens on the mortgaged property. This has been done, however, on grounds not applicable to mortgages executed by private corporations. A railroad corporation is a quasi public institution, charged with the duty of operating its road as a public highway. If the company becomes embarrassed and unable to perform that duty, the courts pending proceedings for the sale of the road will operate it by a receiver, and make the expense incident thereto a first lien. This is done on account of the peculiar character of the property. It is generally mortgaged to secure bonds, and persons who invest in such securities know that the mortgage rests upon property previously impressed with a public duty. Private corporations owe no duty to the public, and their continued operation is not a matter of public concern. It is only against railroad mortgages that the supreme court of the United States has sustained orders giving priority to receiver's certificates representing particular indebtedness, and, as already stated, then only on principles having no application to a mortgage executed by a private corporation owing no duty to the public. *Fosdick v. Schall*, 99 U. S. 235; *Barton v. Barbour*, 104 U. S. 126; *Miltenberger v. Railroad Co.*, 106 U. S. 286, 1 Sup. Ct. 140; *Union Trust Co. v. Illinois M. R. Co.*, 117 U. S. 434, 6 Sup. Ct. 809; *Wood v. Trust Co.*, 128 U. S. 421, 9 Sup. Ct. 131; *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950; *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. 61.

In *Wood v. Trust Co.* the court said: "The doctrine of *Fosdick v. Schall* has never yet been applied in any case except that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern. We do not undertake to decide the question here, but only point it out."

In *Kneeland v. Trust Co.*, supra, in discussing the jurisdiction of the chancellor to displace the lien of a railroad mortgage, the court said: "Upon these facts we remark, first, that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because, in a few specified and limited cases, this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged

property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company, or to work for it; and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens." And further on in the same opinion the court said: "If, at the instance of any party rightfully entitled thereto, a court should appoint a receiver of property, the same being rail-

road property, and therefore under an obligation to the public of continued operation, it, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies, or rentals, and make such expenses a prior lien on the property itself."

In the language above quoted, there is a plain implication that the limited power which courts may exercise in displacing the liens of railroad mortgages should not and cannot be extended to mortgages executed by private corporations. The court is not asked to subvert the lien of the mortgage on the ground that the trustee or bondholders have got possession of anything which, in equity, belongs to general creditors. It is to enable him to operate the mines for the benefit of bondholders, against the wish of part of them, that the receiver desires to be invested with authority to issue certificates which shall be a prior lien upon the property embraced in the trust deed. Extensive as are the powers of courts of equity, they do not authorize a chancellor to thus impair the force of solemn obligations and destroy vested rights. Instead of displacing mortgages and other liens upon the property of private corporations and natural persons, it is the duty of courts to uphold and enforce them against all subsequent incumbrances. It would be dangerous to extend the power which has been recently exercised over railroad mortgages, (sometimes with unwarranted freedom,) on account of their peculiar nature, to all mortgages. The power does not exist, and the application is denied.

HANNA et al. v. STATE TRUST CO. et al.
(70 Fed. 2, 16 C. C. A. 586.)

Circuit Court of Appeals, Eighth Circuit.
Sept. 23, 1895.

No. 593.

Appeal from the circuit court of the United States for the district of Colorado.

On the 1st day of November, 1889, the Denver-Arapahoe Land Company, a Colorado corporation, executed to the appellant John R. Hanna its trust deed on 11,320 acres of land in Arapahoe and Douglas counties, Colo., to secure to the appellant Rufus Clark the payment of its promissory notes aggregating the sum of \$97,000. On the same day the same corporation executed to the Mercantile Trust Company of New York, as trustee, a deed of trust on 4,480 acres of land in Arapahoe county, Colo., to secure an issue of its first mortgage bonds amounting to \$140,000. On the 1st day of March, 1890, the Denver Water-Storage Company, a Colorado corporation, executed to the State Trust Company of New York, as trustee, a deed of trust on about 1,100 acres of land in Douglas county, Colo., together with the Castlewood dam and reservoir, irrigating canals, ditches, etc., to secure the payment of its first mortgage bonds amounting to the sum of \$300,000. Each of these deeds of trust covers different properties, and is the first and valid lien upon the property covered by it. On or about the 1st day of May, 1891, the Denver Land & Water-Storage Company was organized, pursuant to the laws of Colorado, by the consolidation of the Denver-Arapahoe Land Company and the Denver Water-Storage Company, and by virtue of such consolidation acquired, subject to the deeds of trust above described, all of the property covered by or embraced therein. Immediately after its organization the Denver Land & Water-Storage Company executed a deed of trust upon the entire property acquired by the consolidation mentioned, subject to the several deeds of trust executed by the constituent companies, and above set forth, to the State Trust Company of New York, as trustee, to secure an issue of its general or consolidated mortgage bonds to the amount of \$800,000. On the 4th day of June, 1894, the State Trust Company of New York, as trustee in the consolidated mortgage last above mentioned, filed its bill of complaint in the circuit court of the United States for the district of Colorado against the Denver Land & Water-Storage Company, alleging that it had made default, and failed to pay the taxes on its lands or interest upon its bonds, and that it was insolvent, and prayed for the foreclosure of its mortgage and the appointment of a receiver. This bill admitted the priority of the underlying deeds of trust executed by the constituent companies, and that any relief granted in the suit, by foreclosure or otherwise, must be subject to the rights and equities existing under the prior mortgages.

On the day the bill was filed the Denver Land & Water-Storage Company appeared and answered; admitting its insolvency, and confessing all the allegations to the bill. The court thereupon appointed a receiver. On the 24th of July, 1894, the State Trust Company filed its amended and supplemental bill of complaint, to which the Mercantile Trust Company of New York, and the appellants, John R. Hanna and Rufus Clark, were made defendants. This amended bill prayed relief as follows: That the said Mercantile Trust Company, John R. Hanna, and Rufus Clark might be brought in as defendants in the action, and required to set up their respective rights upon the real estate covered by the deeds of trust executed by the Denver-Arapahoe Land Company; that the respective rights of the trustees under the several mortgages or deeds of trust might be judicially ascertained and determined by the court; that the properties covered by the respective deeds of trust might be marshaled, and judicially ascertained and adjusted; that the amounts due upon the notes and bonds issued under the several deeds of trust might be adjudicated and determined; that the said deeds of trust might be foreclosed; that the receiver theretofore appointed in the action might be continued as receiver of all the property covered by each and all of said deeds of trust; that the said John R. Hanna, Rufus Clark, and the Mercantile Trust Company, and the holders of any of the notes, bonds, or securities issued under said deeds of trust, might be enjoined and restrained from commencing any action or proceeding in the circuit court of the United States for Colorado, or any other court, for the foreclosure of the said deeds of trust, and from enforcing their said notes and bonds, or for the collection thereof, against the Denver Land & Water-Storage Company, or its property and effects, except in this action.

On the 16th day of August, 1894, a special master appointed in the cause made a report, from which it appears that the company was endeavoring to carry on a colonization business, and was engaged in selling small tracts of land, for fruit raising and garden purposes, to settlers, or those who proposed to become settlers, or colonists; that in many cases the company sold these tracts of land (usually 10 acres), under executory contracts, for small amounts of cash down, and deferred payments extending over a period of five years, when the various purchasers were to receive the deeds. The company agreed to plant these tracts with fruit trees, and cultivate and care for them during the five years. On the 16th of August the receiver filed his petition, stating, substantially, that the property of the Denver Land & Water-Storage Company consists of 17,000 acres of land in the counties of Arapahoe and Douglas, Colo., and an extensive dam or reservoir, known as the "Castlewood Dam," and a system of canals and irrigating ditches connect-

ed therewith, and a large number of land-purchase contracts and land-purchase notes, referred to in the report of the special master; that the original plan of the Denver Land & Water-Storage Company contemplated the colonization of these lands; the amount of the land-purchase contracts and notes, as shown by the report of the special master; the agreements made by the Denver Land & Water-Storage Company to plant and cultivate the lands, already referred to, and that in consideration thereof the various purchasers have made large payments, and have a right, in justice and equity, to demand performance of the contracts of the Denver Land & Water-Storage Company, and that otherwise the fruit trees upon the tracts sold under the planting and cultivation contracts will die, and the payments made by the purchasers will be absolutely lost; and that, moreover, it is of vital importance to the company that it should collect the balance due upon the land-sale notes and contracts mentioned, which collection is entirely dependent upon the keeping up of the tracts of land, and the performance by the company of the contracts with the purchasers aforesaid. The petition then presents a number of reasons and arguments why, in the judgment of the receiver, certificates should be issued, and calls attention to the default in taxes upon the company's lands, alleged to amount to about \$4,000. The particulars of the three underlying mortgages and the consolidated mortgage are then given, and the receiver calls the court's attention to the opportunity which presents itself for engaging in the colonization of the company's barren lands, if he is authorized to issue certificates of indebtedness to raise funds with which to properly present the merits and advantages of the Denver Land & Water-Storage Company's property. On the 15th day of September, 1894, the court made an order, upon the receiver's petition, which authorized the issue of receiver's certificates to pay taxes due upon the lands, and to redeem the same from tax sales, and making such certificates a first and paramount lien upon the property upon which the taxes were paid. The order also contained this provision: "(5) It is further ordered, adjudged, and decreed that in addition to the amounts which may be necessary to pay the taxes now in arrears upon the property set forth and described in paragraphs 2, 3, and 4 of this order, the receiver shall have, and is hereby granted, authority to borrow such additional sum of money as shall, together with said amounts for taxes, amount in the aggregate to a sum not exceeding \$10,000, and to issue therefor his certificates of indebtedness, which said certificates of indebtedness shall be first and paramount liens upon all the property, rights, and franchises now owned or controlled by the said the Denver Land & Water-Storage Company, defendant herein, wheresoever situated, and

subject, to the jurisdiction of this court. And said additional sums of money shall be used and applied by said receiver for the purpose of preserving the property of the Denver Land & Water-Storage Company in his possession and custody, and carrying out and maintaining the contracts of the company now in existence, under and by which the company has heretofore sold tracts of land to various parties, which said contracts are referred to in the report of said receiver, and for such other purposes as are set out in said petition, with reference to the maintenance, preservation, and protection of the property of the company, or as the court may from time to time direct." From this order, John R. Hanna, trustee in the deed of trust dated November 1, 1889, and Rufus Clark, the beneficiary named therein, and the holder of a large amount of the bonds secured by the mortgage to the Mercantile Trust Company, appealed to this court.

John S. Macbeth (Enos Miles, on the brief), for appellants.

A. C. Campbell (A. E. Pattison and Henry W. Hobson, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The precise question in this case is whether a court of chancery which has appointed a receiver for an insolvent private corporation in a foreclosure suit brought by a second mortgagee may, against the objection of the first mortgagee, authorize its receiver to issue receiver's certificates to raise money to carry on the business of the insolvent corporation and to improve its lands, and make such certificates a first and paramount lien upon the lands covered by the first mortgage. So far as we are advised, the power to do this has been denied in every case in which the question has arisen. One of the first cases in which the question arose was *Raht v. Attrill*, 106 N. Y. 423, 13 N. E. 282. In that case a hotel company mortgaged its property to raise funds to build a hotel. Before the completion of the hotel the corporation became insolvent, and upon the application of its principal stockholder a receiver was appointed; and upon an application and showing that the wages of the men who worked on the hotel building were unpaid, and that they threatened, unless paid, to burn the building, the court made an order authorizing the receiver to issue certificates, which were declared to be a lien prior to the trust mortgage, to raise funds to pay the wages due the laborers. A referee reported that, if the money had not been raised to pay the wages due the men, the hotel and other property of the corporation "would, in all probability, have been destroyed or seriously injured."

In the progress of the case the mortgagee denied that the court had authority or power to set aside the prior lien of the mortgage and make the receiver's certificates, issued under the circumstances mentioned, a first and prior lien upon the property. The court delivered an exhaustive opinion, covering every aspect of the question. We quote some of its utterances. The court said: "The lien of the mortgage attaches, not only to the land in the condition in which it was at the time of the execution of the mortgage, but as changed or improved by accretions or by labor expended upon it while the mortgage is in existence. Creditors having debts created for money, labor, or materials used in improving the mortgaged property acquire on that account no legal or equitable claim to displace or subordinate the lien of the mortgage, for their protection. * * * The act of the court in taking charge of property through a receiver is attended with certain necessary expenses of its care and custody; and it has become the settled rule that expenses of realization, and also certain expenses which are called 'expenses of preservation,' may be incurred, under the order of the court, on the credit of the property; and it follows, from necessity, in order to the effectual administration of the trust assumed by the court, that these expenses should be paid out of the income, or, when necessary, out of the corpus, of the property, before distribution, or before the court passes over the property to those adjudged to be entitled. * * * It would be difficult to define, by a rule applicable in every case, what are expenses of preservation which may be incurred by a receiver by authority of the court. It was said by James, L. J., in *Re Regent's Canal Iron-Works Co.*, 3 Ch. Div. 411, 427, that 'the only costs for the preservation of the property would be such things as the repairing of the property, paying rates and taxes which would be necessary to prevent any forfeiture, or putting a person in to take care of the property.' Wherever the true limit is, we think it does not include the expenditure authorized by the order of August 17th, and that such an expenditure is, and ought to be, excluded from the definition. There must be something approaching a demonstrable necessity, to justify such an infringement of the rights of the mortgagees as was attempted in this case." After referring to the cases in which the receivers of insolvent railroad corporations have been authorized to issue certificates which were declared to be a first lien on the property of the corporations, the court said: "It cannot be successfully denied that the decisions in these cases vest in the courts a very broad and comprehensive jurisdiction over insolvent railroad corporations and their property. It will be found, on examining these cases, that the jurisdiction asserted by the court therein is largely based upon the public character of railroad corporations, the public interest in their continued and suc-

cessful operation, the peculiar character and terms of railroad mortgages, and upon other special grounds, not applicable to ordinary private corporations. * * * These cases furnish, we think, no authority for upholding the order of August 17th, or for subverting the priority of lien which, according to the general rules of law, the bondholders acquired through the trust mortgage on the property of the company. It would be unwise, we think, to extend the power of the court in dealing with property in the hands of receivers to the practical subversion or destruction of vested interests, as would be the case in this instance if the order of August 17th should be sustained. It is best for all that the integrity of contracts should be strictly guarded and maintained, and that a rigid, rather than a liberal, construction of the power of the court to subject property in the hands of receivers to charges, to the prejudice of creditors, should be adopted."

We concur in the doctrine expressed in this case. See, to the same effect, *Farmers' Loan & Trust Co. v. Grape Creek Coal Co.* (C. C.) 50 Fed. 481; *Laughlin v. Rolling-Stock Co.* (C. C.) 64 Fed. 25; *Fidelity Insurance Trust & Safe-Deposit Co. v. Roanoke Iron Co.* (C. C.) 68 Fed. 623; *Snively v. Coal Co.* (C. C.) 69 Fed. 204; and *Hooper v. Trust Co.* (Md.) 32 Atl. 505, 513.

The contention of the appellees is that the order made by the circuit court finds sanction in the cases of *Wallace v. Loomis*, 97 U. S. 146; *Fosdick v. Schall*, 99 U. S. 235; *Barton v. Barbour*, 104 U. S. 126; *Miltenberger v. Railroad Co.*, 106 U. S. 286, 1 Sup. Ct. 140; *Trust Co. v. Souther*, 107 U. S. 591, 2 Sup. Ct. 295,—and other later cases of like character, in which receivers of insolvent railroad corporations were authorized to issue receivers' certificates for various purposes, which were made a first and paramount lien on the property of the insolvent railroad company. But the doctrine of these cases has no application to this case. They rest on the peculiar character of railroad property and of a railroad corporation. The distinction between railroad corporations, which are of a quasi public character, and purely private corporations, has been often pointed out, and need not be repeated here. It is enough to say that the supreme court itself has said that the doctrine of the cases cited has only been applied in railroad cases. In *Wood v. Safe-Deposit Co.*, 128 U. S. 416, 9 Sup. Ct. 131, the court said: "The doctrine of *Fosdick v. Schall* has never yet been applied in any case except that of a railroad. The case lays great emphasis upon the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern. We do not undertake to decide the question here, but only point it out."

The bill in this case is one to foreclose a second mortgage. To such a bill the prior

mortgagees are not even necessary parties. *Jerome v. McCarter*, 94 U. S. 734. The validity and priority of the liens of the mortgages under which the appellants claimed is distinctly admitted in the original and amended bills. The purpose of filing the amended bill making the prior mortgagees defendants seems to have been to enjoin them from foreclosing their mortgages, and subject the lands covered by their mortgages to a prior lien for money borrowed to carry on the business of the corporation and improve its lands. It prays that the receiver may be empowered to manage and operate the property of the insolvent corporation, which consists in irrigating, improving, and colonizing, or settling, arid lands; and, to the end that the receiver may not be interfered with in the conduct of the business, it prays that the holders of all mortgages prior to the complainants' may be enjoined from foreclosing the same. The amended bill would seem to be founded on the theory that a private corporation conducting any kind of business may, when it becomes insolvent, obtain immunity from the compulsory payment of its debts by procuring a junior mortgagee, or some other creditor, to file a bill alleging the insolvency of the corporation, and praying for the appointment of a receiver with authority to manage and conduct its business. Upon the filing of such a bill, it is supposed to be competent for the court, in addition to appointing a receiver to carry on the business of the corporation, to enjoin its creditors, including the holders of the prior liens on its property, from collecting their debts by due course of law, and to continue such injunction in force so long as the court, in its discretion, sees fit to carry on the business of the insolvent corporation. When a receiver is appointed under such a bill, he usually makes haste, as the receiver did in this case, to assure the court that, if he only had some capital to start on, he could greatly benefit the estate by carrying on the business that bankrupted the corporation. In this case, the company being insolvent, and its property mortgaged for more than it was worth, there was no way of raising money to set the receiver up in business, except by the court giving its obligations, in the form of receiver's certificates, and making them a paramount lien on all the property of the corporation, by displacing the appellants' prior liens thereon. As commonly happens in cases of this character, the receiver, the insolvent corporation, and the junior mortgagee united in urging the court to arm its receiver with the desired powers. They ran no risk in so doing. The corporation was insolvent, and a foreclosure of the prior mortgage would leave the junior mortgagee without any security; so that it had nothing to lose, and everything to gain, in experiments to enhance the value of the mortgaged property, so long as the cost of those experiments was made a prior lien thereon. The effect of the proceeding was to burden the prior mortgagee with the whole cost

of the expenditures and experiments made for the betterment of the property on the petition, and for the benefit of the insolvent corporation and the junior mortgagee. The representation is always made, in such cases, that the receiver can carry on the business much more successfully than was done by the insolvent corporation. This commonly proves to be an error. *Raht v. Attrill*, 106 N. Y. 430, 13 N. E. 282. But, if it were true, it would afford no ground of equitable jurisdiction, for it is not a function of a court of equity to carry on the business of private corporations, whether solvent or insolvent. It is obvious that if the holders of the first mortgages and the other creditors of the insolvent corporation were allowed to proceed, in the customary and lawful mode, to collect their debts, it would put an end to the business of the receiver, and they are therefore enjoined from foreclosing their mortgages or collecting their debts. The chancery court thus assumes, in effect, all the powers and jurisdiction of a court of bankruptcy or insolvency, but without any bankrupt or insolvent law to guide or direct it in the administration of the estate. Its only guide is that varying and unknown quantity called "judicial discretion." The powers claimed for a court of equity in such cases are, indeed, much greater than a court of bankruptcy can exercise. There never was a bankruptcy court, under any bankrupt act, authorized, at its discretion, to displace or nullify valid liens on the bankrupt's property, or itself to create liens paramount thereto. The rights of the citizen, lawfully acquired by contract, are under the protection of the constitution of the United States, and, like the absolute rights of the citizen, are not dependent for their existence or continuance upon the discretion of any court whatever. Constitutional rights and obligations are no more dependent on the discretion of the chancellor than they are on the discretion of the legislature. "Rights," says the supreme court of the United States, "under our system of law and procedure, do not rest in the discretionary authority of any officer, judicial or otherwise." *In re Parker*, 131 U. S. 221, 9 Sup. Ct. 708. If junior lien creditors of an insolvent private corporation could do what has been attempted in this case, every private corporation operating a sawmill, gristmill, mine, factory, hotel, elevator, irrigating ditches, or carrying on any other business pursuit, would speedily seek the protection of a chancery court, and those courts would soon be conducting the business of all the insolvent private corporations in the country. If it were once settled that a chancery court, through a receiver appointed on the petition of a junior mortgagee, could carry on the business of such insolvent corporations at the risk and expense of those holding the first or prior liens on the property of the corporation, such liens would have little or no value. It is no part of the duty of a court of equity to conduct the business of insolvent private corporations, any more than it is to carry on the business of

insolvent natural persons. If it may take under its control the property of an insolvent private corporation, and authorize a receiver to carry on its business, and make the debts incurred by the receiver in so doing paramount liens on all the property of the corporation, and enjoin its creditors in the meantime from collecting their debts, it is not perceived why it may not proceed in the same way with the estate of an insolvent natural person.

Without pursuing the subject further, we refer to what is said, and to the cases cited, in *Scott v. Trust Co.*, 16 C. C. A. 358, 69 Fed. 17. The order appealed from is void, whether the suit in which it was made is treated as one to foreclose a second mortgage, or as a bill in equity to administer the estate of an insolvent corporation. It was open to the complainant to take and execute a decree foreclosing its second mortgage, and it is good practice in such cases to require this to be done, on pain of dismissing the bill. And if the complainant desired that money be spent, beyond the income of the property, in carrying on the business of the corporation or improving the mortgaged property, it was at liberty to furnish the means for that purpose; but it had no equity to ask that the expense and the hazards of doing so should be saddled on the first mortgagee, and the court had no jurisdiction or power to place it there.

Taxes are the first and paramount lien on all property, and must be paid. When taxes are due on property in the hands of a receiver, and he has no funds to pay them, the court

will authorize him to borrow money for that purpose, and make the obligation given for the money so borrowed a prior lien on the property on which the taxes were due. This is not fixing a new or additional lien on the property, or displacing any prior lien. It is simply changing the form of the lien from one for taxes to one for money borrowed to pay the taxes.

The order and decree of the circuit court appealed from, which authorizes the receiver to borrow money to "be used and applied by said receiver for the purpose of preserving the property of the Denver Land & Water-Storage Company in his possession and custody, and carrying out and maintaining the contracts of the company, now in existence, under and by which the company has heretofore sold tracts of land to various parties, which said contracts are referred to in the report of said receiver, and for such other purposes as are set out in said petition with reference to the maintenance, preservation, and protection of the property of the company," and which authorizes the receiver to issue his certificates of indebtedness for the money borrowed for these purposes, and makes such certificates of indebtedness the first and paramount lien "upon all the property, rights, and franchises now owned or controlled by the said the Denver Land & Water-Storage Company," is void, in so far as it makes the certificates issued by the receiver a first and paramount lien on the lands embraced in the mortgages of the appellants, and is therefore reversed.

HOWARTH v. ELLWANGER. SAME v.
KENT. SAME v. WOODWORTH.

(86 Fed. 54.)

Circuit Court, N. D. New York. March 31,
1898.

Nos. 3,211-3,213.

At Law. Tried by the court.

These actions are brought against the defendants who were stockholders of the Traders' Bank of Tacoma, Wash., to enforce a liability created by the law of that state making them individually responsible equally and ratably to the extent of their stock for all debts of the bank while they remained stockholders. The plaintiff is a citizen of Washington residing at Tacoma. The defendants are citizens of New York residing at Rochester. On the 19th day of May, 1894, the plaintiff was appointed receiver of the Traders' Bank by an order of the superior court of Washington made in an action commenced against said bank by Henry Hewett, Jr., and George Browne in which it was adjudged that the bank had suspended business and was insolvent. The plaintiff duly qualified as receiver and has since acted as such. On the 12th of September, 1894, the court made an order in said action permitting certain stockholders to intervene for the benefit of themselves and all other stockholders of the bank. On the 20th of October all the defendants, except Chauncey B. Woodworth, were by order of the court upon their own petition made parties to the said action. After applying all the property of the bank to the payment of its debts there remained a deficiency, which, on March 17, 1897, was adjusted and adjudged by the court to be the sum of \$131,670. The plaintiff was thereupon directed by the court to levy upon the stockholders an assessment of 26.34 per cent. and bring suit against those stockholders who, after demand, refused to pay. The amounts assessed against the defendants respectively were duly demanded and payment thereof refused.

P. M. French, for plaintiff.

Charles M. Williams, for defendant Ellwanger.

M. H. McMath, for defendant Kent.

William F. Cogswell, for defendant Woodworth.

COXE, District Judge. It is not disputed that the defendants were stockholders of the Traders' Bank, that the bank became insolvent, that the plaintiff was appointed receiver, that a large deficiency was ascertained, that an assessment was levied by the receiver upon the defendants and that all this was done under and pursuant to the constitution and laws of Washington and in conformity to the orders and decrees of the superior court of that state.

The first proposition argued by the defend-

ants is that the plaintiff, as receiver, is not entitled to maintain the action. The constitution and statutes of Washington (Const. art. 12, § 11) provide: "That each stockholder of any banking * * * association shall be individually and personally liable, equally and ratably, and not one for another, for all the contracts, debts and engagements of such corporation or association accruing while they remain stockholders to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

The courts of Washington have decided that this liability can only be enforced by a receiver under the direction of the court. *Cole v. Railroad Co.*, 9 Wash. 487, 37 Pac. 700; *Wilson v. Book*, 13 Wash. 676, 43 Pac. 939; *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138; *Watterson v. Masterson*, 15 Wash. 511, 46 Pac. 1041. The practical effect of a ruling that a receiver cannot maintain the suit would be to render the law nugatory as to all but resident stockholders. The Washington courts having ruled that a receiver only can bring the suit, it is manifest, should the federal courts and other state courts hold that he cannot maintain the action, that the defendants not only but all stockholders beyond the jurisdiction of the Washington courts will escape a liability intended to be uniform and for the benefit of all the creditors. The precise question was involved in *Sheafe v. Larimer* (C. C.) 79 Fed. 921, and was answered adversely to the defendants' contention. The case arose under the same law, and, upon the facts, was almost identical with the case in hand. See, also, *Schultz v. Insurance Co.* (C. C.) 77 Fed. 375, 387; *Avery v. Trust Co.* (C. C.) 72 Fed. 700; *Failey v. Talbee* (C. C.) 55 Fed. 892.

Again it is argued that the orders and decrees of the Washington court were not binding upon the defendants, and in support of this view various alleged defects in the proceedings are pointed out. The defendants Kent and Ellwanger were parties to the Washington action and are therefore in no position to attack the judgment of the court in a collateral proceeding. The defendant Woodworth was not a party. But whether parties or not the law seems clear that the stockholders are bound by the order making the assessment. *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739. In *Sheafe v. Larimer*, supra, the court says: "In this case it must be held that it is not open to the defendant to question the validity of the assessment order, on the ground that the stockholders were not personally notified of the application for the order, or for the reason that the stockholders should not have been assessed until the other assets of the corporation had been wholly exhausted."

The actions are not barred by the statute of limitations for the reason that the cause of action did not accrue to the receiver prior to

the assessment and that was not made until March 17, 1897. The actions were commenced two months thereafter.

It follows that the plaintiff is entitled to

judgment as demanded in the complaints, respectively, with interest at the rate of 6 per cent. per annum from May 18, 1897, and costs.

WYMAN v. EATON et al.

(77 N. W. 865, 107 Iowa, 214.)

Supreme Court of Iowa. Jan. 20, 1899.

Appeal from district court, Pottawattamie county; Walter I. Smith, Judge.

As a statement of facts, we have taken the following substantially from those made by counsel: This was an action brought by Albert U. Wyman, the receiver of the Nebraska Fire Insurance Company, to enforce against the several defendants their constitutional liability under the Nebraska statute for their unpaid subscriptions to the capital stock of the company. This company was incorporated on March 13, 1883, in conformity with the laws of the state of Nebraska, under the name of the Nebraska & Iowa Insurance Company, its name being subsequently, on February 28, 1890, changed to the Nebraska Fire Insurance Company, under which name it transacted business until its insolvency, in 1891, when an application for its dissolution by W. G. Madden, one of its stockholders, resulted in the appointment of the plaintiff, first, as temporary, and then as permanent, receiver of the corporation, and a decree adjudging the dissolution thereof. The testimony shows that one J. T. Hart, of Council Bluffs, was largely instrumental in the organization of the company; that the subscribers to its stock and the original stockholders were citizens prominent in Omaha and in Council Bluffs; and that when this company, the Nebraska & Iowa Insurance Company, was organized, there was organized at the same time, mainly through the instrumentality of Mr. Hart, another insurance company, called the Iowa & Nebraska Insurance Company, and having its principal place of business at Council Bluffs, Iowa. The original intention of the organizers, as gathered from the testimony of Mr. Hart, and the contract of subscription, was to consolidate the two companies after their organization. This, however, was never done, the two corporations being operated separately in each state, although the stockholders were at first the same. The Iowa corporation did business until about May 29, 1885, when it was merged into a company known as the Western Home of Sioux City, and went into the hands of a receiver. The capital of each company was \$100,000, and the certificates of stock contemplated subscriptions to both companies, and were signed, as appears, by officers of each company. The stock was originally issued in this duplicate or combined form. These combined certificates were subsequently canceled, and were separately rewritten and issued. The contract of subscriptions of the several defendants to the stock of the two companies, and upon which it is claimed that the defendants herein are answerable for the unpaid 50 per cent. thereof, is as follows: "We, the undersigned subscribers hereto, in consideration of each other's subscription to the capital stock

for an insurance company in the state of Iowa and the state of Nebraska, to be organized in both states separately, and after the organization to be consolidated, to be known as the Iowa and Nebraska State Insurance Company, for the purpose of carrying fire and lightning, windstorm and tornado, insurance, business to be done under the laws of both states, do hereby subscribe and agree to pay and secure as provided by the laws of said states the several sums set opposite our respective names, if such an insurance organization is perfected, and on demand, to the secretary thereof, on or before the 12th day of March, 1883." Under this subscription, shares of stock of \$100 each were issued to the subscribing stockholders, one-half of such shares being issued to them in the Iowa company, and one-half in the Nebraska company. The defendants paid 50 per cent. of their several subscriptions upon the stock of the Nebraska & Iowa Insurance Company at the time of its organization, as required by the laws of the state of Nebraska. Nothing more was ever paid upon the stock except in the manner indicated hereafter. The defendants in this action, who had been subscribers to the capital stock of the consolidated company, and to whom had been issued the joint certificates of stock in the Iowa and Nebraska companies, had surrendered their stock, and new stock had been issued to the parties purchasing from them. These purchasers, as the record shows, were in large part the original promoters of the company. Upon the organization of the company, one-half of the capital stock subscribed being paid in cash, the promissory notes of the subscribers, payable on demand and secured, were given in payment of the other one-half of the stock of the corporation. Prior to 1887, these defendants had transferred the stock issued to them, by a surrender of their stock, and reissuance of other certificates to the purchasers; the company accepting the surrender, and recognizing the transfer, returning the stock notes of the defendants, and accepting the stock notes of the transferee in lieu thereof. This was done, as shown by the record, at a time when the corporation was solvent, and the transfers were made and new stock issued to solvent purchasers; all being done in good faith on the part of the corporation, the transferor, and the transferees. Practically, the entire stock passed into the hands of a syndicate composed in large part of original promoters of the consolidated corporation, but not including any of these defendants. From the date of these transfers, these defendants ceased to have any connection with or control over the corporation. The district court entered judgment for the defendants, and the plaintiff appealed. Affirmed.

E. & A. C. Wakley and Flickinger Bros., for appellant. Harl & McCabe, Finley Burke, Wright & Baldwin, Sanders & Stuart, John Y. Stone, and C. R. Marks, for appellees.

GRANGER, J. It will be well to repeat that this action is by a receiver appointed to wind up the affairs of the Nebraska Fire Insurance Company, on the application of one of its stockholders, to recover from the defendants on their subscriptions to the original enterprise, wherein was contemplated the organization of two companies,—one in Nebraska, to be known as the Nebraska & Iowa Insurance Company, and one in Iowa, to be known as the Iowa & Nebraska Insurance Company; the two companies to be thereafter consolidated. The first-named company was organized under the laws of Nebraska, and located at the city of Omaha, in that state; and the latter under the laws of Iowa, and located at the city of Council Bluffs, in Iowa. The consolidation was never made, and the latter company was changed to that of the Western Home of Sioux City, and its place of business changed to Sioux City, Iowa, about May, 1885. The Nebraska & Iowa Company was changed to the Nebraska Fire Insurance Company, and continued to operate until 1891, when the insurance department of Nebraska withdrew its certificates authorizing the company to do business, and, on the application of one of its stockholders, its insolvency was decreed; and the plaintiff is now engaged in winding up its affairs, and this action is in aid of that purpose.

The action has for a legal basis a provision of the constitution of Nebraska, as follows (section 4, art. 11): "Liabilities of Subscribers to Stock. In all cases of claims against corporations and joint-stock associations, the exact amount due shall be first ascertained, and after the corporate property shall have been exhausted, the original subscribers thereof shall be individually liable to the extent of their unpaid subscriptions, and the liability for unpaid subscriptions shall follow the stock." Dismissing for the moment the effect of an arbitrary legal liability, which must be respected and enforced when known, there is not, in view of the entire record in this case, an equitable consideration favorable to a recovery against these defendants. The present liabilities of the Nebraska corporation cannot truthfully be said to have accrued in consequence of, or with reliance upon, the former connection of these defendants with the enterprise from which sprang the present company. These facts are important as aiding in the solution of a legal proposition, urged by appellees, to the effect that this action cannot be maintained in Iowa, because it is brought by a receiver of a Nebraska corporation to enforce a provision of the law of that state; the claim being that such a proceeding can only be had as a result of comity between the states, and that the basis of such an exercise is that the citizens of the state granting it shall not be thereby prejudiced or injured. Admitting, for the sake of argument, the rule that comity controls as to the authority of plaintiff to sue in this state, and,

as we have in effect said, the record leaves us without doubt that its exercise should be denied, because it would be in contravention of the rights of our citizens, and operate to their injury.

Upon the question of the absolute right of plaintiff to sue in this state, we are not without precedent in our own decisions; and while, in announcing a rule, we have recognized the fact of a conflict of authority, we are not persuaded by the argument in this case that a change should be made, or the rule modified. Stress is given in argument to the fact that the order of appointment in Nebraska gives to the receiver authority to bring suits in other states. That authority is valuable as an aid to secure the right to do so in the state where the privilege is sought, and is judiciously granted; but it is without efficiency to create such a right independent of sanction within the state. The case of *Booth v. Clark*, 17 How. 321, contains a somewhat exhaustive consideration of the question of the right of a receiver appointed in one state to bring a suit for the possession of property in another state, and it is there said: "He has no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek." An underlying thought of the rule seems to be that, within the jurisdiction of one's appointment as receiver, he is amenable in his official capacity to the courts, and he may exercise his authority under the law of the jurisdiction; while, in a foreign jurisdiction, the law does no more than to make the person entering it amenable to its laws, and in no way recognizes the official capacity. As a citizen in a jurisdiction foreign to his residence, he has a legal status, and is amenable to, and may invoke the protection of, the law. As an officer of a court from a foreign jurisdiction, he has, and is entitled to, no legal recognition, except as the courts may, in their discretion, grant it, because he is without the official obligation that he assumed in his own jurisdiction, and which is essential to a proper and safe exercise of such power. In *Ayres v. Siebel*, 52 Iowa, 347, 47 N. W. 989, we denied the right of a trustee, appointed by the court in Indiana, to sue and recover on a contract in this state; and in *Parker v. Lamb & Sons*, 99 Iowa, 265, 68 N. W. 686, we denied such a right to a receiver, and cited the *Ayres-Siebel* Case. In *Parker v. Lamb & Sons*, we quoted approvingly from High, Rec. § 289, as follows: "Upon the question of the territorial extent of a receiver's jurisdiction and power for the purpose of instituting actions connected with his receivership, the prevailing doctrine established by the supreme court of the

United States, and sustained by the weight of authority in various states, is that the receiver has no extraterritorial jurisdiction or power of official action, and cannot go into a foreign state or jurisdiction, and there institute a suit for the recovery of demands due the person or estate subject to his receivership. His functions and powers, for the purpose of litigation, are held to be limited to the courts of the state in which he was appointed; and the principles of comity between states and nations which recognize the judicial decisions of one tribunal as conclusive on another do not apply to such a case, and will not warrant a receiver in bringing an action in a foreign court or jurisdiction." These authorities are broad and conclusive, and, unless we are to set them aside, are conclusive of this case. Counsel have shown great zeal

and tact in presenting authorities more or less in point, and we acknowledge somewhat of a conflict, as we have done in other cases; but the weight of authority we regard as in line with our holdings, and we are not disposed to disturb them. Beach on Receivers (section 680) states the same rule, and cites *Booth v. Clark*, supra, from which we have quoted, and then says: "The rule thus laid down by the supreme court of the United States has been followed by other courts with essential unanimity, and can hardly be said to be seriously questioned." In *Fitzgerald v. Construction Co.* (Neb.) 59 N. W. 838, these authorities are approvingly cited and applied. It remains for us to state as a conclusion that the plaintiff is not entitled to recover in the courts of Iowa, and the judgment of the district court will be affirmed.

HUTCH.& BUNK.EQ.—56

AMERICAN BISCUIT & MFG. CO. v.
KLOTZ et al.

(44 Fed. 721.)

Circuit Court, E. D. Louisiana. January 8,
1891.

In Equity.

T. J. Semmes and Bayne, Denegre &
Bayne, for complainant.

W. S. Benedict and Rouse & Grant, for
defendants.

Before PARDEE, Circuit Judge, and BIL-
LINGS, District Judge.

PER CURIAM. This cause is submitted upon an application for a receiver. Some time in May last, the defendant Klotz, and Fitzpatrick, his partner, composing the firm of B. Klotz & Co., sold to the complainant their biscuit and confectionery manufactory for the price of \$259,000, and an assumption of the debts of B. Klotz & Co., amounting to \$42,000, which it was understood and agreed should be paid out of the income from the future business. The visible property was estimated to be of the value of \$101,000, and the good-will of the business to be of the value of \$200,000. The price was paid in stock of the complainant's corporation, estimated to be of value at par; that is, to be worth 100 cents on the face value. The purchase was completed, price paid, property delivered, the factory and good-will transferred by Klotz & Co. to the complainant. Klotz leased his bakery premises to complainant for the term of years, and contracted in writing to become, and did become, the agent of the complainant, at a salary of \$—— per year. Klotz continued to carry on the business as agent for the complainant down to some time in November, when he repudiated the sale and the lease, erased the name of complainant from the bakery, as agent, transferred the policies of insurance from the complainant to himself, as an individual, then to B. Klotz & Co., and, for and in the name of the late firm, resumed the possession of all the property he had sold to the complainant, and the conduct of the business of the bakery and the confectionery establishment. He did this without resort to any legal proceedings. He thereafter held possession adversely to the complainant, and excluded it from the bakery. In this state of things, the complainant filed its bill for an injunction, and for an account and for a receiver, against Klotz and W. A. Schall, who was alleged to be co-operating with him in the possession adverse to the complainant. Klotz has filed an answer, and he, together with his former partner, Fitzpatrick, who intervened by petition *pro interesse suo*, have filed a cross-bill asking a rescission of the entire transaction, i. e., the sale and the lease, and tendering the stock which had been received by them as the consideration of the sale. Numerous exhibits and affidavits have been adduced by each party upon

this hearing. The recital thus given shows that, in an order inverted from what would be expected, we have before us a cause in which a party who has sold and delivered a business to another, and become his agent, and, as such agent, was in possession of the property sold, sets up a possession adverse to his principal, asks for a cancellation of the sale, and the purchaser and principal asks that the agent shall account, shall be enjoined from asserting any claim hostile to his principal,—in a word, for a confirmation of its rights under the purchase.

The immediate question before us is, what disposition shall be made of the res, the business of the bakery and manufactory, pending this contest? The vendor and agent asks that he be allowed to remain in adverse possession. The purchaser and principal asks for a receiver. It is clear that, as to this provisional disposition of the res, the defendant Klotz cannot be allowed to gain anything by his ouster of his vendee and principal. He must stand with those equities, and none other, which existed before the ouster. The case as to the appointment of a receiver must be reviewed and determined as if he (Klotz) had filed his bill averring possession as agent, which he asked to have changed by a decree into a possession as owner, through the cancellation of the sale and the lease; that is, he must aver a legal title in the American Biscuit & Manufacturing Company, which he seeks to have avoided and annulled. If, as in this case, he seeks to do all this by reason of fraud, and he establishes the fraud, a court of equity will not refuse to hear him. He would not be estopped, for fraud vitiates and sets aside even estoppels. *Herm. Estop. par. 22, p. 244; Pendleton v. Richey, 32 Pa. 58, 63.* But, while he is not estopped from proceeding to set aside the sale and the lease by reason of his agency and his obligations as trustee, he comes into court assailing and seeking to cancel a legal title; for until that is done his possession is that of the complainant. Under these circumstances, until the hearing, the practice in the courts of chancery is not to disturb the possession under the legal title prior to the final decree, unless a case of monstrous wrong is established. *Stilwell v. Wilkins, Jac. 280*, reported in full in *Edwards on Receivers, p. 28*, Lord Eldon, when a similar question was presented, observed: "The point that struck me was whether, on a bill to impeach a sale for fraud, the court interposes so strongly before the hearing as to take away the possession from persons holding it under the effect of deeds not yet set aside by decree,"—and he holds that "it was not the general habit of the court." There the case was so monstrous, and the proof was so strong, that "it was hardly possible that the transaction could stand," and the legal title was interfered with.

This is a leading case, and gives what we

find is the rule. The possession under the title is not disturbed unless the proof of fraud is so strong as to lead the court to the clear conviction that it will, on the final hearing, be established. The fraud set up and relied upon by the defendant and intervenor is false and fraudulent representations by the agents of the complainant in this: that they represented that the stock was fully paid-up stock, whereas, in truth and fact, it was none of it paid up in money, and only paid up in part, and, to the extent of that part, by transfer of plants or bakeries and manufactories at an estimated value as capital. The stock delivered to the defendant and intervenor was not paid up until it was issued to them, and was paid for by a transfer of the bakery and good-will; and then it became paid up, and they were discharged from all liability to be made to contribute as shareholders therefor. The testimony as to what was represented by complainant's agents about the stock being paid up is conflicting; but, when viewed in connection with the circumstances under which the stock was received, fails to satisfy us, upon this preliminary hearing, that any false representations are proved to have been made. The case of the defendant and intervenor, set up in their cross-bill, whereby they oppose the appointment of a receiver, is that of parties who seek to rescind a deed on the ground of fraud, which upon this hearing they fail to establish.

So far we have considered the question of appointing a receiver of the property in controversy inter partes, and mainly from the stand-point presented by the defendant's showing, and thereon such appointment seems proper, and we should accord it, but for an aspect of the case originally suggested by the defendant, when the case was pending in the state court, apparently abandoned here, but sufficiently brought to our notice by the exhibits of both parties. We are not satisfied that the complainant's business is legitimate. While the nominal purpose of the complainant's corporation, as stated in its charter, is the manufacture and sale of biscuit and confectionery, its real scope and purpose seems to be to combine and pool the large competing bakeries throughout the country into practically what is known and called a "trust," the effect of which is to partially, if not wholly, prevent competition, and enhance prices of necessary articles of food, and secure, if not a monopoly, a large control, of the supply and prices in leading articles of bread-stuffs. The case shows that an insignificant number of shares of complainant's stock was unconditionally subscribed for, apparently enough to qualify directors; but the great mass was taken and held by irresponsible parties, to be used in parceling out as full-paid stock to such leading and successful bakeries throughout the country as could be induced to come in on an agreed value of the property and a large estimate of good-will.

Each bakery when secured to be carried on by its former managers, subject, however, as to control of funds, territory, prices, and competition, to the central management; all profits pooled, and of course division thereof to be made on the basis of the stock assigned to each bakery. Under this arrangement complainant has already secured the control, and pooled the business, of 35 of the leading bakeries in 12 different states of the West and South, and is evidently seeking more constituents. The act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," expressly prohibits, under severe penalties, "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states," and declares punishable "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the common trade or commerce among the several states." The enforcement of this act is, by the statute, devolved upon the circuit courts of the United States. The first and third sections of an act of the legislature of Louisiana, approved July 5, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies, and to provide penalties for the violation of this act," declare:

"Section 1. That every contract, combination in the form of trust, or conspiracy in restraint of trade or commerce, or to fix or limit the amount or quantity of any article, commodity, or merchandise to be manufactured, mined, produced, or sold in this state, is hereby declared illegal."

"Sec. 3. That every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce within the limits of this state, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

In construing the federal and state statutes, we exclude from consideration all monopolies which exist by legislative grant; for we think the word "monopolize" cannot be intended to be used with reference to the acquisition of exclusive rights under government concession, but that the law-maker has used the word to mean "to aggregate" or "concentrate" in the hands of few, practically, and, as a matter of fact, and according to the known results of human action, to the exclusion of others; to accomplish this end by what, in popular language, is expressed in the word "pooling," which may be defined to be an aggregation of property or capital belonging to different persons, with a view to common liabilities and profits. The expression in each law "combination in the form

of trust" would seem to point to just what, in popular language, is meant by pooling.

Now it is to be observed that these statutes outline an offense, but require for its complete commission no ulterior motive, such as to defraud, etc.; and, further, that the language is altogether silent as to what means must be used to constitute the offense. The offense is defined to "combine in the form of trust, or otherwise, in restraint of trade or commerce," and "to monopolize, or attempt to monopolize, any of the trade or commerce." To compass either of these things, with no other motive than to compass them, and by any means, constitutes the offense. One just and decisive test of the meaning of the expression "to monopolize" is obtained by getting at the evil which the law-maker has endeavored to abolish and restrict. The statutes show that the evil was the hindrance and oppression in trade and commerce wrought by its absorption in the hands of the few, so that the prices would be in danger of being arbitrarily and exorbitantly fixed, because all competition would be swallowed up, so that the man of small means would find himself excluded from the restrained or monopolized trade or commerce as absolutely as if kept out by law or force. If this is the meaning of the defining words, does not this corporation, thus glutted with the 35 industries of 12 states, disclose an "attempt to monopolize?" So far, therefore, as the complainant's business is a combination in restraint of trade, or is an "attempt to monopolize, or combine, in the form of a trust, or otherwise, any part of trade or commerce," as these words are properly defined, the law stamps it as unlawful, and the courts should not encourage it. Aside from this, the complainant's business, even if lawful, being of the kind shown above, is not of that meritorious kind that it should be encouraged by

a court of equity. The appointment of a receiver by a court of equity is not a matter of strict right, but of judicial discretion. *Fosdick v. Schall*, 99 U. S. 235. It falls within that class of interlocutory remedies which courts must grant or withhold, according to a discretion conscientiously exercised, upon a consideration of all the facts which a cause presents, involving the rights of the parties and the interests of the public. The attempt to accumulate in the hands of a single organization the business of supplying bread itself to so large a portion of the poor, as well as the rich, people of the United States should not be favored by a court of equity. It carries with it too much of danger of excluding healthy competition, thereby increasing the difficulty to the general public of participating in a most useful business, as well as adding to the possibility of multitudes of citizens being temporarily, at least, compelled to pay an arbitrary and high price for daily food.

Whatever we may feel compelled to do, on the final hearing of this cause, towards recognizing the complainant's legal rights, and compelling a faithless trustee to account, we are clear that at this preliminary stage, with our present impressions of the character and general scope of complainant's business, the court ought not, by the appointment of a receiver, to aid complainant to perfect, and perhaps to enlarge, his combination or trust; and the refusal to appoint a receiver can result in no serious and lasting injury to complainant, because the shares of stock of complainant company, forming the entire consideration of complainant's purchase, have been tendered in court, and may be impounded, to be held as security for any damages susceptible of proof resulting from defendant's mismanagement of the property pending the suit. The motion for a receiver is denied.

HAYWOOD et al. v. LINCOLN LUMBER
CO. et al.

(26 N. W. 184, 64 Wis. 639.)

Supreme Court of Wisconsin. Dec. 23, 1885.

Appeal from circuit court, Lincoln county.

Pullings, Hoyt & Holway and D. S. Ordway, for appellants Murray Haywood and another. Silverthorn, Hurley & Ryan, for respondents Lincoln Lumber Co. and others.

ORTON, J. This is an action brought by the appellants to foreclose a mortgage given by the defendant lumber company, by its president and secretary, to the said appellants and the defendant T. P. Matthews and one George C. Smith, on the fourth day of February, 1884, on all of the real property of said corporation, to secure a bond in the penal sum of \$100,000, given at the same time by said company, to said mortgagees, conditioned to pay them certain indebtedness of the company past due them, respectively, in the aggregate of over \$50,000. The interest in said mortgage of said George C. Smith was assigned to said plaintiffs. The defendant Robert C. Parcher was appointed receiver in April, 1884, in a suit of one J. C. Clark against said company; and said Parcher, as such receiver, in June, 1884, loaned of the defendant the First National Bank of the City of Wausau the sum of \$10,000, to be used in the management of the business and property of said lumber company; and, by the order and leave of the court, executed, as such receiver, a mortgage upon the real property of said company to said bank to secure the same. The said defendant Parcher and the defendant the Lincoln Lumber Company answered the complaint, alleging, substantially, that the said mortgage sought to be foreclosed was executed by the president and secretary of said company, without authority; and that, at the time, said corporation was insolvent, to the knowledge of said mortgagees, and owed large indebtedness to others; and that said mortgage was given by said officers, and authorized, if at all, by the directors of said company to be given to themselves, to secure their own claims against the company, as an unlawful and fraudulent preference of themselves as the creditors of the company, in fraud and with intent to defraud the other creditors and the company, and that said bond and mortgage were therefore void. The said defendant the National Bank answered, setting up its mortgage by the receiver, and alleging its priority to the mortgage in suit by the agreement of the mortgagees in said mortgage, and prays a foreclosure thereof. The circuit court substantially held that said mortgage was given without authority, because the majority of the quorum of the directors voting that said bond and mortgage be given were interested in the same, and that said company was then insolvent; and that the directors held the

property in trust for the creditors, and the execution of said mortgage by the officers and by the authority of the directors to themselves to secure their antecedent claims against the company was an unlawful preference, and was fraudulent and void; and that the said mortgage to the bank has priority, and was lawfully executed by said receiver. The special findings are numerous, and the case voluminous; but the above are believed to be substantially the findings, and upon the substantial issues in the case.

The principles involved in this suit are really very simple, and almost elementary, and not at all complicated; and we cannot but think they have been greatly magnified and more earnestly contested on account of the amount in controversy. The plaintiffs contest the power of the receiver, Parcher, to give the mortgage to the bank on the ground of the want of jurisdiction of the court to appoint him or any one receiver in the case of Clark against the company. These plaintiffs were directors of the company, and one of them the secretary, and both mortgagees, when the said Parcher was appointed such receiver, and as directors and as mortgagees counseled and advised his appointment, and consented thereto, and the directors over and over again recognized and confirmed it by dealing with him as such, and placing the property of the company in his hands; and, after his appointment, the plaintiffs, together with the defendant Matthews, as said mortgagees, by writing under seal, authorized the said receiver to borrow not exceeding \$15,000, and give a mortgage on the property of the company in his hands to secure it, for the purpose of carrying on the business in running the mills and sawing up the logs, and released their said mortgage so far as it would have preference of the mortgage so given by the receiver, and so as to give the same priority to their said mortgage. There is abundant evidence of the plaintiffs' estoppel to dispute the authority of said receiver, both in pais and by deed. But accepting the allegations of the complaint in that case as true, the court not only had the power, but it was its duty, to appoint a receiver. The directors and officers had given the mortgage in suit alleged to be in fraud of the creditors of the company, nearly or quite insolvent at the time, and threatened afterwards to sell out in gross all the property of the company without notice, and to bid the same off in their own names and for their own benefit, in fraud of many other creditors of the company, and in this way to close up the business of the company. These are some of the substantial allegations of the complaint of Clark, the plaintiff, who was himself one of the stockholders of the company. Within the general powers of a court of chancery, which are preserved in the fifth subdivision of section 2787, Rev. St., this was a proper case for an injunction and receiver both. The property of the company was being mismanaged, and was in danger

of being lost to the stockholders and creditors through the collusion and fraud of its officers and directors. The only place of safety for the business and property of the company was in the "hand" of the court through a receiver pendente lite. A stronger case for a receiver could scarcely be made, and the numerous authorities cited in the able brief of the learned counsel of the respondents, and the facts stated in the complaint, abundantly authorize and justify his appointment in that case. We think the circuit court properly held that the court had jurisdiction to appoint Parcher a receiver; and, upon the evidence, properly found that the mortgage to the bank was not only valid, but has priority over the mortgage in suit. Under repeated decisions of this court, the exceptions of the respondent cannot be considered, except to support the judgment rendered, unless the respondent also appeal. Therefore this court cannot go further than the circuit court in ordering a foreclosure of the bank mortgage in this action.

But the matter of this bank mortgage is of only incidental importance in this case. The main question is of the validity of the mortgage in suit. There was abundant evidence to justify the finding of the circuit court that at the time it was given the company was insolvent. In such case, the authorities seem to be uniform that the directors and officers of the corporation are trustees of the creditors, and must manage its property and assets with strict regard to their interests; and, if they are themselves creditors while the insolvent corporation is under their management, they cannot secure to themselves any preference or advantage over other creditors. The directors are, then, trustees of all the property of the corporation, for all of its creditors, and an equal distribution must be made, and no preference to any one of the creditors, and much less to the directors or trustees, as such. I have carefully examined all the authorities cited on both sides touching this principle, and find it recognized in every case. Many of the authorities cited by the learned counsel of the appellants as holding a contrary doctrine state this doctrine as fully established, and cite many of the authorities in its favor cited here by the learned counsel of the respondents, and cases are made an exception only because, in their facts, this principle has no application. It is reiterated in the text of elementary works, and numerous cases are cited to sustain it. *Mor. Priv. Corp.* 579-581. A few only of the cases holding this principle will be cited here, but many others may be found in the brief of counsel and elsewhere too numerous for citation. *Marr v. Bank*, 4 Cold. 471, 484; *Koehler v. Iron Co.*, 2 Black, 715; *Curran v. Arkansas*, 15 How. 306; *Richards v. Insurance Co.*, 43 N. H. 263; *Bradley v. Farwell*, Holmes, 433; *Drury v. Cross*, 7 Wall. 299; *Paine v. Railroad Co.*, 31 Ind. 353; *Gas-light Co. v. Terrell*, L. R. 10 Eq. 168. I have been unable

to find a single case, which in its facts is like this, in which this doctrine is even questioned and was not strictly applied.

But there is another principle equally unquestionable which renders the mortgage in suit void. The directors and officers made the mortgage, or directly caused it to be made, to themselves. They occupied a fiduciary relation to the corporation, its stockholders, and its creditors, and they had no right to use such relation and their official position for their own benefit, to the injury of others in equal right. This principle was applied to the taking of a mortgage by the directors on the property of the corporation to secure their liability as sureties, upon a note of the corporation, in *Corbett v. Woodward*, 5 Sawy. 403, Fed. Cas. No. 3,223, which is a strong case, and very similar is the case of *Koehler v. Iron Co.*, supra. See, also, *Mor. Priv. Corp.* 243; *Hoyle v. Railroad Co.*, 54 N. Y. 314; *Railway Co. v. Poor*, 59 Me. 277; *Butts v. Wood*, 38 Barb. 188; *Railway Co. v. Huxon*, 19 Eng. Law & Eq. 365; *Scott v. Depeyster*, 1 Edw. Ch. 513; and *Verplanck v. Insurance Co.*, Id. 85; *Railway Co. v. Magnay*, 25 Beav. 586; 1 *Perry, Trusts*, § 194, and cases cited. But it is really unnecessary to cite cases from abroad when the same principles have been established in our own cases, as in *Cook v. Berlin Woolen Mills*, 43 Wis. 434, and *Pickett v. School-district*, 25 Wis. 553.

Directors, officers, and agents, and other like trustees, cannot mortgage or convey to themselves any more than one can contract with himself. The idea that the same persons constitute different identities of themselves by being called directors or officers of a corporation, so that, as directors or officers, they can convey or mortgage to or contract with themselves as private persons, is in violation of common sense. In *re Taylor Orphan Asylum*, 36 Wis. 552, and cases above cited. See 1 *Perry, Trusts*, § 207, and *Mor. Priv. Corp.* § 245; *Walworth County Bank v. Farmers' Loan & Trust Co.*, 16 Wis. 629; *Coal Co. v. Sherman*, 30 Barb. 553.

It is unnecessary to decide the question whether there was a quorum of disinterested directors that directed the mortgage to be given. The mortgage is an entirety, and it makes no difference how many persons are severally interested in it as mortgagees. If such mortgagees, as directors, authorized it, they authorized an act in which they were all jointly interested. They may not have been joint creditors, but they are joint mortgagees, because the mortgage as a security is an entirety. Whether, in this view, the mortgage was never authorized to be given by the president and secretary of the company, by the company through its directors, it may not be necessary to decide; but it seems to me rather illogical to say that, because there is a quorum of directors who are creditors severally, a majority of them may authorize their claims to be secured by one mortgage, and do not act on their own claims, but each

one acts in respect to the claims of the other. If A., B., and C. are several creditors and a quorum of directors, and A. and B. vote to give C. an interest in the mortgage to secure his claim, A. and C. so vote as to the claim of B., and B. and C. as to the claim of A.,—do they not vote for themselves in respect to one mortgage? This would be an ingenious and convenient collusion to vote to themselves all the property of the corporation at almost

any time, on the ground that the majority so voting is disinterested and impartial.

But it is very clear to us that the mortgage is void in view of the above principles, and that disposes of the action of foreclosure. Beyond that, the findings of the court are not very important as to the rights of the defendants.

The judgment of the circuit court is affirmed.

BANK OF FLORENCE et al. v. UNITED STATES SAVINGS & LOAN CO.

(16 South. 110, 104 Ala. 297.)

Supreme Court of Alabama. Aug. 9, 1894.

Appeal from district court, Lauderdale county; W. P. Chitwood, Judge.

Suit by the United States Savings & Loan Company against the Bank of Florence and others. From a decree appointing a receiver, defendants appeal. Reversed.

In addition to the allegations of the bill, which are stated in the opinion, and upon which is predicated the right to have the receiver appointed, the bill also averred that the officers of the bank had, wrongfully and without authority of its stockholders, turned over the assets of the bank to one S. S. Broadus, who had assumed complete control of the same, and that he was pursuing reckless methods in disposing of the assets of said bank.

Roulhac & Nathan and Emmet O'Neal, for appellants. Paul Hodges, for appellee.

BRICKELL, C. J. The material allegations of the original bill, on which is predicated the right to the appointment of a receiver, and the right to the ultimate equitable relief which is prayed, are capable of being reduced to a narrow compass. The complainant is a corporation organized and existing under the laws of the state of Minnesota, having a place of business in the city of Florence, in this state. The Bank of Florence was engaged in a general banking business at Florence, and became the agent of complainant for the collection of moneys there due and owing, and which were to become due, and was charged with the duty of remitting such moneys to the complainant as collected. Neglecting the duty of remittance of these moneys, the bank suffered the sum of \$538.80 to accumulate in its hands, and suspended payments. Though insolvent, the bank made no transfer or assignment of its property and assets, but proceeded in winding up its affairs, with the acquiescence of its creditors. Judgments were being rendered against it, and it was making preferences in payment of its creditors. These are the material allegations of the bill, upon which is founded the right to the appointment of a receiver; and the specific relief prayed is that, for the payment of the sum due, the complainant be decreed a lien on all the assets of the bank, in priority of all general liens, by which we suppose is intended in priority of all creditors not having a specific lien. When an application is made for the appointment of a receiver, the primary inquiry is whether there is shown a reasonable probability that the plaintiff asking the appointment will ultimately succeed in obtaining the general relief sought by the suit. If ultimate success is a matter of grave doubt, or if, as in the present case, it be clear that

the general relief sought cannot be obtained, the appointment ought not to be made. 2 Pom. Eq. Jur. (2d Ed.) § 1331; High, Rec. (2d Ed.) § 8; Randle v. Carter, 62 Ala. 95. It is true, as a general rule, that, in making or refusing the appointment of a receiver, the court will not forestall or anticipate the decision which may be made on final hearing. This is true when a case is presented upon which there is a reasonable probability the plaintiff may ultimately obtain relief. In such cases the pleadings may not be drawn with technical accuracy. The bill may be subject to demurrer for the want of proper parties, or because of defects of form or the absence of substantial allegations,—insufficiencies curable by amendment. These insufficiencies, of themselves, do not form an impediment to the appointment of a receiver, if a case be made by a party having interests to be protected and preserved entitling him to the general relief which is prayed. *Ex parte Walker*, 25 Ala. 81.

The relation between the complainant and the Bank of Florence was that of principal and agent, created by their agreement,—a legal relation strictly, though, to attain the ends of justice, and preserve the confidence it involves, courts of equity, under some circumstances, deal with it as a fiduciary relation. The debt created by the breach of duty of the agent is a mere simple contract debt, for the recovery of which legal remedies are adequate. *Crothers v. Lee*, 29 Ala. 337; *Knotts v. Tarver*, 8 Ala. 743. The demand being a simple contract debt, purely of a legal character, the complainant, in the absence of some peculiar equity, is not entitled to the intervention of a court of equity to enforce its payment. *Reese v. Bradford*, 13 Ala. 838; *Sanders v. Watson*, 14 Ala. 198. These well-recognized principles are not controverted. The insistence is that as the agent converted to his own use the money of the principal, commingling it with his own money, or in some form with his other assets, so that it cannot be identified or the specific uses to which it was applied traced, it is sufficient to trace it into the general assets of the agent to impress them with a trust for the payment of the money,—a trust which is peculiarly of equitable cognizance. It is true that a trustee or an agent or other person standing in a fiduciary relation cannot derive benefit from commingling with his own the moneys of his *cestui que trust* or principal; and it is equally true that, if he makes an investment of such moneys, a court of equity, so long as the moneys may be distinctly traced, will follow them, and impress upon the investment the trust to which the moneys were subject. The conversion of the trust moneys, as distinguished from other moneys of the trustee or agent, must be clearly shown. It is not sufficient to show that there has been a conversion of trust funds, and the acquisition or possession by the trustee or agent of property or

assets, which may be supposed a substitute for such funds. As is said by the supreme court of Massachusetts: "The court will go as far as it can in tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the cestui que trust to follow it fails. Under such circumstances, if the trustee has become bankrupt, the court cannot say that the trust money is to be found somewhere in the general estate of the trustee that still remained. He may have lost it with property of his own, and in such case the cestui que trust can only come in and share with the general creditors." *Little v. Chadwick*, 151 Mass. 109, 23 N. E. 1005. There is no question of tracing or identifying the moneys of the principal. The naked averment of the bill is that, in violation of duty, the agent converted to his own use the moneys of the principal, creating a mere simple contract debt. There is no averment that the assets upon which it is sought to fasten the trust had not been acquired by the agent before the conversion; no averment that in any form the moneys of the principal entered into their acquisition. All that can be said is that which may be said of any delinquent trustee or agent,—that he had converted the moneys of his cestui que trust or principal; and from the business in which the agent was engaged it may be presumed that, in the course of the business, they were commingled and used with the moneys of the agent. If a trust were raised to charge the assets of the agent, a like trust would arise and be fastened on the general assets of every delinquent agent or trustee,—a trust which would prevail against all others than bona fide purchasers. The moneys of the principal are incapable of being identified and traced into any of the assets of the bank, and, this being true, the principal, we repeat, is a mere simple contract creditor of the agent, not entitled to any preference or priority of payment over other creditors. *Ellison v. Moses*, 95 Ala. 223, 11 South. 347; *Association v. Austin* (Ala.) 13 South. 908. It is quite an error to suppose that the two cases chiefly relied on by counsel for the appellee (*National Bank v. Insurance Co.*, 104

U. S. 54; *In re Hallett's Estate*, 13 Ch. Div. 696) support a contrary doctrine. It is apparent the original bill is without equity, the complainant is not entitled to the general relief sought, and the appointment of the receiver was erroneous.

If the case was of equitable cognizance, entitling the complainant to relief, a fatal objection to the regularity of the order appointing the receiver is that it was made without notice to the defendants. A receiver may be appointed without notice to the defendant who is to be dispossessed of his property or assets, but the cases in which notice may be dispensed with are exceptional. There must be shown a strong case of pressing emergency, rendering immediate interference necessary before there is time to give notice; or it must be shown that notice would jeopardize the delivery of the property over which the receivership is to be extended. *Moritz v. Miller*, 87 Ala. 331, 6 South. 269; *Dollins v. Lindsey*, 89 Ala. 217, 7 South. 234. The averment of the bill on which the court below proceeded to the appointment without notice is expressed in these words: "And complainant alleges the necessity exists for the appointment of a receiver, to prevent the further unauthorized and illegal action by the said Broadus, and to prevent irreparable injury and total destruction of the assets of the said bank." It is not on such vague and indefinite allegations, the opinions or conclusions of the pleader, not accompanied by a statement of the facts on which they are founded, that notice of a judicial proceeding can be dispensed with, and parties deprived of the possession or control of property. The particular facts and circumstances supposed to create the necessity for the immediate appointment should have been stated, submitting to the judgment of the court whether they created the necessity—the pressing emergency—for judicial interference. *Verplank v. Insurance Co.*, 2 Paige, 438. Upon the bill alone, without affidavits or other evidence, the appointment was made. The order appointing the receiver must be vacated and annulled, and the cause remanded. Reversed, rendered, and remanded.

COLTON et al. v. DOVER PERPETUAL
BUILDING & LOAN ASS'N OF
BALTIMORE.

(45 Atl. 23, 90 Md. 85.)

Court of Appeals of Maryland. Nov. 24, 1899.

Appeal from circuit court of Baltimore city; Henry Stockbridge, Judge.

Exceptions by the Dover Perpetual Building & Loan Association of Baltimore to the auditor's account distributing the assets of the South Baltimore Bank, refusing to allow said building association to set off a deposit against a note executed by it, and held by the bank. From an order sustaining the exceptions, William Colton and Simon P. Schott, receivers of the bank, appeal. Affirmed.

Argued before McSHERRY, C. J., and PAGE, PEARCE, FOWLER, BOYD, and SCHMUCKER, JJ.

Wm. S. Bryan, Jr., and Martin Lehmayr, for appellants. L. P. Henninghausen and P. C. Henninghausen, for appellee.

BOYD, J. A bill was filed in the court below against the South Baltimore Bank, a corporation of this state, on the 24th day of February, 1898, asking for the appointment of a receiver, and that the bank be declared insolvent. An answer was filed the same day, admitting that the bank was insolvent, and consenting to the appointment of a receiver. One of the appellants was appointed on that day, and afterwards the other was appointed co-receiver. On the 1st day of June, 1898, a decree was passed adjudicating the bank insolvent, and determining it was so when this bill was filed. The receivers proceeded with the discharge of their duties, and in due course the case was referred to the auditor to state an account distributing the assets of the bank. When the bill was filed, the bank held a promissory note of the appellee for \$1,000, which became due on March 2, 1898, and the appellee had a deposit with the bank of \$357.25. At the maturity of the note the appellee tendered the receiver then in office the sum of \$642.75 in payment of said note, claiming the amount of the deposit as a set-off, and demanded the note, but the receiver refused to accept that amount. Subsequently that sum was accepted, under an agreement that it should be credited on the note, without prejudice to the receiver's claim for the balance, and that no suit should be instituted until it was determined whether the appellee was entitled to set off the deposit against the balance due on the note. The auditor refused to allow the set-off, but distributed to the appellee its proportion dividend as a creditor. Exceptions were filed to the audit, which were sustained, and a decretal order was passed directing the receivers to allow the association the deposit as a set-off against the balance due on the note. From that order this appeal was taken by the receivers, with the permission of the court; it

being represented that there were a number of other claims that would be affected by the decision. The question, therefore, to be determined by us, is whether the appellee is entitled to set off the amount of its deposit with the bank at the time of its failure against the balance due on the note, under the circumstances we have stated. Several reasons have been assigned by the appellants in support of the position that the appellee is only entitled to receive a distribution on the amount of the deposit, as other creditors are.

1. One ground relied on at the argument was that a depositor in a bank cannot maintain a suit for his deposit unless he has previously made a demand for it, and that no demand was made in this case. "It is now perfectly well settled that the relation between banker and customer, who pays money into the bank, or to whose credit money is received there on deposit, is the ordinary relation of debtor and creditor." *Hardy v. Bank*, 51 Md. 585. And it is equally well settled that a depositor cannot, as a general rule, maintain an action to recover his deposit until he has first made a demand for its payment. 3 Am. & Eng. Enc. Law (2d Ed.) 838. But, while that is true, there may be circumstances under which no demand is necessary prior to bringing suit; and, on page 839 of the volume of the Encyclopedia of Law above referred to, it is said that "where the bank has suspended, or where for any other reason it would be manifestly futile to make demand, none need be made." In the case of *Planters' Bank v. Farmers' & Mechanics' Bank*, 8 Gill. & J. 449, it was held that the necessity for a demand would be dispensed with by the suspension of specie payments and discontinuance of banking operations by the bank, provided those acts were known to the plaintiff, and from the time of such knowledge the statute of limitations would begin to run. It would have been "manifestly futile to make demand" on the bank or the receiver for the amount of deposit; and, if the appellee had sued, the fact that a demand was not previously made would not have defeated the action. If the bank had not failed, and had sued the appellee for the amount of the note, it would not have been necessary for the latter to have proven a demand for the deposit prior to the time suit was instituted by the bank. A defendant can set off against a plaintiff's demand a note of the plaintiff which matured after the commencement of the action. *Clarke v. Magruder*, 2 Har. & J. 77. As early as *Whittington v. Bank*, 5 Har. & J. 489, our predecessors held that the defendant in an action by a bank on a promissory note against him may set off against the claim of the bank any money he has in bank, and it is not intimated that a previous demand was necessary in order to enable him to do so. The bank being a debtor to the depositor, the right to set off such deposit is

within the very terms of our statute; and hence in a suit by the bank the claim for the deposit can be set off, although no previous demand for it has been made. That being so, it would seem to be clear that no demand would be necessary in order to enable the defendant to set off the amount of the deposit against a claim made by the receiver of the bank, if there be no other reason for not allowing it. In *Morse, Banks*, § 338, it is said: "Where the bank itself stops payment and becomes insolvent, the customer may avail himself, in set-off against his indebtedness to the bank, of any indebtedness of the bank to himself,—as, for example, the balance due him on his deposit account. So, also, even though the debt to him has not matured at the time of the insolvency." This may be done whether a demand had or had not been previously made. *Fort v. McCully*, 59 Barb. 87; *Seymour v. Dunham*, 24 Hun, 93.

2. We come then to the main question in the case. It is argued that to allow the set-off would be, in effect, to give the appellee a preference over the other creditors of the bank, and that it is the duty of the receivers to distribute the assets pro rata, and not to pay in full any one creditor. If the appellee was merely a creditor, that argument might prevail, but that was not the relation that existed between the two. The appellee was not only a creditor to the amount of its deposit, but it was a debtor to the amount of the note held by the bank. Its debit was larger than its credit, and, if the bank had not failed, it could only have recovered the difference between the two. Do the receivers occupy any better position? The general rule undoubtedly is that a receiver takes subject to set-offs which the defendant might have set up against the original owner. See 22 Am. & Eng. Enc. Law, 308, and *Merrill v. Granite Co. (Mass.)* 36 N. E. 797, 23 L. R. A. 313, note, where many authorities are collected. There are some exceptions to the rule, one of which may be mentioned, although not directly involved in the case, as some of the authorities cited by the appellants are to that point; and that is that a claim obtained after the commencement of the proceedings which resulted in the appointment of a receiver should not be allowed as a set-off unless there be some statute authorizing it to be done. In this case, however, the debt was due by the bank to the appellee before the proceedings under which the appellants were appointed were instituted. As we have seen, the relation of debtor and creditor existed; and the question discussed above, as to whether demand must be made before suit can be brought, does not in any wise reflect upon the question of indebtedness, but only on the right to sue for the indebtedness before demand is made. But it is said on behalf of the appellants that, inasmuch as the note fell due after the appointment of the first receiver, he took it free from all equities, just as a bona fide purchaser for value would

have done, and that a claim in favor of the bank which did not mature until in the hands of the receiver is not subject to a set-off by a claim which existed against the bank before the receiver's rights accrued; in short, that in one case the debt is due by the bank to the customer, and in the other by the customer to the receiver. If that were strictly correct, there would be some ground for the contention; for if, for example, the appellee had purchased some property from the receiver, it would not be permitted to set off its claim against such indebtedness to the receiver, for it would thereby not only obtain an unwarranted preference over other creditors, but it would prevent a proper settlement of the insolvent estate, and, moreover, they would not be mutual claims. But when the receiver was appointed he took the assets of the bank, and among those assets was this note. It was a debt already incurred by the appellee, and payable to the bank when due. By reason of the fact that it was payable to and held by the bank, it was an asset that became vested in the receiver, and he took it subject to the equities existing between the appellee and the bank. Although there are some authorities to the contrary, the great weight of authority is to the effect that the fact that the claim thus held by the receiver does not mature until after his appointment does not prevent a defendant from using his claim as a set-off. Among other decisions are *Berry v. Brett*, 6 Bosw. 627; *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; *Platt v. Bentley*, 11 Am. Law Reg. (N. S.) 171; *In re Hatch*, 155 N. Y. 401, 50 N. E. 49, 40 L. R. A. 664; *Bank v. Balliet*, 8 Watts & S. 311; *Aldrich v. Campbell*, 4 Gray, 284; *Smith v. Spengler*, 83 Mo. 408; *McCagg v. Woodman*, 28 Ill. 84; *Armstrong v. Warner*, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466; *Yardley v. Clothier*, 2 C. C. A. 349, 51 Fed. 506, 17 L. R. A. 462; *Skiles v. Houston*, 110 Pa. St. 254, 2 Atl. 30. See, also, *Fera v. Wickham (N. Y. App.)* 31 N. E. 1028, 17 L. R. A. 456, note. Some of these cases make a distinction between a technical set-off in suits at law, and cross demands allowed by courts of equity; but, as we are now considering a distribution in a court of equity, all of the cases can properly be referred to here.

3. But it is contended by the appellants that if it be conceded that the general rule is as we have stated, about the rights of the receivers, they occupy a different position, by reason of our statute. Section 264a of article 23, c. 349, Acts 1896, provides that when a corporation has been determined or proven to be insolvent and dissolved, in accordance with section 264, "all of its property and assets of every description shall be distributed to the creditors of said corporation in the same manner that the property and assets of an insolvent debtor are distributed under the provisions of article 47 of the Code. * * * And the date of the filing of the bill against such corporation, upon which it may be dissolved,

shall be taken and treated for the purpose of determining the validity of preferences and for all other purposes as the date of the filing of the petition in insolvency by or against a natural person." In short, receivers of corporations that are dissolved under that statute are placed on the same basis as trustees in insolvency of natural persons, and the date of filing the bill is the time fixed to determine the status of the parties affected by it. But section 11 of article 47 of the Code provides that "the estates of the insolvent shall be distributed under the order of the court according to the principles of equity." While set-off in equity is generally governed by the same principles as at law, courts of equity sometimes allow a set-off where for some technical reason it could not be allowed at law. The insolvency of the party against whom it is claimed frequently affords equitable ground for allowing it. A technical set-off is wholly of statutory origin, but courts of equity exercise an original jurisdiction over the subject, and will, when reason and justice require it, enforce a counterclaim, though not within the letter of the statute. *Smith v. Donnell*, 9 Gill, 84, and *Manning v. Thruston*, 59 Md. 218, are instances of such equitable relief. It would sometimes work great injustice to customers of banks if they should be required to pay in full their indebtedness to the bank, and only receive a dividend on their deposits. A customer might from time to time make deposits in bank with a view to meet his note held by it, and it would manifestly be a great hardship, if, under those circumstances, he could not apply his deposit towards the payment of the note, because the bank had failed and a receiver had been appointed. A court of equity would certainly not permit such unjust results in the distribution of funds before it, if such facts were proven; and, although in this case there is no evidence that the deposit was made with special reference to the maturity of the note, yet, as it became due a few days after the receiver was appointed, it might well be inferred that the appellee had that fact in view in making the deposits. If the bank had not failed, it could have applied the deposit of the appellee towards the payment of the note. 3 Am. & Eng. Enc. Law (2d Ed.) 828, 835; *Miller v. Bank*, 30 Md. 392. And it would be unreasonable to permit a receiver of an insolvent bank to collect the note in full, without allowing the set-off, particularly as the bank had a lien on the deposits. "The bank holds a lien upon the deposits in its hands to secure the repayment of the depositor's indebtedness, and may enforce that lien as the debts mature, by applying the debtor's deposits upon them, thus setting the two off against each other." 3 Am. & Eng. Enc. Law (2d Ed.) 835; *Miller v. Bank*, supra. If the appellee was not financially responsible, and had attempted to assign its claim for deposits against the bank to a third person, could there have been any question about the right of the receiver to insist upon the application of the

deposit to the payment of the note? Clearly not, as the assignee of the claim would have taken it subject to equities existing between the appellee and the bank, and a court of equity would have protected the bank or its representatives, the receivers. *Marshall v. Cooper*, 43 Md. 46. It would seem clear, then, that at least in equity the deposit should be allowed as a counterclaim or set-off. But even at law it should be allowed against the receivers. It is true that a trustee appointed under our insolvent laws does not occupy precisely the same position that an ordinary trustee under a conventional deed of trust does, as he has greater powers, and represents the creditors. He can, for example, have a deed made by the insolvent in fraud of his creditors set aside, which an assignee under a voluntary deed of trust cannot do, because the latter can only do what his assignor could. But the insolvent law does not vest him with such powers as would enable him to collect more than is actually due the insolvent, and there was only actually due the balance between the two accounts. "All the property of every description, rights and claims of the insolvent," vest in the trustee; and, if the insolvent has disposed of any of his property in violation of the insolvent law, it is void, and the trustee can recover it. It could not be successfully contended that the creditors of an insolvent could deprive one who owes the insolvent of the right of set-off, and how can the trustee who represents them do so? Nor can he avoid the right of set-off on the theory that he occupies the position of a bona fide purchaser for value. *Haxtun v. Bishop*, 3 Wend. 13, referred to by the appellants, tends to sustain that position, but that case has not met with approval. See (N. Y. App.) 31 N. E. 1028, 17 L. R. A. 458, note. In *Dowler v. Cushwa*, 27 Md. 354, this court quoted with approval from *Van Wagoner v. Gaslight Co.*, 23 N. J. Law, 291, that: "The rule pervades both bankrupt and insolvent laws, founded on general principles of equity, that all cross demands, whether connected or independent, provided they be mutual, as between the bankrupt or the insolvent and the creditor, shall be set off, and the balance only shall be deemed the indebtedness on one side or the other. The assignees take a bankrupt's property in the same condition, and subject to the same burthens, as the bankrupt himself held it, on the principle that they are not purchasers for a valuable consideration, but as voluntary assignees and personal representatives, and are therefore distinguished from particular assignees." Although fully recognizing the distinction between the trustee of an insolvent and one appointed by the debtor in a deed of trust, as made by this court in previous cases, we cannot adopt the view urged upon us, that the former is to be regarded as a bona fide purchaser for value of the assets that come into his hands, and thereby permit him to deprive a debtor of such a right as that to set off a debt due by the insolvent prior to the institu-

tion of the insolvent proceedings; and we find nothing in our statute, or in the authorities we feel called upon to follow, to cause us to reach a conclusion that in our opinion would work such manifest injustice. It is not claimed that a receiver appointed under the stat-

ute referred to can occupy any better position than an insolvent trustee, and, for the reasons we have given, we will affirm the order of the court appealed from. Order affirmed; the costs to be paid out of the insolvent estate.

BAILEY v. PITTSBURGH COAL R. CO.
et al.

(21 Atl. 72, 139 Pa. 213.)

Supreme Court of Pennsylvania. Jan. 6, 1891.

Appeal from court of common pleas, Allegheny county.

Bill in equity for the appointment of a receiver to collect unpaid stock subscriptions from the stockholders of a company, for the payment of a judgment creditor of said company. J. N. McCreery, an employé of the Pittsburgh Coal Railroad Company, obtained a judgment against it. The plaintiff, his assignee, filed a bill against said company and seven of the stockholders, for the appointment of a receiver to collect sufficient unpaid stock subscriptions to pay him his claim. The said stockholders joined with said company as defendants, and filed demurrers to the bill, which were all overruled. Defendants were ordered to plead in 15 days. Said stockholders then filed a plea and answer, but the company filed no plea or answer at any time, and no decree was ever taken against it. A general replication was filed, and a master was appointed. Subsequently, pending the hearing before him, Keams, Risher, and McClure, other creditors of said company, presented petitions for leave to intervene, and were allowed to become plaintiffs. On the same day R. B. Brown, one of the seven stockholders, on behalf of himself and his co-defendants, presented a petition, setting forth the names of the other stockholders than those made defendants originally, and the amount of stock held by each, and prayed that the petitions of Keams, Risher, and McClure be granted only upon condition that the said stockholders named by him be made defendants. Keams, Risher, and McClure were joined as plaintiffs, and the stockholders named by Brown were made defendants. The pleadings remained as they were at the appointment of the master, who proceeded to hear the case. He recommended a decree in favor of plaintiffs, in accordance with the prayer in the bill. The report was referred back to him, for a supplemental report of the several sums due the respective plaintiffs, the amount of the subscriptions of each of said defendants, and in pro rata

share which each should be decreed to pay said plaintiffs, respectively. Pending the hearing upon this second reference to the master William Vankirk, one of the original defendants, petitioned the court to grant leave to said defendants to pay Bailey's claim, and the costs of the proceeding, and to vacate the appointment of the master, alleging the want of an issue as to the creditors who had been permitted to become plaintiffs with Bailey. This was refused. The master, under the court's order, filed his supplemental report recommending a decree against 14 of the 22 defendants, which was made in accordance with the recommendation, whereupon 4 of them, to-wit, William Vankirk, R. B. Brown, John F. Dravo, and W. H. Aldred, appealed, assigning for error (1) the decree of the court; (2) the appointment of the master, and the confirmation of his report, "where said case was not at issue as against the Pittsburgh Coal Railroad Company, defendant;" (3) the confirmation of the report, and the making of the decree as to the claims of Keams, Risher, and McClure, when "no issue was ever made up as between them or any of them, and the said defendants, or any of them."

John S. Ferguson, for appellants. C. S. Fetterman, for appellees.

PER CURIAM. This appeal is entitled as though it had been taken by the Pittsburgh Coal Railroad Company. Such is not the fact, however. The appeal was entered by William Vankirk, R. B. Brown, John F. Dravo, and W. H. Aldred, four of the defendants below. Lane's Appeal, 105 Pa. 49, and Bell's Appeal, 115 Pa. 88, 8 Atl. 177, are authority that such a bill can be maintained. The record is voluminous, and consists principally of questions of fact. We must assume that the learned master has decided these correctly, inasmuch as he is sustained by the court below, and no clear error has been pointed out. The matters referred to in the second and third assignments are purely technical, and do not affect the merits. We find nothing in the record to justify us in reversing the decree. Decree affirmed, and the appeal dismissed, at the costs of the appellants.

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